CASE NOTES

BROWN v. THE QUEEN;[1] ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA v. BROWN[2]

Criminal law—M'Naghten rules—Irresistible impulse—Fact or law

'I couldn't help it' was the phrase that recurred throughout B's evidence and constituted the substance of his defence. Although this might seem to a layman a somewhat inadequate defence to a capital charge, the implications of the phrase in law gave rise to a considerable difference of judicial opinion, and resulted in the reversing of a unanimous judgment of the Full High Court by the Judicial Committee.

B had had an unhappy childhood and found considerable difficulty in leading a stable emotional, social or economic life. When aged twenty-six years he was employed as a station hand by L, a happily married man, whom B one night shot dead with a rifle. There was no apparent reason for his action. After running away, he subsequently gave himself up to the police, and at his trial raised the defence of insanity. The medical witnesses agreed that he had a schizoid personality, and the psychiatrist called for the defence thought it probable that at the time of the murder he had lapsed into a state of simple schizophrenia—an attack which passed as suddenly as it came—and that the killing of L, a well-adjusted man living in connubial bliss, objectified B's frustrations and inadequacies. This witness thought that in such a state B would not be able to know that what he was doing was wrong; and although B admitted in cross-examination that he *did* appreciate the wrongness of the act, the witness regarded this as a *retrospective* attempt by B to reconstruct the state of his mind at the time, which, from the nature of the disease, was inevitably inaccurate.[3] B did not raise any question of irresistible impulse, although it was clear from his evidence that that was, in fact, the real nature of the state of his mind at the time, but the trial judge (Abbott J.) went to some pains to explain to the jury that uncontrollable impulse is no defence in law and if that were the true explanation of what B did, he was guilty. B was convicted, and an appeal to the Full Supreme Court of South Australia was dismissed. A further appeal to the Full High Court was allowed on the ground that the existence of an irresistible impulse might afford strong evidence of an inability to know right from wrong, and that not only should the trial judge have directed to this effect, but his direction raised exactly the

[1] (1959) 33 A.L.J.R. 89. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

[2] [1960] 2 W.L.R. 588. Judicial Committee of the Privy Council; Viscount Simonds, Lords Radcliffe, Tucker, Jenkins and Morris of Borth-y-Gest. The advice of their Lordships was delivered by Lord Tucker.

[3] This point was also made by Dixon J. in *Sodeman v. R.* (1936) 55 C.L.R. 192, 217 where His Honour drew attention to the fact that Sodeman's accurate recollection of his acts and the circumstances surrounding the killings (upon which the Crown had relied as shewing that he knew what he was doing) ceased abruptly at the moment he took each of the girls by the throat and began the actual process of strangulation.

opposite inference. Yet another appeal by the Crown to the Judicial Committee was allowed on the ground that whether there was any connexion between irresistible impulse and appreciation of wrong was a matter of fact, and as there was no evidence adduced at the trial of such connexion, Abbott J. was quite correct to ignore the question, it clearly not being an appropriate matter for the courts to take notice of as a matter of law. Various other less important arguments raised in both appeals are not noted here.

There was a dearth of authority with any bearing on the precise point in issue cited in the case. The High Court relied solely on principle, and an observation of Greer J. during argument in the trial of Ronald True[4] where his Lordship recollected that in a previous case he had directed the jury that they might take such an impulse into account when applying the M'Naghten Rules. The Judicial Committee, disapproving Greer J., pointed out that

> in none of the leading cases in recent years such as *Rex v. Kopsch*[5] and *Rex v. Rivett*,[6] where the defence of insanity was raised has there been any suggestion that although irresistible impulse affords no defence *per se* the law will recognise it as a symptom from which the jury may without evidence infer insanity within the M'Naghten Rules.[7]

There was no reason, their Lordships thought, why a layman should think an uncontrollable impulse such a symptom, and why the court should, without medical evidence before it, seek to impose this view on the jury.

Thus the point in question was a very short one, and the decision simply that (a) such connexion is a matter of medical fact; (b) it is not sufficiently well-known and well-accepted for judicial notice to be taken of it;[8] and (c) whatever may have been proved in other cases is nothing to the point, the decision always resting solely on the facts proved before the court in that particular case.[9] It is proposition (a) that is questionable. After stating counsel's arguments seeking to uphold the judgment of the High Court, their Lordships, drawing attention to the consequences that would follow, said succinctly that they could 'find no support for the view that this accurately represents the criminal law'.[10] Nor did the High Court in the instant case do any more than make a dogmatic assertion that the court *could* properly infer that an inability to know wrong might follow from the existence of an irresistible impulse.[11] However, in *Sodeman v. R.*[12] the argument was spelt out much more clearly, notably by Dixon J. (as he then was).[13] Briefly it is this: that the whole

[4] *R. v. True* (1922) 16 Cr. App. R. 164, 167. [5] (1925) 19 Cr. App. R. 50.
[6] (1950) 34 Cr. App. R. 87. [7] [1960] 2 W.L.R. 588, 600.
[8] The *locus classicus* of the law relating to the taking of judicial notice in Australia is now, of course, *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 *passim*.
[9] Although, of course, the Judge can evaluate the evidence by, and supplement it with, his own general experience.
[10] [1960] 2 W.L.R. 588, 598. [11] (1959) 33 A.L.J.R. 89, 93.
[12] (1936) 55 C.L.R. 192. [13] *Ibid.* especially 215 ff.

of the M'Naghten Rules hinge upon the meaning to be ascribed to the word 'know'. This is a word and a concept which is quite alien to the psychiatrist,[14] pertaining rather to the realm of philosophy. 'Knowing' is no more *solely* a material fact than domicile is *solely* physical presence in a certain country[15]: both involve a very large element of something quite alien to the psychiatrist and geographer respectively, and what that element is, although in the instant case no doubt highly controversial amongst philosophers, is a matter of legal philosophy to be determined by the court as law. Of course it is very different from the ordinary rules of law determined and applied by the court, but the fact remains that it is closer to being a question of law than of fact. This can be demonstrated by considering the reply of a psychiatrist if he were asked the meaning of 'know'. He would surely reply that, although there were certain states of the mind which he could name, describe and classify, certain tests he could apply for the purpose of providing information as to the state of a person's mind, these could be useful to the enquiry as to 'knowing' only if he were first given an explanation of what degree of psychical awareness we attached to the word 'know'. As a witness in court, of course, when asked such a question he would apply his own *personal* concept of 'knowing', but that should not obscure the fact that in doing so he is usurping the function of the court because his own concept is formed by him not *qua* psychiatrist but *qua* person—or, if you like, *qua* philosopher. If this usurpation were somehow prevented, then no-one would ever answer the question of what is meant by 'know'. The Privy Council denies that it is a matter of law; the psychiatrists deny that it has any relation to their science; and so the question would fall between two stools.

For this reason, with great respect, the point deserved more prolonged consideration.[16]

No-one in the case questioned the proposition that irresistible impulse *per se* is not within the M'Naghten Rules. All concerned in the case seem to think that now too well established to be jumped over: it must be avoided. As their Lordships pointed out, the decision of the High Court 'would in effect make a very considerable inroad into those rules as hitherto interpreted'.[17] This tendency of the High Court to interpret the Rules more widely (and more accurately from an historical standpoint) than English judges has already been the subject of comment.[18] The instant decision has to a certain extent disapproved the High Court's point of view. The desirability of English judges doing so is perhaps questionable when it is remembered (a) that the law of insanity assumes importance mainly because of the death penalty;[19] (b) that the United

[14] Overholser, *The Psychiatrist and the Law* (1953).
[15] *Udny v. Udny* (1869) L.R. 1 Sc. and Div. 441.
[16] Stephen devotes considerable space to supporting the argument: *A History of the Criminal Law of England* (1883) ii, ch. 19.
[17] [1960] 2 W.L.R. 588, 598.
[18] Morris, 'Daniel M'Naghten and the Death Penalty' (1954) 6 *Res Judicatae* 304. Particularly notable examples of such interpretation are *R. v. Porter* (1936) 55 C.L.R. 182 and *Stapleton v. The Queen* (1952) 86 C.L.R. 358.
[19] Morris, *op. cit.*

Kingdom has recently drastically revised the law relating to the death penalty,[20] so that there insanity is not as vital a question; and (c) the traditional arguments as to the desirability of uniform law are inapplicable because Queensland, Western Australia and Tasmania all have codes in which the law of insanity is different from that set out by the Judicial Committee.

Be that as it may. Yet it is still, perhaps, not too late to argue that irresistible impulse by itself is included in the M'Naghten Rules as a defence. Stephen was of this opinion;[21] almost all of the states of the United States have so held as a matter of judicial decision and not of parliamentary legislation;[22] so has South Africa;[23] and Evatt J. so held in *Sodeman v. R.*[24] What is the authority against the proposition? It is true that there are clear decisions of the Court of Criminal Appeal (*R. v. Kopsch*,[25] *R. v. Flavell*[26]) but the High Court is very far from being bound by that court the judges of which, as Evatt J. pointed out in *Sodeman v. R.*,[27] are drawn from the Queen's Bench Division. The main authority cited by text writers[28] is the decision of the Privy Council in *Sodeman v. R.*, but, as their Lordships point out in the instant case, the point was *obiter dicta*:

> The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised and to the sufficiency of the trial judge's direction thereon, but in the course of the judgments references were made to 'irresistible impulse' . . .[29]

The House of Lords has never even *considered* the point, and it is possible that were they to do so, they would adopt the overwhelming arguments pressed by lawyers and medical men alike[30] by admitting the defence of irresistible impulse into the law:[31] such a step would not be as great as that in *Woolmington v. D.P.P.*[32] which 'established with greater eloquence than historical accuracy that Sir Michael Foster[33] and all subsequent text writers were wrong'[34] on the subject of onus of proof. The tacit acceptance by the courts, including the Privy Council, of the proposition that irresistible impulse is *not* a defence, is not a necessary bar to the House of Lords.[35]

[20] Homicide Act 1957, especially s. 2. [21] *Op. cit.* ii, ch. 19.
[22] *Report of the Royal Commission on Capital Punishment* (Cmd 8932) para. 298.
[23] *Ibid.* [24] (1936) 55 C.L.R. 192, 225 ff. [25] (1925) 19 Cr. App. R. 50.
[26] (1926) 19 Cr. App. R. 141. [27] (1936) 55 C.L.R. 192, 227.
[28] *E.g.* Glanville Williams, *Criminal Law: The General Part* (1953) 342-343, n. 4.
[29] [1960] 2 W.L.R. 588, 599.
[30] *Report of the Royal Commission on Capital Punishment* (Cmd 8932) especially paras. 245, 322-333.
[31] The possibility of this was set out at length by Evatt J. in *Sodeman v. R.* (1936) 55 C.L.R. 192.
[32] [1935] A.C. 462, 475. [33] *Crown Law* (1762) 255.
[34] Barry, 'Insanity in the Criminal Law in Australia' (1943) 21 *Canadian Bar Review* 429, 437.
[35] *E.g.* the clear ruling of the Judicial Committee in *Victorian Railways Commissioners v. Coultas* (1888) 13 A.C. 222 was completely disregarded by the High Court in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1 and by the House of Lords in *Bourhill v. Young* [1943] A.C. 92.

This addition would still leave the M'Naghten Rules standing, and thus would be only a partial solution to the perplexing question of insanity. Many have argued for complete abolition of the Rules, and the substitution of such a simple test as: was the accused at the time of the act suffering from mental deficiency to such a degree that he ought not to be held responsible? This was the view of Doe C.J. in *State v. Pike*[36] and it has been the law of New Hampshire ever since; it was recently substantially adopted by the Court of Appeals in the District of Columbia;[37] it was the view of a majority of the Royal Commission on Capital Punishment.[38]

It has considerable merit. The law pre-supposes both a large area of human free-will, and the possibility of abstracting from the course of events a 'cause', or at least a manageable number of causes. Both of these premisses, practically necessary though they might be, are becoming increasingly suspect logically. Be that as it may, what is the law to do with so many of its major inarticulate premisses, if not swept away, at least being shaken to their foundations? Although the 'common sense' world was so effectively destroyed by Berkeley[39] and Hume,[40] most students of the activities of civilized man have been compelled to fall back on the values of common sense.[41] The law has never really abandoned these values and so has not so far to retreat: but the M'Naghten Rules are a reminder of one unfortunate excursus outside the field of common sense,[42] and it is for this reason that they ought to be abandoned. It has been frequently said, even by those not given to a complacent acceptance of the *lex in statu quo,* that the Rules work a substantial measure of rough justice.[43] The opposite has as frequently been urged. The conclusion of the Royal Commission on Capital Punishment was that these divergent views were explained by the great variation in practice as to the strictness of their application.[44] The Commission seems to adopt the opinion of Frankfurter J.:

[36] (1870) 49 New Hampshire 399.

[37] *Durham v. United States* (1954) 214 F. 2d. 862.

[38] Cmd 8932 para. 333. The matter was put more succinctly by Lord Cooper who, giving evidence before the Select Committee on the Homicide Amendment Bill (1874), said that the question was 'Is this man mad or is he not?'

[39] *Principles of Human Knowledge* (1871).

[40] *Treatise of Human Nature* (1951).

[41] *E.g.* in the field of aesthetic theory: R. G. Collingwood, *The Principles of Art* (1938); historically: Butterfield, *George III and the Historians* (1957); in international relations: Bertrand Russell, *Common Sense and Nuclear Warfare* (1959). (Russell the practical, constructive reforming optimist of the works for laymen is in marked contrast to Russell the pessimistic, determinist, logical analyst of the more intellectual works for specialists. This difference is illustrative of a basic reliance on common sense.)

[42] Thus it is that Sir Owen Dixon has said: 'The unforeseen result has, as I think, been to imprison the common law in a formula, a formula which has been misunderstood at more than one point and has deprived the common law not only of its capacity for development, but even of its accustomed flexibility of application. The growth of modern knowledge on the whole subject has meanwhile deprived the terms in which the formula is expressed of practical meaning.' 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255, 261.

[43] *E.g.* Morris, *op. cit.* 304.

[44] Cmd 8932 para. 240.

> I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them'.[45]

In view of the proposition above that ultimately the question of insanity is a legal one, to be decided by lawyers, and not doctors,[46] surely the best test is ultimately the obvious one propounded by Lord Cooper:[47] Is this man mad, or is he not?

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DENNIS HOTELS PTY LTD v. VICTORIA[1]

Constitutional law—Duties of excise—What constitute—Victualler's licensing fees (Vic.)—Constitution, section 90—Licensing Act 1958 (Vic.), sections 19 (1) (a), (b)

The plaintiff company by its statement of claim alleged that it had paid certain sums of money for the renewal of its victualler's licence for the year 1958 and for temporary victualler's licences during the same period; that these sums were demanded from it under sections 19 (1) (a) and 19 (1) (b) of the Licensing Acts;[2] that these provisions were invalid as amounting to the imposition of excise duties by a State in contravention of section 90 of the Commonwealth of Australia Constitution;[3] that the fees had been paid by it involuntarily and were recoverable by it as money had and received. The defendants demurred to the whole of the statement of claim heard before the Full Court.

The Court held by a majority (Fullagar, Kitto, Taylor and Menzies JJ.: Dixon C.J., McTiernan and Windeyer JJ. dissenting) that the demurrer

[45] *Ibid.* para. 290. In para. 295 the Commission quotes Mercier, *Criminal Responsibility* (1905), who described the stretching of the plain words of the Rules 'until the ordinary non-legal user of the English language is aghast at the distortions and deformations and tortures to which the unfortunate words are subjected, and wonders whether it is worth while to have a language which can apparently be taken to mean anything the user pleases'. *Cf.* Lewis Carroll, *Alice Through the Looking-Glass* (1871) where Humpty-Dumpty says 'when I use a word it means exactly what I choose it to mean, neither more, nor less'.

[46] The Report of the Royal Commission recounts the opinion of the Royal Medico-Psychological Association that, although the Rules are based on 'a very out-of-date idea of sanity and mental illness', the Association 'could not suggest a suitable alternative'. (Cmd 8932 para. 245.)

[47] *Supra* n. 38.

[1] (1960) 33 A.L.J.R. 470; [1960] Argus L.R. 129. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ.

[2] The Court throughout referred for convenience to the consolidating 1958 Act: ss. 19 (1) (a) and 19 (1) (b) of that Act respectively prescribe that the fees for a victualler's licence 'shall be equal to the sum of six per centum of the gross amount . . . paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of application for the grant or renewal of the licence was purchased for the premises' and the fees for a temporary victualler's licence shall include 'a further fee equal to the sum of six per centum of the gross amount . . . paid or payable for all liquor purchased for sale or disposal under such licence'.

[3] The relevant portion of s. 90 of the Constitution states: 'On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise . . . shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise . . . shall cease to have effect.'