INSANITY UNDER THE QUEENSLAND AND WESTERN AUSTRALIAN CODES

A great deal has been written about insanity as a defence in the criminal law, but the provisions of the Criminal Codes of Queensland and Western Australia[1] have received comparatively scant attention.[2] The purpose of this article is briefly to re-examine these provisions in the light of what the draftsman had in mind when he formulated them.

The first paragraph of section 27 of the Criminal Code of Queensland, and section 27 of the Criminal Code of Western Australia is the same, provides:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to know that he ought not to do the act or make the omission.

These provisions have generally been regarded as extending the M'Naghten rules[3] 'to include irresistible impulse caused by disease of the mind,'[4] but this hardly does justice to Sir Samuel Griffith, Chief Justice of Queensland at the time and later the first Chief Justice of the High Court of Australia, who drafted them.

Griffith was, of course, well aware of the M'Naghten rules, but he consciously avoided drafting his proposals in similar terms. He pointed out that 'the real question [in the *M'Naghten* case] was as to the

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1 The Western Australian Code of 1902 (re-enacted in 1913) was copied from the Queensland Code of 1899.

2 There are remarkably few reported cases in which the provisions have been considered. These cases will be referred to later in this article. The provisions have been discussed in articles but not extensively or at any great depth: see A. A. Wolff, *Crime and Insanity,* (1936) 10 A.L.J. Supp. 76; Norval Morris, *The Defences of Insanity in Australia,* in ESSAYS IN CRIMINAL SCIENCE (ed. G. O. E. Mueller) 273; C. Howard, *Automatism and Insanity,* (1962) 4 SYD. L. REV. 36.

3 The rules propounded in M'Naghten's case, (1843) 10 Cl. & Fin. 200; 8 E.R. 718.

4 Report of the Royal Commission on Capital Punishment, (1953) Cmd. 8932, 408; see also Model Penal Code of the American Law Institute, Tentative Draft No. 4, 165; Mental Abnormality and Criminal Responsibility—A Plea for Justice, (Report adopted by the 1965 Annual Conference of the Victorian Branch of the Australian Labour Party), 13.

proper rule for judging of the criminal responsibility of a man labouring under specific delusions but otherwise of sound mind . . . ,'[5] and referred, apparently with approval, to Lord Chief Justice Cockburn's severe criticism of the rules.

The Griffith formulation appears at first sight to be a modified version of Sir James Fitzjames Stephen's Article 27,[6] and he did acknowledge[7] that he had 'freely drawn upon the labours' of the English Royal Commission of 1878-1879. Stephen had not only been a member of the Commission but the draft Code it appended to its report[8] had been largely his work. But Griffith indicated that it was the Italian Code, at least in part, that influenced him. He said:

> The definition actually adopted in the Italian Code may be thus translated: 'Such a state of infirmity of the mind (*mente*) as to deprive him of consciousness of his acts or of freedom of action' (s. 46). The definition given in the text [i.e. the text of the Queensland draft] is substantially the same as this, with the addition of the element of moral capacity.[9]

And it was this addition that he seems to have regarded as most in need of explanation.

Under the general pattern adopted by Griffith in his chapter on criminal responsibility, in which he attempted to codify the law relating to the mental element in crime, an individual is excused responsibility for conduct 'which occurs independently of the exercise of his will' (s. 23), or which in the state of things which he honestly and reasonably but mistakenly believes to exist does not constitute an offence (s. 24); and a person under the age of fourteen years is

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5 In his notes on the Draft of a Criminal Code prepared for the Government of Queensland: QUEENSLAND PARLIAMENTARY PAPERS, C.A. 89-1897, 14.

6 STEPHEN, DIGEST OF THE CRIMINAL LAW 20-21 (3rd ed., 1883). The relevant part of the Article reads:

> No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind
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> (a) from knowing the nature and quality of his act; or,
>
> (b) from knowing that the act is wrong; (or,
>
> (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.)

The portions in brackets Stephen noted as being 'doubtful'.

7 In his Explanatory Letter to the Attorney-General of Queensland with the Draft Code: QUEENSLAND PARLIAMENTARY PAPERS, C.A. 89-1897, iv.

8 C. 2345. In s. 22 of the English Draft Code, (which became the Criminal Code Bill of 1880 and, though not enacted in England, provided a model for other parts of the Commonwealth) the portions of Stephen's Article 27 which he had noted as being 'doubtful' (see n. 6, above) were left out.

9 QUEENSLAND PARLIAMENTARY PAPERS, C.A. 89-1897, 14.

excused responsibility for an act or omission unless 'he had the capacity to know that he ought not to do the act or make the omission' (s. 29). It is this same pattern that he deliberately followed in the insanity section. As he himself put it, 'the rule stated [in section 27] . . . is merely a particular instance of the application of the general rules determining the question of criminal responsibility stated in [sections 23, 24 and 29].'[10] In effect, if the excuse from criminal responsibility in any particular case is attributable to 'a state of mental disease or natural mental infirmity', the excuse prevails but the consequences are different. The verdict is still not guilty, but the accused suffers incarceration at Her Majesty's pleasure.[11]

Griffith's own explanation of his insanity rule was as follows:

> If the person in question is incapable from mental disorder of rightly perceiving the facts, he should be treated on the same footing as a man who in good faith misapprehends the facts (s. 24). If he is for the same cause incapable of exercising the power of determination or choice, he should be treated on the same footing as a man who does an act independently of the exercise of his will (s. 23). So far there is little reason for controversy. But it is conceived that our law assumes the notion of duty. No one supposes that everyone or anyone knows all the provisions of the criminal law. Yet no one above the age of discretion (s. 29) is excused by ignorance of law (s. 22). Why is the distinction drawn at a particular age? Not, surely, because at that age knowledge of the law comes to a child, but because he is then supposed to be capable of knowing that some things ought not to be done—i.e., of apprehending the idea of duty. If this is so, there is a third element of criminal responsibility corresponding to the capacity of a child who has reached the age of discretion; and a person who by reason of mental disorder is in the condition of a child as to capacity of apprehending the notion of duty ought to be equally free from criminal responsibility. This last element seems to be wanting in the definition of insanity given in the Continental Codes, but it is, I believe, part of the law of England.[12]

Later in this same note he added:

> I believe that any direction to a jury which omitted a reference to any one of the three elements—capacity of perception, capacity of choice, and moral capacity—in a case in which such an element was material would be contrary to the common law.

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10 Ibid.

11 Under s. 653.

12 QUEENSLAND PARLIAMENTARY PAPERS, C.A. 89-1897, 14. I have changed the section numbers in the brackets so that they refer to the sections in the Code instead of the original draft.

This proposition cannot now be sustained, if it ever could. But whatever his understanding of the common law, it is obvious that there are several differences between the Griffith formulation and the M'Naghten rules.

First there is the substitution of 'state of mental disease or natural mental infirmity' for the 'defect of reason from disease of the mind' of the M'Naghten rules. Among the questions which arise from this are: Does the expression "natural mental infirmity"[13] extend the "mental disease" requirement? And, if so, how?

In *Moore*,[14] on an appeal from a conviction of wilful murder, the Full Court of Western Australia was faced squarely with the issue. The Inspector-General of Insane had testified that in his opinion the accused, who had been born weak-minded and whose brain had never properly developed, was suffering from a natural mental infirmity which would deprive him of the capacity to control his actions. In a judgment which is not helpful,[15] McMillan J. said:

> What the section was intended to do was to relieve from responsibility a person who is prevented, from disease or mental infirmity, from controlling his actions. This is a person who in the ordinary sense of the word is insane. It was not intended to enable a person to be free from responsibility because he allowed himself to be influenced by excitement, even although he might, from the nature of his intelligence be a person more likely to be affected by excitement than another person would be . . . In my opinion the learned judge was right in directing the jury that the evidence of Dr. Montgomery was not of itself sufficient evidence of insanity.[16]

Parker, J. concurred, and the appeal was dismissed.

Until recently the Court of Criminal Appeal of Queensland too has not in any reported decision offered any guidance in this regard. In 1960 in *Foy*[17] it examined the meaning of "disease of the mind" in some depth. It did not directly consider the question of what, if anything, the expression "natural mental infirmity" added, though Philp, J. did state that in his view "disease of the mind" meant 'the

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13 Stephen was of opinion that the "defective mental power" part of his formulation was doubtful—see n. 6, above. And cf. New Zealand Crimes Act 1961, s. 23, and Canadian Criminal Code 1953-54, s. 16.

14 (1908) 10 W.A.L.R. 64.

15 The case has been criticized elsewhere. See, e.g., Wolff, *Crime and Insanity*, (1936) 10 A.L.J. Supp. 76 and 79; Philp, *Criminal Responsibility at Common Law and under the Criminal Code, Some Comparisons*, 1 U. OF QUEENSLAND L.J. 1.

16 (1908) 10 W.A.L.R. 64, 66.

17 [1960] Qd. R. 225.

dementia of every description to which Hale referred,' and that for Hale, *"dementia"* had included *'dementia naturalis* (i.e. inherent or congenital *dementia*) or idiocy.'[18]

In 1961 Queensland introduced "diminished responsibility" provisions into its Code. The new section[19] follows the pattern of the insanity section (s. 27) of the Code substituting words from section 2 of the English Homicide Act in the appropriate places. Thus, instead of 'state of disease of the mind or natural mental infirmity', the new section reads 'state of abnormality of mind (whether arising from a condition of arrested or retarded development of the mind or inherent causes or induced by disease or injury).' The provisions of the new section were considered in *Rolph*.[20] The majority of the Court of Criminal Appeal (Hanger and Brown JJ.) allowed an appeal from a conviction of wilful murder and ordered a new trial because no definition or description of abnormality had been put before the jury. But it is the judgment of Mansfield C.J. who dissented that is of interest on the point being discussed. The Chief Justice made a comparison of the provisions of the insanity and the diminished responsibility sections. He said:

> Section 27 refers to 'mental disease or natural mental infirmity', whereas section 304A mentions 'abnormality of mind (whether arising from a condition of arrested or retarded development of mind, or inherent causes, or induced by disease or injury)'.
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> Whether or not the words used in section 304A cover a wider area of causation of defect of the mind than the words used in section 27 is a matter which causes some difficulty. "Arrested or retarded development of mind" (s. 304A) are in my view equivalent to and bear a similar meaning as "natural mental infirmity" (s. 27).
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> Section 304A refers to "disease or injury" whereas section 27 refers to "disease" only. This difference is more academic than practical, because it has been the view of the courts that "mental disease" in section 27 is wide enough to cover defect of mind caused by trauma.
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> The words "inherent causes" in section 304A may be no wider than the words "natural mental infirmity" in section 27, but as there has been a change of language, it would appear that the

18 Id. at 243 and 241.

19 Section 304A, under which diminished responsibility reduces wilful murder to manslaughter. The need for such a provision in a State in which capital punishment had long been abolished would hardly, from a practical point of view, have been pressing, the maximum penalty for wilful murder, murder and manslaughter being the same.

20 [1962] Qd. R. 262.

> legislature intended to cover a wider area of causation in the new section.[21]

His Honour went on to cite *Rose*[22] in which on an appeal from the Bahama Islands the Judicial Committee of the Privy Council had 'accepted as authoritative and correct' Lord Parker C.J.'s statement in *Byrne*:

> "Abnormality of mind", which has to be contrasted with the time-honoured expression in the M'Naghten rules "defect of reason", means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.[23]

There can be no doubt then that the "abnormality of mind" requirement of the diminished responsibility provisions is more comprehensive than the "defect of reason from disease of the mind" of the M'Naghten rules, and in the opinion of Mansfield C.J., in any event, the "natural mental infirmity" requirement of the Griffith formulation approximates if it is not quite the equivalent of "abnormality of mind". It should certainly make the Code test more comprehensive.

Next, as already indicated, whereas there are two branches to the M'Naghten rules, there are three in section 27. Moreover, even between the matching branches there is not as close a conformity as appears generally to have been accepted.

Regarding the first of these, it is at least arguable that the provision in the M'Naghten rules is more restrictive than the equivalent provision in the Code; that a man might 'know the nature and quality of his act,' that is, its physical nature and quality,[24] and yet not have 'capacity to understand what he is doing'. Such a man would be sane

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21 Id. at 271. Note also Womeni-Nanagawo, [1963] P. & N.G.L.R. 72, per Ollerenshaw J. at 78: 'In my opinion it is clear that the phrase "natural mental infirmity" is in this section to embrace forms of insanity or unsoundness of mind not comprehended by the phrase "mental disease".'

22 [1961] 1 All E.R. 859.

23 [1960] 2 Q.B. 396, 403.

24 It has been held by the English Court of Criminal Appeal in Codere, (1916) 12 Cr. App. R. 21, that the nature and quality refer only to the physical act and not to its moral character. The Tasmanian Criminal Code 1924, s. 16(1), refers to 'understanding the physical character' of the act.

under the M'Naghten rules but insane under the Code.[25] The point has, however, not yet been made in any reported case.

Regarding the second, it has been accepted that the right-wrong test of the M'Naghten rules has been imported into the Code. For example, in *Holmes*,[26] the judge directed the jury that the accused's capacity to know that he ought not to do the act was the same as his 'inability to distinguish right from wrong.' But, apart from Griffith's explanation of this requirement as 'the condition of a child as to capacity of apprehending the notion of duty',[27] it is significant that exactly the same words—'capacity to know that he ought not to do the act or make the omission'—are used in section 29 of the Code under which a child under fourteen[28] is excused liability unless it is proved that he had this capacity. At common law, too, the test for determining excuse from criminal responsibility because of immaturity of age has some similarity to the test for insanity under the M'Naghten rules. The prosecution has to prove that the child under fourteen had "mischievous discretion", i.e. knowledge that what was done was morally wrong.'[29] There is not, however, the same coincidence as there is between the sections of the Code, and taking into consideration the "natural mental infirmity" provision in section 27, and reading the section in the light of section 29, it would seem that the test for determining the sanity of an adult person with the intelligence or mental ability of a child of under fourteen was intended to be the

25 It is probably too late now to argue that both the M'Naghten rules and the Code by implication presuppose some awareness on the part of the insane person of the motions through which he is going, and that neither equarely covers the case of a man who does not know what he is doing in the sense of being totally unaware of his actions. Such a distinction would however afford a sounder basis for distinguishing between automatism or blackout and insanity than the rather vexed one of whether the accused was suffering from a disease of the mind.

26 [1960] W.A.R. 122, 125. See also Armanasco, (1951) 52 W.A.L.R. 78, 81.

27 See the text to n. 12, above.

28 Under the same section a child under seven is excused criminal responsibility completely.

29 CROSS, INTRODUCTION TO CRIMINAL LAW 54-55 (5th ed. 1964). See also WILLIAMS, CRIMINAL LAW, THE GENERAL PART, para. 269 (2nd ed. 1961). HOWARD, AUSTRALIAN CRIMINAL LAW 303, uses the terminology of the Code to state the common law rule. He says that the prosecution must prove that the child 'at the time of committing the offence had the mental capacity to understand that he was doing something that he ought not to do'. The common law rule is not stated in these terms in any of the authorities he cites nor is the word "understood" used in this context in any of the Australian codes. See also Farrer, *The History of the Criminal Liability of Children*, (1937) 53 L.Q.R. 364.

same (questions of burden of proof apart) as that for determining the criminal responsibility of a child of the same age.

Finally, there is the additional branch under the Code, the "irresistible impulse" test read out of the "capacity to control his actions"[30] part of section 27. Griffith, as his explanatory note indicates, accepted this branch of his test as affording 'little reason for controversy'.[31] His formula is similar to that used by Stephen in Article 27 of his Digest[32]—'prevented . . . from controlling his own conduct'. In his Digest Stephen acknowledged this part of the Article as doubtful, but in his History of the Criminal Law of England[33] he too argued that it was supported by the answers given by the judges in M'Naghten's case. Irresistible impulse as a third branch of the M'Naghten rules has however been firmly rejected,[34] and in *Attorney-General for South Australia v. Brown*[35] the Judicial Committee of the Privy Council even refused to accept what they took the High Court of Australia to be putting forward as a matter of law, that 'irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong.'

There are no reported Queensland cases in which the "irresistible impulse" provisions have been directly considered. In Western Australia, apart from the *Moore* case[36] in which the defence did not get past the first hurdle of proving the 'state of mental disease or natural mental infirmity', there is one other recorded case, *Wray*,[37] in which the question arose. The jury convicted the accused, but the Court of Criminal Appeal, holding that the uncontradicted evidence established that the accused had a disease of the mind which would have deprived him of the capacity to control his actions, quashed the conviction and directed a verdict of acquittal on account of unsoundness of mind.

ERIC J. EDWARDS

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30 Cf. the Tasmanian Criminal Code 1924-1963, s. 16 (1) (b), which is framed more directly in terms of irresistible impulse—'an impulse . . . he was in substance deprived of any power to resist'.

31 See the text to n. 12, above.

32 See n. 6, above.

33 Vol. II, 163 *et seq.* For the development of and present position regarding the "irresistible impulse" test in the United States, see Model Penal Code of the American Law Institute, Tentative Draft No. 4, 157 *et seq.* and cf. PERKINS, CRIMINAL LAW 759.

34 See Kopsch, (1925) 19 CR. APP. R. 50, 51-2; Sodeman, (1936) 55 C.L.R. 192.

35 [1960] A.C. 432, 448.

36 See n. 14, above.

37 (1930) 33 W.A.L.R. 67.