Chapter 6: The Exemption for Mental Disorder

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I. Introduction

Most common law jurisdictions in Canada, Great Britain and the United States accord a defence to criminal charges or some modification in sentencing when it is shown that the accused was suffering from a mental disorder at the time of the offence. However, the legal test for determining whether an accused person had a mental disorder at the time of the offence has developed differently in various jurisdictions. There are several philosophical debates about the origin of and the justifications for applying the "insanity defence". Sometimes these philosophies affect the way that the laws are drafted and applied in the various jurisdictions.

Canadian criminal law regarding mental disorder, as in other jurisdictions, has been examined many times over the century and many recommendations for changes have been made. It was not until recently, however, that a Supreme Court of Canada decision necessitated that Parliament make changes to the procedures followed once a person is found not criminally responsible on account of mental disorder.

This chapter outlines the development of the "insanity defence". In particular, it discusses the evolution of not criminally responsible and amendments that have been made to Canada's *Criminal Code*.[1] Next, the chapter analyzes the jurisprudence that applies to the current and former provisions dealing with the exemption for mental disorder. The chapter also examines the related but separate defence of automatism. Finally, it looks at the legal, practical and social effects of a verdict of not criminally responsible on account of mental disorder.

II. Elements of the Exemption for Mental Disorder (formerly the insanity defence)

A. General

There are two ways in which mental disability becomes an issue in a criminal trial. First, an accused's mental disability may affect whether he is fit to stand trial. This

[1] RSC 1985, c C-46 (all future references are to this legislation unless otherwise specified).

issue is discussed in Chapter 5. Second, an accused's mental disability at the time of the offence may affect his criminal liability for that offence. The issue of criminal liability will only arise if the accused is found fit to stand trial. The relevant time period for determining whether the accused was experiencing a mental disorder for the purposes of criminal liability is the time that the accused committed the offence, not the accused mental state at the time of the trial. While many mentally disabled accused will not face criminal trials because they are unfit to stand trial, a very complex case may arise when an individual is found fit to stand trial but asserts an exemption from criminal liability due to past mental disorder (i.e., “Not criminally responsible” or “NCR”).

It should be noted that amendments to the *Criminal Code* have changed the terminology in this area of law. The previous case law and legislation refers to “insanity”, while the more recent provisions refer to “mental disorder”. This chapter will use “mental disorder” when referring to the amended provisions, and “insanity” when referring to the former *Criminal Code* provisions.

B. Background

The current Canadian law is based on the rules provided in the English House of Lord's decision, *M'Naghten's Case*.[2] M'Naghten suffered from a delusion that he was being persecuted by Sir Robert Peel, who was then the Prime Minister of England. During a procession, M'Naghten shot and killed Peel's secretary, thinking it was Peel. At trial, M'Naghten was found not guilty by reason of insanity. Queen Victoria, the House of Lords and the newspapers of the day disapproved openly of the verdict. M'Naghten's assassination attempt marked the fifth attack on English sovereigns and their ministers in just over 40 years.[3] After the acquittal, the House of Lords called upon the 15 judges of the common law courts to answer several questions relating to criminal responsibility, which essentially required the judges to explain for the actions in the M’Naghten case. “In effect, the judges were being asked to account for a miscarriage of

[2] (1843), 10 Cl & Fin 200, 8 ER 718 (HL) (hereinafter *M'Naghten*).
[3] R.J. Simon, *The Jury and the Defence of Insanity* (Toronto: Little, Brown and Co, 1967) at 21 (hereinafter Simon).

justice."[4] Lord Tindal C.J., speaking for 14 of the 15 judges, stated the main proposition:

> [E]very man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong. [5]

This test focuses on cognitive capacity, meaning the accused's knowledge. The accused is required to establish one of two prongs of the test, either that, at the time of the act, he was incapable of grasping the nature and quality of the act or understanding that what he/she was doing was wrong as a result of the mental disorder. This test was adopted in several common law jurisdictions, including Canada and the United States. While Canadian law has refined the original test, it still retains the original two-pronged approach and emphasis on cognitive incapacity.[6] Several proposals for reform have been debated by various academic, professional and law-making individuals and groups.[7] There is little consensus among these groups as to what the appropriate test

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[4] Simon, at 22.

[5] Simon, at 23.

[6] This approach does not address situations where the accused can appreciate that an act is wrong, but the act is the result of delusion, paranoia or other irrationality due to a mental disorder. See *R v Cheong*, [1998] OJ No 5857, (QL).

[7] See, for example: *Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (Ottawa: 1956) (McRuer J, Chair); Law Reform Commission of Canada, *Criminal Law—The General Part—Liability and Defences* (Working Paper No 29) (Ottawa: LRC, 1982); Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (Ottawa: LRC, 1987); SC 1991, c 43, *An Act to Amend the Criminal Code (mental disorder) and to Amend the National Defence Act and the Young Offenders Act in Consequence Thereof; Report of the Committee on Mentally Abnormal Offenders* (England 1975, Cmnd 6244) (Lord Butler, Chair); D. Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, Ontario: Thomson Professional Publishing Canada, 1991) at 252 - 256; G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 Queen's L J 135; A. Stalker, "The Law Reform Commission of Canada and Insanity" (1982-83) 25 Crim Law Q. 223; A. Saunders, "The Defence of Insanity: The Questionable Wisdom of Substantive Reform" (1984) *42 UT Fac Law Rev 129*; A.W. Mewett, "Editorial - The Mentally Disordered Offender" (1987) 29(2) Crim Law Q 145; BCL Orchard, "The Defence of Insanity" (1984) Health Law in Canada *57*; R. Nice, *Crime and Insanity* (New York: Philosophical Library, 1963); D. Hermann, *The Insanity Defence: Philosophical, Historical and Legal Perspectives* (Springfield, Illinois: Thomas, 1983); P. Low, J. Jeffries Jr., and R. Bonnie, *The Trial of John W Hinckley, Jr.: A Case Study in the Insanity Defense* (New York: Foundation Press Inc., 1986); B. Swadron, *The Law and Mental*

should be.

1. Proposals for Reform

Don Stuart, in *Canadian Criminal Law*: *A Treatise*, provides a summary of the various proposals for abolition of or amendment to the general defence of insanity.[8] He notes that the limits of psychiatry in the context of the criminal trial, the dangers of civil commitment procedures and the limited variety of alternative sentences in the criminal law make this area of law particularly difficult.[9] Consequently, recommendations for substantive changes must be considered in the context of the inherent difficulties in this area of law.

One recommendation for reform is to abolish both the insanity defence and the concept of *mens rea*, meaning the mental element of a crime. This fairly radical approach would mean that when the issue of mental disorder arises in a criminal trial, the court would not consider the issue of criminal responsibility. Instead, once the criminal act is proven, the court would consider the appropriate sentence based on the dangerousness of the individual.[10] This approach is based on the theory that state of mind should not be relevant to one's guilt. Rather, state of mind should only affect one's sentence. This approach is open to criticism because it does not accord with a system

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Disorder (Toronto: Canadian Mental Health Association, 1973); E.A. Tollefson and B. Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Carswell, 1993), ch. 1; Deborah W. Denno, "Gender, Crime, and the Criminal Law" (1994) 85 J. Crim. L. & Criminology; Faye Boland, "The Criminal Justice (Mental Disorder) Bill 1996" (1997) Web Journal of Current Legal Issues; Stephen J. Morse "Excusing and the New Excuse Defenses: A Legal and Conceptual Review" (1998) 23 Crime & Just 329; Ellen Hochstedler Steury, "Criminal Defendants with Psychiatric Impairment: Prevalence, Probabilities and Rates" (1993) 84 J Crim L & Criminology 352; Phil Bates, "Legal Responsibility and Protection of Mentally Disordered People in English Law", Polit.it Psychiatry on Line; Brian A. Beresh and Karen McGowan, "Defending the Mentally Ill: A Discussion of Selected Topics" (May 23, 1998) Criminal Trial Lawyers Association - Spring Seminar. National Criminal Justice Section, Canadian Bar Association "Submission on Mental Disorder Provisions of the Criminal Code (Presented by Heather Perkins-McVey and Allan Manson to the House of Commons Standing Committee on Justice and Human Rights, April 11, 2002), online: <http://www.cba.org/cba/pdf/2002-04-19_disorderse.pdf >L. Daniel Wilson "Bill C-30: An Analysis of the Legislative Response to R. v. Swain" (1992) 1 Health L Rev 3, online: QL(CRCM); Honourable G.A. Martin, "The Insanity Defence" (1989) Newsletter, Ontario Criminal Lawyer's Association 10:1, online: QL(CRCM); R. Drewry, "Recommendations by The Canadian Mental Health Association regarding Amendments to the Criminal Code Concerning Mental Disorder" (1992) 1 Health L Rev 12, (QL); R. Schneider, "Mental Disorder in the Courts: Significant Threat" (1997) Newsletter, Ontario Criminal Lawyer's Association 18:4, online: QL(CRCM).

[8] 7th ed, (Toronto: Carswell, 2014) at 446-458 (hereinafter Stuart).

[9] Stuart, at 446.

[10] Stuart, at 446.

that is built on only punishing those who are morally blameworthy. In addition, there does not appear to be a rationale for denying the person accused of the offence the ability to demand that the state prove her guilt beyond a reasonable doubt, which requires proving both the *actus reus* (the criminal act) and the *mens rea*.[11]

Another recommended reform is to abolish the defence of insanity, while still allowing the concept of *mens rea*. Under this scheme, *mens rea* would continue to be required for criminal liability, but the person accused of the criminal act could not argue that a mental disorder is a bar to conviction. Mental disorder would only be considered after a conviction for the purpose of determining the appropriate treatment.[12] Primarily, this system is criticized for suggesting that *mens rea* be required for a criminal conviction, while arbitrarily excluding relevant evidence as to the accused's mental state.[13]

A third suggested reform is that the defence of insanity should be abolished because normal and abnormal behaviour cannot be validly distinguished. This reform option is based on the idea that mental illnesses cannot be adequately differentiated. Although there may be some limitations to psychiatric diagnosis and treatment, it is highly unlikely that there is an absolute inability to identify any form of mental disorder. Accordingly, this argument for abolition seems to be extremely weak.[14]

A fourth proposal is to abolish the defence of insanity but allow evidence of the accused's mental disorder to show that he/she did not have the required *mens rea*. One difficulty with this idea in Canada is that our current insanity defence includes "appreciating" and "knowing". "Appreciating the nature and quality of one's act" is a deeper test of knowledge than is used for the traditional analysis of the *mens rea* component, while "knowing the act is wrong" is foreign to the usual test for *mens rea*.[15] In this way, it would be difficult to fit the insanity defence into the existing concept of *mens rea*. More importantly, this scheme would exclude the insanity defence for

[11] Stuart, at 446.
[12] Stuart, at 447.
[13] Stuart, at 447.
[14] Stuart, at 447.
[15] Stuart, at 447.

offences that do not include a *mens rea* component, like manslaughter.[16]

Finally, the State of New York proposed that the insanity defence be abolished and replaced by a rule of "diminished capacity". Under diminished capacity, evidence of a person's abnormal mental condition would be used to help determine the degree of crime for which the person could be convicted.[17] Consequently, mental disorder would cease to be a complete defence but would have a bearing on culpability, as charges may be reduced to reflect this mental state. For instance, offences that require intent or knowledge would likely be reduced to lesser charges that only necessitate that the accused was reckless or criminally negligent. Less serious offenders would generally be subject to civil commitment or acquitted, while those facing serious charges would be processed by the penal system. Under this proposal, however, it still would have been possible for a person who suffers from a significant mental disorder to be convicted of a serious criminal offence and be dealt with entirely through the criminal justice system. [18] As a result, some seriously mentally ill persons would be sent to prison and might never receive alternative treatment. Sending mentally ill persons into the penal system instead of the healthcare system seems to be lacking in humanity given the context of our current prison facilities.[19]

In addition to the general recommendations, there have also been specific suggestions for how to alter section 16 of the Canadian *Criminal Code*, particularly in relation to the test for mental disorder and the types of sentences available.[20] The *M'Naghten* test, underlying the approach to mental disorder in Canada, has been criticized for not accounting for degrees of incapacity. The test only considers the accused's knowledge of the nature or wrongness of his/her actions, which is contrary to the modern understanding that mental disorders should not be considered in absolute terms.[21] Despite these criticisms, the current approach to mental disorder in Canada has been defended. For example, in 1956, the majority of the Royal Commission examining

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[16] Stuart, at 447.
[17] Stuart, at 448.
[18] Stuart, at 448.
[19] Stuart, at 448.
[20] Stuart, at 449.
[21] Stuart, at 450.

the law of insanity recommended that there be no change to the approach to the mental disorder defence, as the Commission maintained that the test had accomplished justice in Canada.[22] Additionally, the department of Justice reviewed the insanity provisions in 1985 and recommended in its final report that the existing formulation of the insanity defence be retained with only some minor changes. The Department of Justice found that there was some evidence that indicated that the particular wording of the test did not have an impact on its practical use and there was no consensus among mental health and legal professionals or organizations as to the appropriate tests that should be implemented.[23]

Several jurisdictions, including some of the American States, Australia, and South Africa, have developed a test of irresistible impulse in addition to the *M'Naghten* formula. Using this test, these jurisdictions import the criterion of lack of control into the insanity defence.[24] Canadian courts and the Reform Commissions have largely recommended against importing this test into our law.[25] Stuart, however, suggests that there is a case for extending s 16 of the *Criminal Code* to incorporate a lack of control caused by the accused's mental disorder, because it relates to the *mens rea* requirement.[26]

2. Development of the Insanity Defence in the United States

The United States has a different criminal system than does Canada. Canada has one set of laws embodied in the *Criminal Code* that apply to all Canadians, regardless of their province or territory of residence. In the United States, each state has its own criminal laws that deal with crimes committed in that state. In addition, there is federal criminal law in place to deal with crimes that occur in more than one jurisdiction (e.g., mail fraud). Consequently, it is not unusual to have different rules and different case law on criminal subjects from state to state.

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[22] *Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (Ottawa: 1956) (McRuer J, Chair) at 46 (hereinafter McRuer Report); Stuart, at 450.
[23] Stuart, at 450.
[24] Stuart, at 451.
[25] See, for example: the McRuer Report, at 46; *R v Abbey* (1982), 29 CR (3d) 193 at 207 (SCC) (hereinafter *Abbey*).
[26] Stuart, at 452.

The *M'Naghten* test that focuses on whether the accused had the cognitive capacity to understand the nature of the act or that it was wrong has influenced the development of the insanity defence in the United States. Many states still use the *M'Naghten* test as the legal standard for insanity.[27] Over time, three main criticisms of the *M'Naghten* test emerged. First, scholars took issue with the cognitive focus of the test and that it did not incorporate a volitional element. The test did leave room for the possibility that some mentally ill persons could understand the nature and wrongness of the act but be unable to restrain their actions due to their significant mental health challenges. Scholars also criticized the *M'Naghten* test for being too rigid, meaning that the criteria for mental illness was too stringent and would omit all but the most serious cases of mental illness.[28] Finally, many scholars dispute the right or wrong standard associated with the *M'Naghten* test, arguing that this dichotomy often necessitates that clinicians make moral judgments about the defendants' actions.[29] In response to these criticisms, several states reformulated the insanity defence.

In 1954, The United States Court of Appeals for the District of Columbia Circuit (federal jurisdiction) provided a test for insanity in *Durham v United States*.[30] This test was referred to as the *Durham* test. Judge Bazelon, on behalf of the Court, outlined the test as follows:

> It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.[31]

This test became known as the *Durham* rule, or product test. The approach under this test is very similar to a product test that was originally formulated in New Hampshire in the 1869 case of *State v Pike*.[32]

The Court in *Durham* specified that disease denotes a condition that is capable

[27] Henry Fradella, "From Insanity to Beyond Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era" (2007) 18 U Fla JL & Pub Pol'y 7 (West Law) (hereinafter Fradella).
[28] Fradella.
[29] Fradella.
[30] 214 F 2d 862 (DC Cir 1954) (hereinafter *Durham*).
[31] *Durham,* at 874.
[32] 49 NH 399 (1869); see also *State v Jones,* 50 NH 369 (1871).

of improving or deteriorating, while a defect cannot improve or deteriorate. A defect may be hereditary or be the long-standing effect of an injury or mental or physical disease. The product test requires the trier of fact to determine whether the accused suffered from a mental disease or defect and whether that mental disease or defect caused the accused to commit the offence.[33] To reach a conclusion as to whether the disease or defect caused the action, the jury may consider such matters as whether the disease or defect rendered the defendant unable to differentiate between right and wrong or control his or her actions.[34]

The criticisms of the product test or *Durham* rule included the criticism that it was difficult to prove that the mental disorder *caused* the criminal act. Second, the test did not include a legal standard for determining mental disease and primarily left that decision to the medical community. Changes in the medical classification of certain mental conditions could lead to acquittals of persons who were previously considered criminally responsible.[35] Further, the reliance on medical expertise tended to lead to an over-reliance on expert evidence, which effectively overshadowed the fact-finder's role.[36]

In 1962, the Court of Appeals District of Columbia Circuit limited the test, ruling that only those disorders that substantially affected mental or emotional processes and substantially impaired behaviour controls could provide the basis for insanity.[37] The *Durham* rule was later overturned by the Court of Appeals District of Columbia Circuit in 1972 in *United States v Brawner*. [38] Instead, the Court in *Brawner* reformulated the insanity defence in accordance with the 1962 Model Penal Code created by the American Law Institute (ALI), a test which was not as broad as the *Durham* rule. The Model Penal Code test, or ALI rule, had also already been adopted in many states.[39]

The Model Penal Code was designed to be used as a model for legislation

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[33] John Worrall & Jennifer Moore, *Criminal Law*, (Upper Saddle River, NJ: Pearson Education, Inc, 2013) at 213 (hereinafter Worrall & Moore).
[34] *Durham*.
[35] Stuart, at 453.
[36] Fradella.
[37] *McDonald v US,* 312 F.2d 847 (DC Cir 1962) (hereinafter *McDonald*).
[38] Fradella; *United States v Brawner*, 471 F 2d 969 (DC Cir 1972) (hereinafter *Brawner*).
[39] *Brawner*; Fradella.

throughout the United States.[40] Section 4.01(1) of the Model Code states:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The Model Penal Code test has four elements. First, it requires that the accused suffer from a mental disease or defect, though the Model Penal Code did not define mental disease or defect. Second, the Model Code uses the term “substantial incapacity”, which effectively recognizes that there may be partial incapacity.[41] This element acknowledges that there is generally a spectrum of criminal responsibility, and it is very difficult to draw the line between sane and insane behaviour. Third, the Model Code uses “appreciate” instead of “know”, “thereby including an emotional as well as intellectual inquiry.”[42] Fourth, it examines the accused’s capacity either to appreciate the criminality of the conduct or to conform his/her behaviour to the requirements of the law. By criminality, the Model Code includes the accused’s ability to understand whether it is wrong. If the accused appreciated the criminality, this test allows a court to consider whether the accused had the ability to exercise control over his/her behaviour. This analysis of control is a method of incorporating a volitional element into the test.[43] It recognizes that there may still be legal insanity if the accused had no ability to control his/her actions.[44]

Subsection (2) of the Model Penal Code test provides that persons with anti-social personality disorder cannot raise the defence of insanity. This has been criticized because although there are those who deny that such a syndrome exists, there are

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[40] *Proposed Official Draft* (May 4, 1962), s 4.01.
[41] Stuart, at 453.
[42] Stuart, at 453.
[43] Fradella.
[44] Stuart, at 453.

others who assert that repeated anti-social behaviour may be associated with other mental disorders.[45]

The Model Code insanity defence was widely accepted and by 1980 had been adopted by legislation or judicial ruling in more than half of the states. It was adopted without modifications or with certain omissions or supplemental definitions in most federal jurisdictions through court rulings.[46] The Model Code continues to be quite prevalent in the United States, with about twenty-three states and territories utilizing the Model Penal Code test or some variation of it.[47]

Until 1984, no federal statute dealt with the insanity defence. Because Congress had never addressed the content of the insanity defence in legislation, the federal courts of appeal also followed the ALI's Model Penal Code.[48] Until that time, the United States Supreme Court had never ruled on the appropriate content of the insanity defence in federal courts, though the Supreme Court had ruled in 1895 that the government was required to disprove insanity when that defence was raised.[49]

Dissatisfaction in the United States with the prevailing approaches to the insanity defence started in the late 1970s. Because the public was concerned about the early release of persons who had been acquitted on the basis of insanity, several states narrowed the criteria for insanity and Montana abolished the insanity defence

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[45] Stuart, at 412.
[46] See: *United States v Williams,* 483 F. Supp 453 (2nd Cir 1980); *United States v Chandler,* 393 F 2d 920 (4th Cir. 1968); *United States v Pilkington,* 583 F 2d 746 (5th Cir 1978) *cert denied* 440 US 948; *United States v Sennett,* 505 F 2d 774 (7th Cir 1974); *United States v Rimerman,* 483 F Supp 97 (8th Cir 1980); *United States v Munz*, 542 F 2d 1382 (10th Cir 1976), *certiorari denied* 429 US 1104; *United States v Austin,* 533 F 2d 879 (3rd Cir 1976), *certiorari denied* 429 US 1043; *United States v Smith,* 404 F 2d 720 (6th Cir 1968); *Wade v United States,* 426 F.2d 64 (9th Cir 1970), *later appealed* 489 F.2d 258 (9th Cir.); *United States v Brawner,* 471 F.2d 969 (DC Cir 1972).
[47] Worrall & Moore, citing DB Rottman and SM Strickland, *State Court Organization*, 2004 (Washington, DC: Bureau of Justice Statistics, 2006) at 199-201, online <http//bjs.ojp.usdoj.gov/content/pub/pdf/scc04.pdf> :Hawaii, Kentucky, Maryland, Michigan, New York, North Dakota, Oregon, Puerto Rico, Tennessee, Vermont, the Virgin Islands, Washington DC, West Virginia, Wisconsin, and Wyoming use the Model Penal Code test (ALI rule); Arizona, Arkansas, Connecticut, Delaware, Illinois, Indiana, Maine, Rhode Island use a variation of the Model Penal Code test (ALI Rule).
[48] P. Low, J. Jeffries, Jr., and R. Bonnie, *The Trial of John W. Hinckley, Jr. A Case Study in the Insanity Defence* (Mineola, New York: Foundation Press Inc, 1986) at 18 (hereinafter Low, Jeffries Jr. & Bonnie).
[49] Low, Jeffries, Jr., & Bonnie, at 129.

altogether in 1979.[50] The famous case *Unites States v Hinckley,* tried in a federal court in the District of Columbia, caused the issue of the insanity defence to be debated all over the United States. [51]

On March 30, 1981, John Hinckley Jr. shot and wounded President Ronald Reagan, as well as three other people. James Brady, the Press Secretary, was gravely injured by a wound in his head. Hinckley was immediately apprehended and charged with 13 crimes. His defence at trial was that he was insane at the time of the offences. The Model Penal Code test for the insanity defence was used at trial. The jury found him not guilty by reason of insanity. This finding led to many debates about the insanity defence in the legislatures around the United States. During the three year period following the trial, Congress and half of the states enacted changes in the insanity defence, all designed to limit it in some way. The following were among these changes: Congress and nine states limited the test for insanity; Congress and seven states reassigned the burden of proof to the defendant, instead of the government; eight states added an alternate, distinct verdict of guilty but mentally ill; and Utah abolished the insanity defense altogether.[52]

Generally, these attempts at modification focused on the Model Penal Code, as it was the basis for the *Hinckley* decision and the predominant test at the time. Some critics of the Model Penal Code argued that the volition aspect of the defence should be eliminated and the definition of mental diseases restricted. The American Bar Association and the American Psychiatric Association supported this type of modification to the insanity defence. [53]

Congress largely followed these recommendations when it passed the *Insanity Defense Reform Act* ("IDRA") in 1984, which replaced the Model Penal Code test in all federal cases.[54] The IDRA diverged from the Model Penal Code by mandating that the accused have a "severe" mental disease and abandoning the volition component of the

[50] Low, Jeffries Jr. & Bonnie, at 21.
[51] 525 F Supp 1342 (DDC 1981), *clarified,* 529 F Supp 520, *aff'd* 672 F 2d 115 (DC Cir 1982); Crim Case No 81-306 (DC Cir 1982) (jury instruction).
[52] Low, Jeffries Jr. & Bonnie, at 126-27.
[53] Low, Jeffries Jr. & Bonnie, at 127.
[54] Fradella.

insanity defence.[55] The severity requirement effectively restricts the defence to those suffering from psychosis or mental handicap.[56] In the IDRA, Congress also specified that insanity is an affirmative defence, thereby shifting the burden of proof to the defendant. Specifically, the statute reads:

> a) Affirmative defense – It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
> b) Burden of proof – The defendant has the burden of providing the defense of insanity by clear and convincing evidence.[57]

In addition, the IDRA created a comprehensive civil commitment procedure to fill the statutory hole that had been identified by federal courts. Up until that time, a defendant who successfully established a reasonable doubt in respect to his/her sanity at the time of the offence was found "not guilty" and there was no general civil commitment procedure to ensure that these individuals received proper care after being acquitted.[58] Under IDRA, an accused who successfully raises the insanity defence is considered "not guilty by reason of insanity" ("NGI"). Following that verdict, a hearing will be held to determine whether the defendant poses "a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect."[59] That hearing must be held within 40 days of the special verdict.[60] To conclude the hearing, the court decides whether the defendant should be hospitalized or released.[61] If the defendant is hospitalized as a result of the hearing, that person will be released when the director of the facility determines that the person has recovered from the mental disease or defect to the extent that a conditional release with a prescribed treatment program would not create a substantial risk of bodily injury

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[55] Low, Jeffries Jr. & Bonnie, at 129.
[56] Fradella.
[57] 18 USCA s 17.
[58] *Shannon v United States*, 512 US 573 (1994).
[59] 18 USCA 4243(d).
[60] 18 USCA 4243(c).
[61] 18 USCA 4243(d) & (e); *Shannon v United States*, 512 US 573 (1994).

to or serious damage to property of another person.[62]

The IDRA also has had a substantial impact on the law of evidence in relation to expert witnesses. Rule 704(b) of the Federal Rules of Evidence now reads:

> In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.[63]

Today, the legal standard that applies to the insanity defence varies by state. In about two-thirds of the states that recognize the insanity defence, however, the defendant bears the burden of proving that he/she was insane at the time of the offence.[64] Some states have also supplemented the insanity defence with additional verdicts. More than 20 states have established a "guilty but mentally ill" verdict. This finding is available when the person is determined to be guilty of the crime, sane when the crime was committed and mentally ill at the time of the trial. In the states that incorporate guilty but mentally ill, there are generally four conclusions available to a court: "guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill."[65] Of the states that have created a guilty but mentally ill option, only two have narrowed the four possible findings by abolishing the insanity defence.[66] A person who is held to be guilty but mentally ill will generally be incarcerated but will, almost certainly, receive treatment while in prison.[67]

The supporters of the guilty but mentally ill defence generally see it as addressing some of the perceived deficiencies of the insanity defence. Primarily, it is intended to prevent the release of offenders who were insane when they committed the offence.[68] Critics, however, often contend that guilty but mentally ill verdict is

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[62] 18 USCA 4243(f).
[63] Fed R Evid 704(b), 28 USCA.
[64] The Insanity Defense Among the States, online: Findlaw <http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html> (hereinafter Findlaw).
[65] Worrall & Moore, at 216.
[66] Worrall & Moore, at 216.
[67] Worrall & Moore, at 216.
[68] Worrall & Moore, at 215-216.

problematic because it makes an already complex area of law even more complicated. In addition, many people argue that this verdict requires that offenders first raise the insanity defence, which increases the number of insanity please and, possibly, the number of acquittals.[69]

Beyond alternative verdicts, five states abolished the insanity defence – Idaho, Kansas, Montana, and Nevada.[70] These states, however, allow evidence of mental disorder to prove that the defendant did not have the mental element required for conviction of the offence charged.[71] The elimination of an express insanity defence gave rise to an extensive debate regarding whether the insanity defence is constitutionally guaranteed in the United States. The United States Supreme Court has never ruled on the constitutionality question, but the issue has been litigated in the supreme courts of those five states.

In 2001, Nevada's high court ruled the abolition of the insanity defence was unconstitutional.[72] Conversely, the other four states' supreme courts have held that there is no constitutional right to an insanity defence. In 2012, John Delling challenged the abolition of the insanity defence in Idaho at the Idaho Supreme Court, arguing that it violated his right to due process under the Fourteenth Amendment, present a defense under the Sixth Amendment, and avoid cruel and unusual punishment in accordance with the Eighth Amendment.[73] The Court found that that the appellant's constitutional rights had not been violated. In reaching that conclusion, the Court determined that an insanity defence is not a fundamental part of the justice system and, as a result, is not required to satisfy the right to due process. The Court also concluded that if an accused is able to adduce evidence of mental illness or disability to contest criminal intent, or *mens rea*, then the Sixth Amendment has not been infringed. Finally, the Court held that there were sufficient safeguards under the Idaho Code to protect the accused from cruel and unusual punishment, because the statute provided that that a person who

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[69] Worrall & Moore, at 216.
[70] Nevada has since reinstated the insanity defence.
[71] Worrall & Moore, at 214.
[72] Paul Appelbaum, *Does the Constitution Require an Insanity Defense?*, Law & Psychiatry at 94, online: < http://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.6401004> (hereinafter Appelbaum).
[73] *State v Delling,* 152 Idaho 122 (hereinafter *Delling ID*); Appelbaum, at 944.

does not have the capacity to understand the proceedings or participate in his/her own defence cannot be convicted for a criminal offence. [74]

Delling appealed to the United States Supreme Court, but the Court denied his petition for a writ of certiorari.[75] Three justices dissented and would have allowed the appeal to hearing arguments in relation to due process. Justice Breyer, writing for the majority, outlines his primary concern that Idaho's standard for accounting for insanity likely would not apply to individuals who are insane and unable to comprehend that an action is wrong but are, nevertheless, able to form intent. He also noted that there is a significantly different outcome for persons whose mental illness prevented them from understanding the consequences of their actions. As a result, these individuals would not be held criminally liable because they were unable to form intent. These two scenarios are quite different despite both types of offenders being equally incapable of comprehending the nature of their actions.[76] Because the U.S. Supreme Court refused to hear this case, it sent the message that states may decide for themselves on the issue of constitutional entitlement to an insanity defence.[77]

In sum, the various jurisdictions of the United States elect which legal test for insanity "insanity" to use. The most common tests are the American Law Institute's Model Penal Code and the *M'Naghten* test. One state (New Hampshire) continues to use the *Durham* or product test, and four states do not have a discrete insanity defence. The federal courts are governed by the configuration of insanity in the *Insanity Defence Reform Act*, which recognizes "severe mental disease or defect" as a threshold to a finding of mental disorder and that does not recognize lack of control.

3. Development of the Defence of Mental Disorder in England

In England, the insanity defence is governed by the *M'Naghten* rule. Accordingly, the legal test for insanity is whether the accused was suffering from a defect of reason stemming from a disease of the mind to such an extent that the accused did not know

[74] *Delling ID*; Appelbaum, at 944.
[75] *Delling v Idaho,* 133 S.Ct. 504 (hereinafter *Delling S.Ct.*).
[76] *Delling S.Ct.*
[77] Appelbaum, at 945.

the nature and quality of the act or that was she/she was doing was wrong. [78] According to *Clarke*, a defect of reason requires a lack of reasoning power.[79] For a disease of the mind, mind refers to the mental faculties that govern reason, memory and understanding. Disease means that the cause of the impairment to the mental faculties of the defendant is internal to that accused.[80] If insanity is pleaded by the defendant, the defendant bears the burden of establishing on a balance of probabilities that he/she was insane, according to this definition, at the time of the offence.[81]

Even if the defendant does not expressly plead insanity, a judge may determine, as a matter of law, that the defendant has indirectly raised the insanity defence by presenting medical evidence related to a disease of the mind.[82] In addition, at times, the prosecution may raise insanity. Section 6 of the *Criminal Procedure (Insanity) Act 1964* indicates that when a defendant pleads diminished responsibility in a trial for murder, the prosecution may adduce evidence of insanity. In such a case, the prosecution must prove the *M'Naghten* elements of the insanity defence beyond a reasonable doubt.[83] Lord Denning's obiter in *Bratty v A-G for Northern Ireland* also made it clear that the prosecution can give evidence regarding the accused's sanity when the accused puts his/her state of mind into issue, such as when the accused pleads non-insane automatism.[84]

Under the current wording of section 2(1) of the *Trial of Lunatics 1883*, if the insanity defence is successfully established, the judge or jury must return the special verdict of "not guilty by reason of insanity."[85] This adaptation of the special verdict was instituted by the *Criminal Procedure (Insanity) Act 1964*.[86] Before that time, the verdict read "guilty of the act or omission charged, but insane so as not to be responsible,

[78] Richard Card, *Criminal Law*, 21 ed, (Oxford: Oxford University Press, 2014) at 608-610 (hereinafter Card).
[79] [1972] 1 All ER 210, CA.
[80] *Sullivan* [1984] AC 156, HL; Card, at 612.
[81] Card, at 608-610.
[82] Card, at 610.
[83] Card, at 618; (UK), 1964, c 84; *Grant* [1960] Crim LR 424.
[84] [1963] AC 386 at 411; Card at 618.
[85] Card, at 618.
[86] Section 1.

according to the law, for his actions."[87] This initial wording was developed to help satisfy Queen Victoria's desire to increase deterrence for mentally ill individuals, but modified after years of criticisms. The accused can appeal the special verdict of not guilty by reason of insanity under the *Criminal Appeal Act* 1968. [88]

The order that a defendant receives following a special verdict of not guilty by reason of insanity has changed significantly over the years. Prior to 1991, the defendant would be sentenced to indefinite detention in a hospital, and only would be eligible for release once the Home Secretary determined that the person no longer needed to be detained for the protection of the public.[89] This approach was changed by the *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* and then by the *Domestic Violence, Crime and Victims Act 2004*. With these amendments, section 5 of the *Criminal Procedure (Insanity) Act 1964* now provides three possible orders that a judge can make when a person is found not guilty by reason of insanity: "a hospital order (with or without restriction); a supervision order; or an order for his absolute discharge."[90] A hospital order is required if an accused receives a special verdict for a murder charge and the judge has the power to make a hospital order under section 37 of the *Mental Health Act 1983*.[91] Under section 37, a judge may make such an order if the defendant is currently suffering from a mental disorder, meaning any disorder or disability of the mind, which makes hospitalization appropriate and the most suitable sentence for the defendant.[92] If the section 37 requirements are not met, a judge is restricted to making an order for supervision or absolute discharge.

If the judge makes a hospital order, the defendant will be admitted to a special hospital or a mental health hospital, depending on the election of the Secretary of State. The judge may put restrictions on the hospital order if he/she is of the opinion that such measures are needed to protect the public from harm. These restrictions

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[87] Stephen White, "The Insanity Defense in England and Wales since 1843" (1985) 26:1 The Annals of the American Academy of Political and Social Science at 45 online: <http://journals.sagepub.com.ezproxy.lib.ucalgary.ca/doi/abs/10.1177/0002716285477001005>.
[88] (UK), 1968, s 12, as amended.
[89] Card, at 619.
[90] Card, at 619.
[91] *Mental Health Act 1983*, 1983 (UK), c 20.
[92] Card, at 619.

generally set parameters on release and may or may not specific a time limit for detention. Both the Secretary of State and Mental Health Review Tribunal have the authority to terminate a restriction order.[93] Otherwise, for an unrestricted order, the defendant will be released once the hospital authorities decide that it is appropriate and the Mental Health Review Tribunal reviews and approves that determination.[94] Since the mandatory indefinite hospitalization component of the verdict of not guilty by reason of insanity was nullified in the *Criminal Procedure (Insanity and unfitness to Plead) Act 1991*, studies have indicated that the number of special verdicts has been increasing.[95] The increasing number of verdicts may mean that the insanity defence is becoming more common in England.

Over the years, this system of dealing with mentally disordered accused has been the subject of various criticisms. In 1953, the Royal Commission on Capital Punishment in England recommended the abolition of the *M'Naghten* test and the adoption of the following test:

> At the time of the act, [was] the accused ...suffering from a disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible[?][96]

This test was not adopted in England. It was criticized for not providing a legal standard or criterion to guide the jury.[97]

The 1975 Report of the Butler Commission on Mentally Abnormal Offenders recommended the abolition of the *M'Naghten* rule.[98] The Commission proposed a new verdict be formulated that found the accused "not guilty on evidence of mental disorder". Further, the Commission proposed that members of the jury return such a verdict if they find that:

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[93] Card, at 619.
[94] Card, at 619.
[95] Card, at 620.
[96] *Report of the Royal Commission on Capital Punishment*, 1949-1953 (Cmnd. 8932) as cited in Stuart, at 359-60 (hereinafter Royal Commission on Capital Punishment).
[97] Stuart, at 360.
[98] (1975) Cmnd. 6244.

> (1) They acquit the defendant solely because he is not proved to have had the state of mind necessary for the offence and they are satisfied on the balance of probability that at the time of the act or omission he was mentally disordered, or
>
> (2) they are satisfied on the balance of probability that at the time he was suffering from severe mental illness or severe abnormality. [99]

The Committee recommended this test because it was looking for a test that was modern and one that restricted medical witnesses to testifying about the facts of the accused's mental condition rather than whether or not the accused was criminally responsible. Although some aspects of the Butler Committee's recommendations have been recently adopted by England, the alternative test has not yet been adopted and has been criticized for not being able to achieve these purposes.[100]

In March 1991, a private member's bill relating to the special verdict of insanity was introduced in the Commons in England and proceeded to be passed. In October, 1991, an order made by the Home Secretary appointed January 1, 1992, as the date for the coming into effect of the *Criminal Procedure (Insanity and Unfitness to Plead) Act.* [101] This Act adopts some of the recommendations made by the Butler Committee in 1975.[102]

While this Act does not change the *M'Naghten* test, it does provide that the jury cannot return a verdict of not guilty on account of insanity unless there is evidence from two or more registered medical practitioners. It also expands the possible dispositions available to the court to include a guardianship, treatment or supervision order or an order for absolute discharge. These new sentencing options would not apply if there is a sentence fixed by law.

The Law Commission also reviewed this area of law and published a discussion

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[99] Lawrence Gostin, *A Human Condition, The Law Relating to Mentally Abnormal Offenders, Volume 2,* London, England: MIND, National Association for Mental Health, 1977 at 189 (hereinafter Gostin).
[100] Stuart, at 414.
[101] Order 1991, 2488.
[102] (UK), 1991, c 25.

paper entitled "Criminal Liability: Insanity and Automatism",[103] which included several criticisms of the current law and proposals for reform.

4. Development of the Insanity Defence in Canada

The evolution of the recommended legislative changes to the insanity defence in Canada follows an equally intricate path. While based on the *M'Naghten* test, the *Criminal Code* provisions do have some important differences that have been emphasized by the Law Reform Commissions and the courts. Until the 1992 amendments to the *Criminal Code,* section 16 was substantially the same as the original provision in the 1892 *Criminal Code*.[104] Amendments enacted in 1955 simply changed a few words and its arrangement. In 1956, The Royal Commission on the Law of Insanity as a Defence in Criminal Cases (McRuer Report) made several recommendations. They included:

> 2. No amendment should be made to the law with respect to the procedure in determining criminal responsibility…
> 5. The addition of a defence of irresistible impulse related to diseases of the mind would not be a wise amendment to the Criminal Code.
> 6. The repeal of section 16 and the substitution of the law of the State of New Hampshire or that of the District of Columbia [both of which used the Durham rule or product test] would not make for a better administration of justice in Canada. (Two dissentients)…
> 7. There is no sound reason to alter the burden of proof as it now exists under Canadian law…
> 8. The law of diminished responsibility should not be adopted in Canada. (Two dissentients)…
> 14. No sufficient case has been made out for changes in terminology in the statute law, which has been the subject of jurisprudence for many years, but if section 16 is to be revised the words 'mentally defective' might be substituted for the words 'in a state of natural imbecility'.[105]

[103] Law Commission, *Criminal Liability: Insanity and Automatism, A Discussion Paper*, online: <http://www.lawcom.gov.uk/wp-content/uploads/2015/06/insanity_discussion.pdf>.
[104] Stuart, at 424 ref'g SC 1892, c 29, ss 11 & 736.
[105] McRuer Report, at 46.

In 1976, the Law Reform Commission of Canada recommended changes in the disposition of persons found not guilty by reason of insanity.[106] While it was outside the scope of the report to discuss the legal definition of insanity, the Commission did recommend that the issue of criminal responsibility, as raised by the insanity defence, be discussed. There was little further action in the area until 1982, when the Law Reform Commission of Canada made some initial proposals for changes in the insanity defence in *Working Paper 29*.[107] The Commission put forward two alternative tests for mental disorder. They are:

> Mental Disorder Alternative (1):
> Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he was incapable of appreciating the nature, consequences or unlawfulness of such conduct.
>
> Mental Disorder Alternative (2):
> Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law.[108]

These proposals were made to modernize the language of section 16. The Commission proposed that “natural imbecility” be replaced with “defect of the mind” so as to ensure that the benefit of the insanity provision applies to cases of mental malfunction due to mental handicap.[109] Some critics argued that “defect” is just as insulting and dehumanizing as “natural imbecility”. “Mental disability” was offered as a more appropriate alternative.[110]

The *Working Paper 29* proposals also involved substituting “mental disorder” for “insanity”, presumably to address more modern medical and social attitudes. That

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[106] Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Supply and Services, 1976) (P Hartt, chair) at 21-22 (hereinafter LRC, Report 5).
[107] Law Reform Commission of Canada, *Criminal Law—The General Part—Liability and Defences* (Working Paper 29) (Ottawa: LRC, 1982) (hereinafter LRC, Working Paper 29).
[108] LRC, Working Paper 29, at 50.
[109] LRC, Working Paper 29, at 45.
[110] G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 Queen's LJ 135 at 137 (hereinafter Ferguson).

suggestion was also criticized. On critique preferred to retain the insanity defence because the term "insanity" is familiar to the public and connotes a more serious mental impairment than "mental disorder", which could be used to mean both minor and major impairments. In addition, the author maintained that "insanity" emphasizes that the issue is not a medical one, but rather a legal one for the judge or jury to decide.[111]

"Disease of the mind" was left undefined by the Commission because it felt that the term was satisfactorily defined by the courts and the definition may need room to change in light of scientific developments.[112] The rationalization that the term was defined through case law was criticized as being an anti-codification view, which did not align with a *Criminal Code* that was intended to be both clear and comprehensive. Accordingly, a critic suggested that the *Criminal Code* should contain a definition of "disease of the mind" or of "mental disorder" to make it clear that transitory disturbances of the mind are excluded.[113]

Finally, the Commission was criticized for continuing to formulate the insanity test around incapacity, or the inability to appreciate or know, rather than establishing an inquiry into whether the accused did, in fact, appreciate or know. Instead, it was suggested that the insanity defence should require an inquiry into the accused's actual knowledge, not just capacity. In support, *R v Dees*, an intoxication defence case from the Ontario Court of Appeal, was cited for the proposition that an accused may have capacity without the specific intent that is required for an offence. [114] Accordingly, the fundamental question should be whether the accused had the necessary intent.[115]

In response to the Law Reform Commission's reports, the Federal Department of Justice established the Mental Disorder Project in 1982 as part of a comprehensive review of the criminal law.[116] The purpose of the Project was to prepare a set of

[111] Ferguson, at 137.
[112] LRC, Working Paper 29 at 46.
[113] Ferguson, at 138.
[114] *R v Dees* (1978), 40 CCC (2d) 58 (Ont CA). See also: *R v Robinson* [1996], 1 SCR 683 and *R v Seymour* [1996], 2 SCR 252.
[115] Ferguson, at 139.
[116] E.A. Tollefson and B. Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Carswell, 1993) at

recommendations that could be used as a basis for legislative reform. The Project prepared a Discussion Paper that set out the issues and options, followed by a Draft Report that discussed the problems and potential solutions identified through consultation with various stakeholders.[117] In 1985, the Mental Disorder Project released its final report, which incorporated feedback from the Draft Report.[118]

In 1986, the Federal Government tabled draft legislation before Parliament entitled “Proposed Amendments to the Criminal Code (Mental Disorder)”. This draft legislation read:

> 16. No person shall be convicted or discharged under section 662.1 of an offence in respect of an act or omission on the part of that person that occurred while that person suffered from a mental disorder that rendered him incapable of appreciating the nature and quality of the act or omission or of knowing that the act or omission is wrong.[119]

Again, some critics voiced disapproved of using the term “mental disorder” without providing a definition that excluded transitory disturbances of the mind.[120] Similarly, the use of “wrong” might also pose a problem because it could mean either morally or legally wrong.[121] This legislation, however, did not pass, because it did not get tabled before there was an election in 1988 and it did not get reintroduced after that time.[122]

In 1987, the Law Reform Commission of Canada made further recommendations for changes to the legislation. They made two proposals for changes to s 16, which read:

> 3(6) Mental Disorder. No one is liable for his conduct if, through disease or defect of the mind, he was at the time incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he was doing was morally right] (the bracketed portion added by the

3 (hereinafter Tollefson & Starkman).

[117] *Mental Disorder Project: Discussion Paper* (Ottawa: Department of Justice, 1983); *Mental Disorder Project, Criminal Law Review, Draft Report* (Department of Justice, May, 1984); Tollefson & Starkman, at 3-4.

[118] *Mental Disorder Project, Criminal Law Review, Final Report* (Department of Justice, 1985).

[119] Ferguson, at 136.

[120] Ferguson, at 137.

[121] Ferguson, at 139.

[122] Tollefson & Starkman, at 7.

> minority).
>
> Appendix B "Illustrative Draft Legislation"
> 14. A person is not criminally liable if, at the time of the relevant conduct, the person, by reason of mental disorder, is incapable of appreciating the nature or consequences of the conduct or of appreciating that the conduct constitutes a crime.[123]

The differences between these provisions and the existing *Criminal Code* provisions were that the proposed sections excluded the section on insane delusion because it had been seldom used and frequently criticized because the "idea of partial insanity is not in accordance with modern medical opinion."[124] Second, the new provisions did not deal with the burden of proof or presumption of sanity because the drafters felt that this should be left to evidence provisions. The Commission also replaced "insanity" with "mental disorder". Mental disorder was intended to have the same meaning as insanity but be more in line with medical and social attitudes of the time.[125] The recommended changes have been criticized for the same reasons as other proposals. The most common criticism is that it is not clear whether "disease of the mind" or "mental disorder" includes mental handicap.[126]

It is evident that the evolution of the insanity defence has followed a complicated course in many jurisdictions. In part, this likely reflects the uncomfortable relationship between the law and psychiatry in cases involving persons with mental disorders. It also reflects public pressure to detain dangerous individuals. It is difficult for the law to balance the individual's rights to appropriate treatment with society's desire for protection. Consequently, it is likely that there will continue to be proposals for changes in the mental disorder provisions.

[123] Ferguson, at 135-136, citing Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (Ottawa: LRC, 1987) (hereinafter LRC, Report 31).
[124] LRC, Report 31, at 33.
[125] LRC, Report 31 at 33.
[126] Ferguson, at 138.

C. 1992 Amendments

1. Developments in the Law

As discussed in the previous section, the Law Reform Commission of Canada in its fifth report, *Mental Disorder in the Criminal Process,*[127] recommended major changes to the way in which the criminal law dealt with persons with mental disabilities. As a result, the Minister of Justice tabled a Draft Bill in Parliament in June of 1986 for discussion purposes. Then, in May of 1991, in *R* v *Swain*,[128] a majority of the Supreme Court of Canada ruled that the sections of *Criminal Code* that provided that an accused found not guilty on account of insanity be confined without a hearing and held in custody at the pleasure of the Lieutenant-Governor contravened sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* and were of no force and effect.[129] The Court allowed the Government a six-month transition period to amend the *Criminal Code* to reflect this finding. In addition, the Supreme Court indicated that other related *Criminal Code* provisions “attract[ed] suspicion”. The Court also struck down and reformulated the common law rule that permitted the Crown to raise the insanity defence over the objection of the defence.

Consequently, swift amendments to the *Criminal Code* became necessary. A Private Member’s Bill (C-228), using the language of the Draft Bill previously tabled in 1986, was introduced in the spring of 1991.[130] Bill C-228 was subsequently withdrawn on June 10, 1992, as the government had introduced amending legislation before the Private Member’s Bill could be addressed.[131] That amending legislation came in the form of Bill C-30, which was introduced on September 16, 1991.[132] Bill C-30 received royal

[127] Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Supply and Services, 1976) (P Hartt, chair) at 21-22 (hereinafter LRC, Report 5) note 106.
[128] (1991), 63 CCC (3d) 193 (SCC) (hereinafter *Swain*).
[129] Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (hereinafter *Charter of Rights*).
[130] Tollefson & Starkman, at 11, note 17; *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, 3rd Session, 34th Parl, 1991 at 1363.
[131] Tollefson & Starkman, at 11, note 17.
[132] Tollefson & Starkman, at 10; an Act to amend the *Criminal Code* (mental disorder) and to amend the *National Defence Act* and the *Young Offenders Act* in consequence thereof, 3rd Session, 34th Parliament.

assent on December 13, 1992 and came into force on February 4, 1992.[133] These amendments affected several aspects of what used to be called the "insanity defence" and the subsequent treatment of persons found not criminally responsible on account of mental disorder.

More recently, Bill C-10, an Act to amend the *Criminal Code* (mental disorder) and to make consequential changes to other Acts, was introduced by the Minister of Justice and received first reading in the House of Commons on October 8, 2004.[134] The Senate passed Bill C-10 on May 16, 2005.[135] It received Royal Assent on May 19, 2005.[136] "The Bill expande[d] the powers of provincial and territorial Review Boards, the legal bodies that make decisions about the detention, supervision and release of mentally disordered accused persons, by allowing them to order psychiatric assessments, adjourn hearings and extend the time for review of an accused's disposition."[137]

In part, Bill C-10 was introduced in order to respond to the Supreme Court decision in *R c Demers*, a case mentioned in Chapter 5.[138] In *Demers*, the Court held that it is a violation of the *Charter* to continually subject a permanently unfit accused to the criminal process when there is clear evidence that the accused will never recover capacity and no evidence that the person poses a significant threat to public safety.[139] The Supreme Court, however, suspended its declaration that sections 672.33, 672.54 and 681.81(1) of the *Criminal Code* are invalid in order to provide Parliament with an

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[133] Tollefson & Starkman, at 12.
[134] An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, Bill C-10, 1st Session, 38th Parliament, 2004 (Minister of Justice I. Cotler), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3298299>. Note that Bill C-10 is a slightly reformulated version of Bill C-29, 3rd Session, 37th Parliament, which died on the *Order Paper* – note 1 online: <http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C10&Parl=38&Ses=1#Background>. Hansard online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=5&Parl=38&Ses=1&Language=E&Mode=1#Int-95925>.
[135] *Debates of the Senate*, 38th Parl, 1st Sess, Vol 142 (16 May 2005), online: <https://sencanada.ca/en/Content/Sen/chamber/381/debates/060db_2005-05-16-e>.
[136] SC 2005, c 22.
[137] An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts, Bill C-10, 1st Session, 38th Parliament, 2004 (Prepared by Wade Raaflaub) <http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C10&Parl=38&Ses=1#A1Definition> [Bill C-10, Raaflaub].
[138] [2004] 2 SCR 489 (hereinafter *Demers*).
[139] Bill C-10, Raaflaub.

opportunity to amend the *Code*. In its decision, the Court specified that the amendments should include the ability to grant an absolute discharge to a permanently unfit accused, as well as order a psychiatric evaluation if there is no current evaluation available.[140] In addition, Bill C-19 enables a court to hold an inquiry, of its own motion or at the recommendation of a Review Board, in relation to an accused who is permanently unfit to stand trial, at which time the court may order a judicial stay of proceedings if the accused does not present a threat to public safety.[141] Bill C-10 also repealed unproclaimed provisions of the *Criminal Code* that covered such matters as the maximum time that a person may be detained, dangerous and mentally disordered accused persons, and hospital orders.[142]

Importantly, in Bill C-10, the government did not make changes to the mental disorder defence or definition. The government made this decision in response to 19 recommendations made by the House of Commons Standing Committee on Justice and Human Rights in the *Review of the Mental Disorder Provisions of the Criminal Code*, which was published on June 10, 2002. In the report, the Committee suggested that the defence based on mental disorder under section 16 and the definition of "mental disorder" in section 2 of the *Criminal Code* should remain in their present forms.[143] Beyond agreeing to this recommendation, the government "concluded that application of the law by the courts has been fair and consistent, and has balanced the rights of mentally disordered persons and the protection of society."[144]

2. Former Sections of the *Criminal Code* Dealing with Insanity

Prior to the 1992 amendments, subsection 16(2) of the *Criminal Code* contained the conditions that must be met to establish the insanity defence, or that an exemption

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[140] Bill C-10, Raaflaub, citing *Demers*, at para 60.
[141] Bill C-10, Raaflaub.
[142] Bill C-10, Raaflaub; See Department of Justice Canada, News Release, "Government Moves to Modernize Mental Disorder Provisions of the Criminal Code," Ottawa, October 8, 2004 online: <http://canada.justice.gc.ca/en/news/nr/2004/doc_31250.html>.
[143] Standing Committee on Justice and Human Rights, 14th Report, *Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, June 2002 online: ,http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Studies/Reports/JUSTRP14-e.htm.
[144] Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code*, Ottawa, November 2002 online: <http://www.justice.gc.ca/en/dept/pub/tm_md/mdr.pdf>.

from responsibility under the *Code* should be applied. Former section 16 read:

> 16(1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.
>
> (2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
>
> (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.
>
> (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.[145]

As a threshold element, the former *Criminal Code* exemption required that the accused was in a “state of natural imbecility” or suffering from “a disease of the mind” at the time the person committed the act. However, a person with a “disease of the mind” or who suffered from “natural imbecility” would only be exempted if his or her disease or condition: (a) rendered him or her incapable of appreciating the nature and quality of an act or omission, or (b) rendered him or her incapable of knowing that an act or omission was wrong. Some of the circumstances where the exemption applied continue to form part of the law. These situations are discussed below.

3. Current *Criminal Code* Provisions

The amended provisions of the *Criminal Code* dealing with exemption from criminal responsibility due to mental disorder are:

> 2 "mental disorder" means a disease of the mind;
>
> 16 (1) No person is criminally responsible for an act

[145] *The 1990 Annotated Tremeear’s Criminal Code*, (Toronto: Thomson Reuters Canada Limited, 1990).

> committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.[146]

The insanity provisions that were in effect prior to the 1992 amendments were the subject of extensive academic debate. At issue was whether a claim of insanity negated *mens rea*, provided an excuse or justification, or exempted an accused from a criminal conviction on policy grounds.[147] The characterization of the exemption was discussed by the Supreme Court of Canada in 1990 in *R v Chaulk.*[148] After citing several examples of ways in which an insanity defence could apply to a given situation, Lamer C.J.C. stated:

> The foregoing examples illustrate that the insanity defence can be raised in a number of different ways, depending on the mental condition of the accused. All of these examples have one thing in common however. Each is based on an underlying claim that the accused has no capacity for criminal intent because his or her mental condition has brought about a skewed frame of reference. When a person claims insanity, he or she may well be denying the existence of *mens rea* in the particular case or putting forward an excuse which would preclude criminal liability in the particular case; but he is also making a more basic claim which goes beyond *mens rea* or *actus reus* in the particular case—he is claiming that he does not fit within the normal assumptions of our criminal law model because he does not have the capacity for criminal intent. Such a claim may or

[146] This version of section 16 came into force with the 1992 amendments and remained the same after the 2005 amendments.
[147] *R v Chaulk* (1990), 62 CCC (3d) 193 (SCC) at 204 (hereinafter *Chaulk*).
[148] *Chaulk*, at 204.

> may not be successful. If the incapacity is such that it fits into the defence of insanity encompassed in s. 16, it will preclude a conviction.
>
> Based on the foregoing, I prefer to characterize the insanity defence as an exemption to criminal liability which is based on an incapacity for criminal intent. [149]

The 1992 amendments reflect this way of thinking, as Parliament changed the wording of the verdict after a successful s 16 exemption from "not guilty on account of insanity" to "not criminally responsible on account of mental disorder". In an Information Paper released in September of 1991, the Department of Justice stated:

> Section 16 of the *Criminal Code*, which sets out the defence of insanity, is amended to modernize its terminology to make it more consistent with current medical usage, and to remove a subsection that was found by the court to be unnecessary. The amendments do not attempt to alter the judicial interpretation of the insanity test itself.
>
> Consultation and press reports over the last few years show that the general public finds it difficult to understand the present verdict of 'not guilty on account of insanity' when it is known that the accused committed the act. In addition, a number of psychiatrists suggested that the verdict of not guilty permits the accused to continue deluding himself or herself that he or she has done nothing wrong. This may interfere with the possibility of successful treatment.
>
> Some American states have moved to a verdict of 'guilty but insane'. This runs counter to the basic principle of Canadian criminal law that to be convicted of a crime, the state must prove not only a wrongful act, but also a guilty mind. The Bill therefore proposes a verdict which declares that 'the accused committed the act or omission but is not criminally responsible on account of mental disorder'.[150]

Thus, in addition to the traditional verdicts of guilty and not guilty, Parliament

[149] *Chaulk*, at 207.
[150] Canada, Minister of Justice and Attorney General, *Justice Communiqué*, Ottawa, September, 16, 1991.

added the new category "not criminally responsible on account of mental disorder". The legal and practical effects of this amended verdict are discussed at the end of this chapter.

While it is important to focus upon the 1992 provisions of the *Criminal Code*, it may also be relevant to consider the former law. Where necessary, we will refer to the previous subsections, their interpretation, and their application to various situations. Further, much of the jurisprudence that arose under the old regime will continue to apply.

D. Mental Disorder—General (s. 16(1) and s. 2)

1. Introduction

Under section 16 of the *Criminal Code*, a person is held not criminally responsible if he/she was suffering from a mental disorder while committing an act or making an omission under certain circumstances. Formerly, a person found to be suffering from a mental disorder was found "not guilty on account of insanity". The change in terminology reflects a long-standing debate in all of the common law jurisdictions as to what should be the appropriate test for mental disorder and what should be the disposition for persons found not guilty or not criminally responsible on account of mental disability.[151] Academics and law reform bodies have debated factors such as whether there should be recognition of diminished capacity and how to determine the appropriate level of impairment that will warrant a finding of insanity or mental disorder. Another issue debated is the role of psychiatrists and experts in deciding if a person suffers from a mental disorder in the legal sense. Several recommendations for reform have been proposed in all jurisdictions. In Canada, there was a flurry of reform recommendations leading up to the 1992 revisions made to the *Criminal Code.*[152] Consequently, the reforms represent, to a large extent, an attempt at reconciling these diverse views.

[151] See previous discussion under B. Background.
[152] See previous discussion under B. Background.

2. The Nature of the Beast

Much has been written about the nature of the mental disorder or insanity "defence". It has been characterized as either a defence to the prosecution's case (e.g., it negates *mens rea*), as an excuse, or as an exemption. Even the Justices of the Supreme Court of Canada are not wholly agreed as to its nature, although Canadian courts have stressed that s 16 refers to an inability to *appreciate* the nature and quality of acts. This is in contrast to the *M'Naghten* rule, which refers to an inability to *know* the nature and quality of the act. The ability to appreciate the nature and quality of an act involves more than knowledge or cognition that the act is being committed. It includes the capacity to measure and foresee the consequences of the conduct. In *R v Cooper*, Dickson J. stated:

> The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, the act will result in the death of a human being. [153]

It is important to categorize the "defence" because its nature may affect the type of evidence required, persuasive burdens and appeals. A comprehensive overview of the juristic nature of the "insanity defence" may be found in *Chaulk*. The majority of the Supreme Court held that insanity is only one among several instances of criminal incapacity. Criminal capacity is the ability of a "rational autonomous being [to appreciate] the nature and quality of an act and of knowing right from wrong."[154] With insanity, "the accused is suffering from some disease of the mind or from some delusions which cause him or her to have a frame of reference which is significantly different than that which most people share."[155] Thus, the accused is largely incapable of criminal intent and, therefore, should not be subject to criminal liability in the same

[153] *R v Cooper* [1993] 1 SCR 146, at para 147 (hereinafter *Cooper*).
[154] *Chaulk*, at para 25.
[155] *Chaulk*, at para 25.

manner as sane people. The majority held that the "insanity provisions operate, at the most fundamental level, as an *exemption* from criminal liability which is predicated on an *incapacity for criminal intent*."[156]

There are different ways in which this basic incapacity could manifest itself in the accused. A claim of insanity could incorporate a denial of the *actus reus* or the *mens rea*.[157] For example, the accused could argue that his/her mental condition at the time of the offence affected his/her ability to act consciously.

Conversely, the accused could claim that he/she did not have the required *mens rea*, despite acting voluntarily or consciously. In *Chaulk*, Lamer C.J.C. cites the example of a person who was consciously and voluntarily chopping but thought he was chopping bread, when in reality he was chopping a victim's head.[158]

Another way in which the insanity defence may be raised is as an excuse. For example, the accused may not be denying *actus reus* or *mens rea*, but rather that her/his mental condition rendered her/him incapable of knowing that the act was wrong.

Thus, in the majority's view, criminal insanity can preclude conviction in two ways: (a) by providing a defence to the prosecutor's case, in that it asserts the absence of fault or the absence of a voluntary act, or both; or (b) by admitting the offence but providing an excuse. Sometimes, the accused may be relying on both branches of the "insanity defence" —using it as a defence and as an excuse. All of these are based on an underlying claim that the accused "has no capacity for criminal intent because his mental condition has brought about a skewed frame of reference."[159] The courts have not expanded the defence to apply to those who, because of mental disorder, were unable emotionally to appreciate the effect of their actions on the victim.[160] In *R v Simpson,* Martin J.A. stated that the defence did not apply to an accused:

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[156] *Chaulk,* at para 26.
[157] *Chaulk,* at para 26.
[158] *Chaulk,* at para 26.
[159] *Chaulk,* at 207.
[160] Ken Roach, *Criminal Law* 4th Revised edition (Toronto, Ont: Irwin Law; 2008). See Chapter 7: Mental Disorder and Automatism.

> …who has the necessary understanding of the nature, character and consequences of the act, but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feeling stems from "disease of the mind." Appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people. . . . No doubt the absence of such feelings is a common characteristic of many persons who engage in repeated and serious criminal conduct. [161]

An inability to appreciate that a victim may die can result in a mental disorder defence. An inability to have appropriate emotions about the death of another person, however, does not result in a s 16 defence, even if it is an indication of a mental disorder such as a psychopathic personality.

Three of the dissenting justices in *Chaulk* accepted the concept that the "underlying rationale of our insanity provisions is the broad concept that criminal responsibility should be confined to persons capable of discerning between right and wrong."[162] Incapacity under the insanity defence, however, is not the incapacity of the accused to appreciate the nature and quality of an act; instead, it is the incapacity of the accused to exercise choice. Insanity is not a defence in the true sense of the word but, rather, sanity is a precondition to criminal responsibility and punishment. In other words, the accused must be sane before any consideration of the essential elements of the offence or exculpatory defences become relevant.[163] Thus, in the view of the minority, criminal insanity, not being a defence or an exculpatory claim, lies in some third category of claims that warrant a formal acquittal.

Both the majority and the minority judgments in *Chaulk* appear to agree that criminal insanity is concerned with incapacity. Both also characterize the claim of mental disorder as an exemption. While the majority asserts the exemption acts either as a defence or an excuse, the minority asserts that the exemption lies in a third

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[161] *R v Simpson* [1981] OJ No 23 (hereinafter *Simpson*).
[162] *Chaulk*, at para 220.
[163] *Chaulk* at para 223-232.

category that goes to the fundamental aspect of criminal responsibility and punishment that criminal liability ought only to be imposed on those with the capacity to reason and choose right from wrong and, as such, warrants an acquittal.[164]

The Supreme Court of Canada in *R v Oommen* held that the inquiry into the accused's mental state should focus on the accused's ability to know that a specific act was wrong in the circumstances, rather than whether he or she had the general capacity to know right from wrong.[165] In *Oommen*, the accused had been suffering from a mental disorder for many years, described as a psychosis of a paranoid delusional type and, at the time of the killing of his friend, his paranoia was fixed on a belief that members of a local union were trying to kill him. He became convinced that his friend was one of the conspirators and had been commissioned to kill him. Because of this delusion, Mr. Oommen was persuaded that he must kill the victim to prevent her from killing him.[166]

The Supreme Court of Canada in *Oommen* held that subsection 16(1) of the *Criminal Code* embraces not only the intellectual ability to know right from wrong in an abstract sense, but also the ability to apply that knowledge in a rational way. In such a circumstance, the accused should be exempted from criminal liability where, at the time of the act, a mental disorder made him incapable of rational perception and, as a result, he was incapable of rationally determining the rightness and wrongness of the act.[167] The inability to make a rational choice may result from a variety of mental disorders, including a delusion which causes the accused to perceive an act which is wrong as right or justifiable in the circumstances.

Mr. Paul Bourque, counsel with the Alberta Department of Justice in Edmonton, stated that the test for insanity has always encompassed the capacity to appreciate and to know that an act is wrong, whereas now there is an additional requirement that the individual have the ability to apply their knowledge and appreciation in a rational way at

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[164] For further discussion of the nature of the insanity defence, see: E. Colvin, "Exculpatory Defences in Criminal Law" (1990) 10 Oxford J Legal Stud 381; A. Mewett, "Insanity, Criminal Law and the Charter" (1989) 31 Crim Law Q 241; Ferguson, at 135.
[165] (1994) 91 CCC (3d) 8, at para 21 (hereinafter *Oommen*).
[166] *Oommen,* at paras 3-6.
[167] *Oommen,* at para 30.

the time of the killing.[168]

3. The Proper Time for the Application of the Test

It is important to remember that the correct application of the mental disorder exemption is at the time of the offence and not at the time of trial.[169] Consequently, any evidence raised at the trial should relate to the accused's mental condition at the time of the offence. If there is some doubt about the accused's mental condition at the time of trial, the fitness provisions of the *Criminal Code* apply.[170]

E. Mental Disorder—Specific Tests (s. 16(1))

1. "Mental Disorder"; "Disease of the Mind"

The *Criminal Code* sections read:

> 2 "mental disorder" means a disease of the mind;
>
> 16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(a) Who Determines What is a Disease of the Mind?

The term "disease of the mind" is a legal one and therefore the judge decides what conditions amount to a "disease of the mind". The trier of fact, either a judge or jury, decides whether the particular accused suffers from a "disease of the mind" at the time of the offence.[171] Because of the complexity and variety of psychiatric terms for various mental conditions,[172] judges resist the notion that psychiatric testimony should be the sole determination of what is a "disease of the mind". As Devlin J. stated in the English case of *R v Kemp*:

> [t]here is...no general medical opinion upon what category of

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[168] Christin Schmitz, "SCC clarifies insanity defense" *Lawyer's Weekly* (July 8, 1994) Vol 14 No 10, 3.
[169] *M'Naghten,* at 722. See also: *Criminal Code,* s 16(1).
[170] See Chapter 5.
[171] *R v Rabey* (1977), 40 CRNS 46 (Ont CA); aff'd (1980), 32 NR 451; 54 CCC (2d) 1 at 6-7 (SCC) (hereinafter *Rabey*) at para 8, ref'g *Bratty v AG Northern Ireland*, [1963] AC 386, [1961] 3 AII ER 523 (HL) (hereinafter *Bratty*).
[172] See for example: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 5th ed, Revised (2013) (hereinafter *DSM V*).

> diseases are properly to be called diseases of the mind...Doctors' personal views, of course, are not binding upon me. I have to interpret the rules according to the ordinary rules of interpretation...[173]

Medical opinions, however, are considered by the English court to be of assistance, "inasmuch as they illustrate the nature of the disease and the matters that form the medical point of view have to be considered in determining whether or not it is a disease of the mind."[174]

In *Bratty v AG for Northern Ireland*, Lord Denning agreed that the issue of whether an accused suffers from a disease of the mind should be determined by a judge.[175] In *Rabey*, the Supreme Court of Canada adopted the reasoning of the Ontario Court of Appeal in the same case when it held that disease of the mind is a legal term, which has both medical and legal aspects.[176] The legal, or policy, component outlines the scope of the exemption from criminal responsibility, as well as the public protection created by the control and treatment of people who have serious mental illnesses. The medical element refers to the way in which the condition can be characterized medically. Because this medical component reflects the medical knowledge at the time and medical knowledge evolves over time, the concept of "disease of the mind" is capable of changing as medical knowledge about mental disorders increases. [177] Even though there is the strong medical component to the definition of "disease of the mind" and medical evidence can be considered, it is ultimately the judge who determines what is included within this term and whether there was evidence that the accused suffered from such a disease of the mind at the time of the offence.

Martin J.A., speaking for the Ontario Court of Appeal, stated:

> I take the true principle to be this: <u>It is for the Judge to determine what mental conditions are included within the term "disease of the mind", and whether there is any</u>

[173] [1957] 1 QB 399 at 406 (hereinafter *Kemp*).
[174] *Kemp,* at 406.
[175] *Bratty*.
[176] *Rabey, at paras 8, 45.*
[177] *Rabey* (ONCA), at paras 39-40.

> evidence that the accused suffered from an abnormal mental condition comprehended by that term. The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant to the judicial determination of whether such a condition is capable of constituting a "disease of the mind". The opinions of medical witnesses as to whether an abnormal mental state does or does not constitute a disease of the mind are not, however, determinative, since what is a disease of the mind is a legal question. [178] [Emphasis added]

In *R v Bouchard-Lebrun*, the Supreme Court of Canada affirmed that it is for the trial judge to determine whether a condition constitutes a "disease of the mind," and thus a "mental disorder".[179] Therefore, in a jury trial, if the judge determines that the condition constitutes a "mental disorder", it is up to the jury to consider the facts and decide whether the accused was suffering from a mental disorder when he or she committed the offence.

(b) What is a "Disease of the Mind"?

Determining what constitutes a "disease of the mind" is complicated because there is no generally accepted definition of mental disease in the medical profession, and because the legal definition is not entirely clear. In *R v Oakley*, the Ontario Court of Appeal held that "[a]ny medically recognized mental disorder or mental illness that could render a person incapable of appreciating the nature and quality of his/her act, or of knowing that it is wrong, is comprehended by the term 'disease of the mind', save that transient mental disturbances caused by such external factors as violence or drugs

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[178] *Rabey* (ONCA), at paras 44, 57-58. In *R v Bouchard-Lebrun*, 2011, SCC 58, [2011] 3 SCR 575 *Bouchard-Lebrun*], the Supreme Court confirmed that when determining whether a condition constitutes a disease of the mind, the trial judge is not bound by medical evidence in making their determination. This is because medical experts generally do not take into account the policy component that is part of the mental disorder analysis.

[179] *Bouchard-Lebrun,* at para 61. See also: *R v Stone,* [1999] 2 SCR 290 (hereinafter *Stone*), *R v Cooper* (1978), 40 CCC (2d) 145 (ONCA), reversed on other grounds (1980), 51 CCC (2d) 129, 13 CR (3d) 97 (SCC) (hereinafter *Cooper*), *Simpson* (some holdings in this case are now suspect in light of *Swain*), *R v Parks* (1990), 56 CCC (3d) 449 (Ont CA), aff'd (1992), 140 NR 161 (SCC) (hereinafter *Parks*], *R v Ratti* (1991), 24 CR (4th) 293 (SCC) (hereinafter *Ratti*).

do not fall within the concept."[180]

In *R v Parks*, the Supreme Court held that disease of the mind is a legal concept that is determined by adding both a medical component and a legal, or policy, component.[181] In *R v Stone*, the Supreme Court established that a trial judge should take a holistic approach to determining what constitutes a disease of the mind.[182] The inquiry must include reference to either, or both, the internal cause and continuing danger factors,[183] which are distinct approaches to the legal or policy component.[184] Under the continuing danger approach, any condition that is likely to present a continuing danger to the public is considered a mental disorder.[185] In contrast, the internal cause theory regards conditions that result from the psychological or emotional makeup of the accused, rather than from external factors, as mental disorders.[186]

H. Fingarette is often quoted in judgments and elsewhere for his study of psychiatric literature, which indicates:

> When the problem of defining mental disease is raised explicitly, it is in fact resolved by some personal decision, or at times a hospital decision, and in any of the following different ways: (1) There is no such medical entity as mental disease, or we would do well not to use the phrase. (2) Mental disease is psychosis but not neurosis. (3) Mental disease is any significant and substantial mental disturbance, or is any condition at all that is authoritatively dealt with by the psychiatrist or physician treating mental conditions. (4) Mental disease means substantial social maladaptation, or incompetence, or both as judged by legal criteria. (5) Mental disease is the failure to realize one's nature, capacities or true self. [187]

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[180] *R v Oakley* (1986), 13 OAC 141 at para 25, 24 CCC (3d) 351 (hereinafter *Oakley*).
[181] *Parks*, at para 8.
[182] *Stone*, at para 203.
[183] The internal cause includes an assessment of how a 'normal' person would react or behave in a similar situation. The continuing danger factor requires an assessment of the likelihood of recurrence of violence. See *Stone* and *Parks*.
[184] See *Stone* and *Parks*.
[185] See *Stone* and *Parks*.
[186] See *Stone* and *Parks*.
[187] H. Fingarette, *The Meaning of Criminal Insanity* (Berkeley: University of California Press, 1972) at 26-28, as cited in M. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 128, note 43.

The McRuer Report recommended the phrase "disease of the mind" not be replaced by "mental illness" because of the differing categorizations of mental disease made by the medical community. [188] The Report of the Royal Commission of Capital Punishment, England provided a statement on "mental disease" that is quoted by Canadian judgments. [189] The Royal Commission stated:

> For us, therefore, mental disease is only one part of mental disorders of all kinds, and broadly corresponds to what are often called major diseases of the mind, or psychoses; although it may also arise in cases, such as those of epilepsy and cerebral tumour, which are not ordinarily regarded by doctors as psychotic. Among the psychoses are the conditions known as schizophrenia, manic depressive psychoses, and organic disease of the brain. Other conditions, not included under this term, are the minor forms of mental disorder—the neurotic reactions, such as neurasthenia, anxiety states and hysteria—and the disorders of development of the personality—psychopathic personality. We are aware that this classification will not be unconditionally endorsed by all psychiatrists, and that some would prefer to include under the term 'disease of the mind' even the minor abnormalities we have referred to. We believe, however, that the nature of the distinction we have drawn will be clear to them, and will be acceptable to them as the basis for a discussion of criminal responsibility. [190]

Another often-quoted passage was written by Sir Owen Dixon, formerly the Chief Justice of Australia. He advocated a broad and liberal legal construction of the term "disease of the mind". The renowned jurist stated:

> The reason why it is required that the defect of reason should be 'from disease of the mind', in the classic phrase used by Sir Nicholas Tindal, seems to me no more than to exclude drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man. In the advice delivered by Sir Nicholas Tindal no doubt the words 'disease of the mind' were chosen because it was considered that they had the widest possible meaning. He would hardly have supposed it possible that the

[188] McRuer Report, at 44-5.
[189] See, for example: *Cooper*, at 114.
[190] At 73, cited in *Cooper,* at para 43.

> expression would be treated as containing words of the law to be weighed like diamonds. I have taken it to include, as well as all forms of physical or material change or deterioration, every recognizable disorder or derangement of the understanding whether or not its nature, in our present state of knowledge, is capable of explanation or determination.[191]

Finally, in *Bratty*, Lord Denning acknowledged that "[t]he major mental diseases, which the doctors call psychoses...are clearly diseases of the mind" and "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind".[192]

The Canadian courts have discussed the meaning of "disease of the mind" on many occasions. One area that is often at issue is whether certain personality disorders are "diseases of the mind".[193] In the cases of *Rabey* and *Simpson*, the Ontario Court of Appeal recognized that personality disorders may be capable of constituting "diseases of the mind".[194] In *R v Cooper*, the accused, an out-patient of the Hamilton Psychiatric Hospital, had been charged with the murder of a female in-patient from the same institution.[195] At trial, the defence did not raise the issue of insanity, but argued that the accused did not have the intention to commit murder. The trial judge, however, raised the issue of insanity with the jury. The jury found the accused guilty of non-capital murder. An appeal to the Ontario Court of Appeal was dismissed without reasons.[196]

The medical diagnosis was that Cooper had "personality disorder, mixed type, showing schizoid, anti-social explosive and inadequate features, borderline mental retardation", [197] although the medical testimony at the trial was that he was not suffering from psychosis at the time of the murder. In holding that a personality

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[191] Sir Owen Dixon, "A Legacy of Hadfield, M'Naghten and Maclean" (1957) 31 ALJ 255 at 260, cited in *Cooper,* at para 44.
[192] *Bratty,* at 534, cited in *Cooper,* at para 42.
[193] According to the court in *Kemp*, disease of the mind does not mean 'only a physical defect of the brain'.
[194] *Rabey*; *Simpson*.
[195] *Cooper,* at paras 1-3.
[196] *Cooper,* at paras 8-16.
[197] *Cooper,* at para 71.

disorder can constitute a disease of the mind and in ordering a new trial, Dickson J. (speaking for the majority of the Supreme Court of Canada) stated:

> [I]n a legal sense 'disease of the mind' embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong. [198]

In *R v Rabey*, at trial, the accused was acquitted of the charge of causing bodily harm with the intent to wound when he struck a friend on the head with a rock and choked her.[199] The accused asserted that he was in a dissociative state induced by the psychological blow of finding out that the victim did not share his fond feelings. Dr. Orchard, a psychiatry professor at the University of Toronto, examined Rabey and said that the accused was suffering from a dissociative state that was not a “disease of the mind”. Dr. Orchard categorized three main groups of mental disorders as follows:

> (1) The psychoses which are the major mental illnesses involving a loss of contact with reality.
>
> (2) The neuroses which are the minor mental illnesses which do not involve loss of contact with reality.
>
> (3) The personality or character disorders which are neither psychoses nor neuroses but are a 'maladaptive pattern or lifestyle'. [200]

Martin J.A., speaking for the majority of the Court of Appeal of Ontario, discussed whether a dissociative state could be a “disease of the mind” and stated:

> The term 'disease of the mind' includes not only mental

[198] *Cooper* at para 51.
[199] *Rabey*, at para 1.
[200] *Rabey* (ONCA), at para 32.

> disorders which have an organic or physical cause, for example, arteriosclerosis, but also comprehends purely functional disorders which, so far as is known, have no physical cause.
>
> The mental disorder may be permanent or temporary, curable or incurable (subject to the qualification with respect to transient mental disturbances, produced by an external factor, discussed later) [citations omitted].
>
> A mental disorder may be a 'disease of the mind' whether it is recurring or non-recurring. [201]

In *Rabey*, the accused's dissociative state was held to be caused by his internal emotional or psychological makeup and therefore constituted a "disease of the mind". The Court of Appeal went on to consider the other elements of the defence of mental disorder. In the result, a new trial was ordered. An appeal to the Supreme Court of Canada was dismissed, with the majority adopting the reasoning of the Ontario Court of Appeal.

In *R v Rafuse*, the accused was convicted of second-degree murder.[202] After drinking heavily, the accused went home with a woman he had met in a bar and attempted to have sexual intercourse with her. He testified that when he was not able to have intercourse with the deceased, she began to taunt him and she slapped him. He testified that he did not know what happened afterwards except he remembered standing over the body. The deceased had been repeatedly stabbed.[203] A psychiatrist testified that the accused had episodes during heavy drinking when he passed into a condition of losing contact with his environment. In the psychiatrist's opinion, the accused had an identifiable mental illness, a passive-aggressive personality disorder. This mental illness, coupled with the drinking and the taunting of the victim, resulted in a short circuiting between stimulus and action so that he had no conscious control of behaviour. This event was called an "episodic dyscontrol".[204] In ordering a new trial, the

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[201] *Rabey* (ONCA), at paras 48-50.
[202] (1980), 53 CCC (2d) 161 (BCCA) (hereinafter *Rafuse*).
[203] *Rafuse,* at paras 1-7.
[204] *Rafuse,* at para 8.

British Columbia Court of Appeal held that mental illness in the form of a personality disorder was a disease of the mind.[205]

Generally, self-induced states caused by the consumption of alcohol or drugs are excluded from "diseases of the mind".[206] However, there are some circumstances where mental illness may be associated with or caused by drug consumption. For example, in *R v Hilton*, the accused was convicted of murder by a jury, and there was evidence that the accused was suffering from one or more diseases of the mind, some of which may have been brought about by the consumption of drugs or alcohol.[207] The trial judge instructed the jury if the accused was unable to appreciate the nature and quality of his acts due to a state of mind that was caused by intoxication, the s 16 defence is not available to him.[208] On appeal, the Ontario Supreme Court ordered a new trial. It stated:

> It is clear from the judgment of the House of Lords in *Director of Public Prosecutions v Beard*, [1920] AC 479 that insanity whether produced by drunkenness or otherwise is a defence to a crime charged. In our view the learned trial judge failed to make it clear that, notwithstanding that the disease of the mind of the appellant was the result of the ingestion of drugs or alcohol, he was entitled to be found not guilty on [account] of insanity if he had a disease of the mind within the meaning of s. 16(2) of the *Criminal Code*, whatever the origin or cause of such disease of the mind. [209]

In *R v Malcolm*, the accused was charged with murdering his wife and mother-in-law.[210] He was a chronic alcoholic who had experienced marital troubles resulting in

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[205] *Rafuse,* at para 22.
[206] See *Bouchard-Lebrun* where the court held that voluntary self-intoxication by a person who does not suffer from any mental disorder does not entitle them to rely on a defence of disease of the mind. See also *R v Paul,* (2011) BCCA 46 [*Paul*], where the court noted that once three factors are proved, an accused can no longer rely on the defence of disease of the mind, they are: 1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person. Where these three things are proved, it is not a defense that the accused lacked the general intent or the voluntariness required to commit the offence.
[207] (1977), 34 CCC (2d) 206 at paras 1-2 (ON Sup Ct) (hereinafter *Hilton*).
[208] *Hilton,* at para 3.
[209] *Hilton,* at para 4, per Jessup, JA.
[210] (1989), 50 CCC (3d) 172 (Man CA) (hereinafter *Malcolm*).

several separations. Shortly before the murders, his wife had moved in with her mother. The accused attended a dance with his wife and began consuming alcohol. While his recollections were vague, the accused apparently consumed a great deal of alcohol for a few days afterwards and then went hunting in the bush where he stopped drinking. He suffered from memory blackouts and hallucinations. It was after these events that the accused committed the killings. The medical experts who testified at the trial indicated that the accused was suffering from *delirium tremens* caused by the withdrawal of alcohol after consuming it to excess. When the accused withdrew from alcohol, an excess of adrenalin in the brain tissues caused him to become agitated or excited and to lose touch with reality. The trial judge rejected *delirium tremens* as a disease of the mind because he thought that it fell within the exclusion for self-induced states caused by alcohol or drugs.[211] The accused was convicted of the murders.

In ordering a new trial, the Manitoba Court of Appeal discussed the distinction between the immediate effects of alcoholic excess and those brought about by a supervening disease of the mind caused by alcoholic excess. Twaddle J.A. stated:

> It is clear from Dr. Jacyk's evidence that 'delirium tremens' is the label attached to an abnormal state of mind which may follow the habitually excessive use of alcohol. It is not self-induced in the way of drunkenness: it is the supervening result of abuse over an extended period of time. It is, in my view, a 'disease of the mind' within s. 16 of the Criminal Code. [212]

Thus, the chronic use of alcohol or drugs may lead to a disease of the mind even though the initial difficulty was self-induced.[213]

There are several other disorders and conditions that have been held to be capable of being a disease of the mind. They include: epilepsy,[214] psychoses (or

[211] *Malcolm,* at para 26.
[212] *Malcolm*, at para 34.
[213] See also: *DPP v Beard,* [1920] AC 479 (HL).
[214] *Bratty; R v Gillis* (1973), 13 CCC (2d) 362 (BC Co Ct); *R v O'Brien,* [1966] 3 CCC 288 (NBCA); *R v Johnson* (1975), 28 CCC (2d) 305 (NBCA). But see *R v Wasserman* (1986), 17 WCB 311 (Ont HC) where epilepsy was used as a basis for an automatism defence.

schizophrenia),[215] arteriosclerosis,[216] dissociative state,[217] psychopathic [anti-social] personality disorder,[218] cultural amok syndrome (a psychosis),[219] brain damage resulting in episodic dyscontrol syndrome,[220] delusions,[221] irresistible impulse,[222] and communicated insanity (person in constant attendance of another person of unsound mind later becomes insane himself).[223] However, some recent case law seems to suggest that the courts are not necessarily finding an accused not criminally responsible based on the above mentioned mental illnesses or disorders. For example, in *R v JMW*, the British Columbia Court of Appeal held that although the two accused youths suffered from schizophrenia, they understood society's views as to right and wrong and their delusions did not deprive them of the ability to rationally choose which action to

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[215] *R v Mailloux* (1985), 25 CCC (3d) 171 (Ont CA), aff'd (1988), 45 CCC (3d) 193 (SCC) (hereinafter *Mailloux*); *Bratty; Hilton*; *R v Winko* (March 29, 1984) Vancouver CC831811 (BCCo Ct); *R v Atkinson* (1979), 19 AR 202 (Alta SCTD) (hereinafter *Atkinson*); *R v Lutz* (1991), 103 NSR (2d) 70 (NSSCTD) [*Lutz*]; *R v Oakley* (1986), 24 CCC (3d) 351 (Ont CA) (hereinafter *Oakley*); *R v Oommen* (1993), 21 CR (4th) 117 (Alta CA), leave to appeal to SCC granted (October 14, 1993) 23608 (SCC); *R v Huk* (January 18, 1993) OJ 522 (Quicklaw) (On Prov Ct). See also *R v Yim* (June 15, 1993) NWTJ No 62 (Quicklaw) (NWTSC), where the accused, who had been detained and tortured by the Khmer Rouge as a child in Cambodia, was found not criminally responsible on account of mental disorder because the cruel treatment he had suffered, coupled with the isolation he experienced in Canada, contributed to a major mental illness—paranoid schizophrenia; *R v BEJ* [1998] OJ No 1300 (Ont Gen Div); *R v Bird* [1997] AJ No 591 (Alta Prov Ct); *R v WD,* [2001] SJ No 70 (Prov Ct) where Fetal Alcohol Syndrome (FAS) and Alcohol Related Neurodevelopmental Disorders (ARND) are viewed as medical diagnoses rather than psychiatric disorders. However, as a mental disorder, they may also be viewed as a mental disability for the purposes of section 15 of the *Charte*r. See also *R v Gray*, [2002] BCJ No 428 (Prov Ct), *R v JH*, [2002] BCJ No 313 (Prov Ct), *R v CJC*, [2002] BCJ No 1151 (Prov Ct) and *R v TJ*, [1999] YJ No 57 (Terr Ct) where FAS and ARND are discussed.

[216] *Rabey; Kemp; R v Mackie* (1933), 59 CCC 254 (Man CA).

[217] *Rabey; R v James* (1974), 30 CRNS 65 (Ont HC) (hereinafter *James*); *Parnerkar v R* (1972), 16 CRNS 3347 (Sask CA), aff'd [1974] SCR 449 (hereinafter *Parnerkar*); *R v MacLeod* (1980), 52 CCC (2d) 193 (BCCA) (hereinafter *MacLeod*); *R v Revelle* (1979), 21 CR (3d) 161 (Ont CA), aff'd [1981] 1 SCR 576 (hereinafter *Revelle*).

[218] *R v Craig* (1974), 22 CCC (2d) 212, varied (1976), 28 CCC (2d) 311 (Alta CA) (hereinafter *Craig*); *Simpson; Chartrand v R*, [1977] 1 SCR 314 (Que) (hereinafter *Chartrand*); *Cooper*. But see *R v C (RM)* (1988), 53 Man R (2d) 297 (Man CA) where the court held that megalomania, where the accused thought they had extraordinary powers and were entitled to disregard the laws of the country, did not excuse the accused from first degree murder.

[219] *R v Mailloux* (1985), 25 CCC (3d) 171 (Ont CA), affirmed (1988), 67 C.R, (3d) 75, 45 CCC (3d) 193 (SCC) (hereinafter *Mailloux*); *R v Hem* (1989), 72 CR (3d) 233 (BCCo Ct) (hereinafter *Hem*).

[220] *R v Butler* (1988), 72 Nfld & PEIR 25 (PEITD) (hereinafter *Butler*).

[221] *Oommen*; *Ratti*; *Abbey*; *R v Harrinanan,* [1977] 5 WWR 655 (Alta SC) *Harrinanan*; *R v Budic* (1978), 43 CCC (2d) 419 (Alta. CA) (hereinafter *Budic (No 3)*; *R v Riel* (1885), 2 Man R 321 (NWT), leave to appeal to PC refused 10 App Cas 675 (PC); *Mailloux*; *R v Seyoum* (June 10, 1987) (BCSC).

[222] *R v NG* (2006), 212 CCC (3d) 277 (Alta CA) leave to appeal refused (2007), CCC (3d) vi (SCC) [*R v NG*]; *R v Charest* (1990), 76 CR (3d) 63, 57 CCC (3d) 312 (Que CA).

[223] *R v Windle,* [1952] 2 All ER 1 (CA).

take. Instead, the Court found that the youths believed that societal rules did not or should not apply to them or their ultimate goal justified doing something that was morally and legally wrong.[224] As a result, they were not excused from criminal liability.[225]

There have been cases where certain conditions have been held not to amount to a "disease of the mind". For example, reactive depression—depression caused by a certain turn of events in one's life such as losing a job or a divorce—has been found not to constitute a disease of the mind.[226]

Thus, "disease of the mind" is a very broad category that encompasses many illnesses, disorders or mental conditions, but excludes self-induced states. However, *delirium tremens*, chronic alcoholism and drug psychosis have also been considered diseases of the mind. Conversely, some ordinarily recognized diseases of the mind, such as schizophrenia, have not led to an exemption for criminal liability when the accused was aware of the nature and consequence of the act. Finally, the mental disorder or illness that causes a disease of the mind may be permanent or temporary, curable or incurable.[227]

(c) Mentally Handicapped—"Disease of the Mind" or "Natural Imbecility"?

Formerly, the insanity defence applied to people who met the *Criminal Code*'s subsection 16(2) requirement of "natural imbecility" [an archaic term]. However, the 1991 amendments are not clear regarding whether a mentally handicapped person who is not dually diagnosed (e.g., a person who suffers from both a mental handicap and a mental illness) would be able to rely on the s 16(1) exemption.

In Canada, very few cases provide explicit guidance on whether "disease of the mind" includes mental handicaps and developmental disorders. There are, however, cases that indicate that developmental disorders may constitute diseases of the mind. There are cases that indicate that Fetal Alcohol Spectrum Disorder (also referred to as

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[224] [1998] BCJ No 457 (QL) at paras 35-36. See also: *R v Normore* [2002] NJ No 330.

[225] See also *R v Molodowic* [1998] MJ No 247 (Man CA) (QL) where despite the accused's obvious paranoid schizophrenia, the jury held him to be criminally responsible for the killing of his grandfather; *R v Olah* 33 OR (3d) 385 (Ont CA); *R v DB* [1997] BCJ No 1291 (BCCA) (QL).

[226] *R v Jacobson* (1985), 61 AR 254 (Prov Ct) (hereinafter *Jacobson*); *R v Hachey* (1985), 66 NBR (2d) 146 (CA); See also, *R v Samra* [1998] OJ No 3755 (Ont CA).

[227] *Rabey; Oakley.*

Fetal Alcohol Syndrome) and Alcohol Related Neurodevelopment disorder may be considered a mental disorder under section 16. The Newfoundland Court of Appeal in *R v CPF*[228] and the Saskatchewan Provincial Court in *R v RF*[229] both found that these alcohol-related developmental disorders were diseases of the mind. These courts, however, determined that the section 16 not criminally responsible provision did not apply, as the defendants failed to establish that they did not appreciate the nature or quality of their acts due to their mental disorder.

The remaining ambiguity around whether all types of mental handicaps can be considered mental disorders may stem from the separate exemption for person in a state of "natural imbecility", which existed prior to the 1991 amendments. Unfortunately, there is very little case law that discusses that exemption.

While modern medical theories do not include mental handicaps under "disease of the mind", in Canada there was little judicial consideration of the former "natural imbecility" provision. Perhaps the only available judicial consideration of this branch of the exemption may be found in *Cooper*. Cooper, who had had psychiatric difficulties since the age of seven, was charged with the strangulation of a psychiatric patient. At trial, he did not raise the defence of insanity. Instead, psychiatric evidence was used to deny proof of *mens rea*. On various intelligence quotient tests, Cooper had scored between 69 and 79 (the normal range being 90 to 110). The psychiatrist agreed that in addition to his serious psychiatric problems, the accused had "borderline mental retardation."[230] With respect to the exemption for "natural imbecility", the trial judge instructed the jury that the evidence did not establish natural imbecility.[231] The accused was found guilty of non-capital murder and appealed.

The majority of the Ontario Court of Appeal dismissed the appeal without reasons. Dubin J.A., in dissent, held that a new trial should be ordered on the basis of the trial judge's failure to relate the medical testimony to the defence of insanity. He

[228] See, for example: *R v CPF*, 2006 NLCA 70, 72 WCB (2d) 129; *R v RF*, 228 Sask R 111, 56 WCB (2d) 170 (SK Prov Ct).
[229] *R v RF*, 228 Sask R 111, 56 WCB (2d) 170 (SK Prov Ct).
[230] *Cooper* (ONCA), at 151.
[231] *Cooper* (CA), at 152-53.

held that there was evidence that the accused was either suffering from a "disease of the mind" or from "natural imbecility". In the dissenting reasons, Dubin J.A. analyzed the meaning of natural imbecility. He stated:

> Since the term 'a statement of natural imbecility' is included in s. 16 of the Code, it must be given, in my opinion, an independent meaning from the term a 'disease of the mind'. I would have thought that the term 'a state of natural imbecility' has reference to the imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased.

Dubin J.A. then considered dictionary definitions for imbecility and related terms in the *Criminal Code* in an attempt to formulate a concrete definition of natural imbecility. He did not seem to be able to draft such a definition, but commented that "…the determination of whether a person is in a state of natural imbecility is not resolved solely by consideration of intelligence quotients. It should be based on the evidence relevant to the patient's psychiatric history, his ability to function, his academic and vocational achievements, his skills, and emotional and social maturity." Dubin J.A. ultimately reached the conclusion that there was enough evidence on which the jury could have been instructed to consider natural imbecility. A further appeal to the Supreme Court of Canada resulted in a new trial being ordered for Cooper. The Supreme Court did not deal with the question of "natural imbecility".

The Supreme Court did, however, provide a definition of "disease of the mind". The court stated that the term "'disease of the mind' embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion."[232] Arguably, this definition is broad enough to include persons who have mental disabilities such as mental handicap, brain injuries or learning disabilities.

In *R v Whitehead,* the Ontario Provincial Court relied on the definition of "mental

[232] *Cooper,* at para 51. See also *Paul,* at 62.

disorder" articulated in *Cooper* to conclude that it included mental handicap.[233] The accused, who was mentally handicapped, was facing charges of assault and assault with a weapon. His fitness to stand trial was at issue. The court concluded that "mental disorder" included mental handicap, and found the accused unfit to stand trial. However, the court expressed concern that the accused could remain in a mental institution for the rest of his life because his condition is not reversible.[234] Indeed, the court invited counsel to appeal the decision.

The previous lack of Canadian case law in this area may be a consequence of the practical decisions reached by lawyers who were defending persons with mental handicaps. First, it is often the case that clients are able to successfully hide the fact that they have mental handicaps, so the issue never arises at trial.[235] Second, under some circumstances, for minor offences, the police may decide not to charge the accused, or the Crown may exercise its discretion and stay the charges against him or her. Third, even where the lawyer identifies that the person has a disability and the Crown proceeds with the charges, the lawyer may decide that the result of a finding of not guilty on account of mental disorder would not be in the best interest of the client. Under the former regime, a person found not guilty by reason of insanity could be held indefinitely—presumably until the Lieutenant Governor or her agent found that the accused was "cured". This was also the case where the client was found unfit to stand trial. A person with a mental handicap cannot be "cured". Therefore, many lawyers likely decided that it would be the best option for the accused to plead guilty and serve a definite sentence in prison rather than to plead not guilty by reason of insanity and

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[233] (August 24, 1993) OJ 2348 (Quicklaw) (Ont Prov Ct). See also: *R v SD*, [1998] NSJ No 325 (NSYC), where the court held that although the accused was functioning at a borderline intellectual level he had the ability to understand the charges against him, to converse with counsel, and to participate with understanding in the process. The court noted that with "sensitivity, thoughtful interpretation and patience ..." the accused would be able to fully participate with understanding in the process.

[234] The 2005 amendments to the mental disorder provisions under Bill C-10: An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to Other Act repealed the capping provisions, but expressed modern thinking that the procedures for sentencing and detaining those who are found not criminally responsible should ensure that only those persons who continue to pose a threat to the public should be in a detention centre. For more on those procedures, see Chapter 12, Sentencing.

[235] S. Manna, "Crimes of Innocence" (1980) 9(2) Student Lawyer 24 at 24-5 (hereinafter Manna).

risk facing indefinite confinement in an institution.

Due to the 2005 amendments to the *Criminal Code* under Bill C-10, which repealed the capping provisions, the Crown may be less likely to divert the accused away from the criminal justice system in favour of finding a more appropriate disposition. Second, lawyers may be more comfortable subjecting their clients to a possible finding of not criminally responsible on account of mental disorder or unfit to stand trial.

Thus, it is likely that more cases will arise where counsel argues that mental handicap is included in the new *Criminal Code* exemption for mental disorder. Arguably, it would have been preferable if "mental handicap" was specifically included in section 16. The amended section 16 deletes any reference to "natural imbecility" and simply exempts persons who are suffering from a "mental disorder" under certain conditions. In section 2, "mental disorder" is defined as "a disease of the mind". Does "disease of the mind" include mental handicap? In Driedger's *The Construction of Statutes*, the modern principle of statutory interpretation is stated as, "the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[236] The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament, the object of the Act and the scheme of the Act.[237] The overall intention of Parliament in enacting the *Criminal Code* is difficult to ascertain, but it would be fair to state that in enacting the amendments, Parliament was trying to strike a balance between the rights of the accused not to be deprived of his liberty indefinitely and to be treated humanely with the object of protecting society from dangerous individuals.[238] Further, section 16 reflects the thinking that a person should not be held criminally responsible for an offence if, because of a mental disorder, he did not appreciate what he was doing at the time he committed the act.

In the second step in statutory interpretation, the words of the individual

[236] (Toronto: Butterworths, 1974) 67; (hereinafter Driedger).
[237] Driedger, at 81.
[238] Canada, House of Commons, *Commons Debates* (October 4, 1991) at 3295 - 99.

provisions are to be read in the grammatical and ordinary sense in the light of the intention, object and scheme of Parliament. If they are clear and unambiguous and in harmony with that intention, object and scheme and if they coincide with the general body of law, that is the end of the matter.[239] The phrase "disease of the mind" is fairly clear in its meaning. The *Oxford English Dictionary* defines "disease" as "a disorder of structure or function in an animal or plant of such a degree as to produce or threaten to produce detectable illness or disorder".[240] The *Dictionary of Canadian Law* defines "disease" as "any condition that adversely affects the heath of an animal"[241] and "disease of the mind" as "any malfunctioning of the mind or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not) may be a 'disease of the mind' if it prevents the accused from knowing what he is doing, but transient disturbances of the consciousness due to certain specific external factors do not fall within the concept of disease of the mind."[242] On the basis of an ordinary reading of the words in light of the intention, a disease of the mind would appear to be related to a malfunction in one's mental health. Mental handicap is not considered an illness by most professionals.[243] Mentally ill people have disturbances in their thought processes and emotions; mentally handicapped people have limited ability to learn.[244] Indeed, most lay people would probably not consider a permanent mental disability to be a disease of the mind. However, there may be room to argue that the term is ambiguous enough to encompass those with mental handicaps.

The history of Bill C-30 may indicate that Parliament did not intend that people with mental handicaps should be exempted by s 16. In an earlier draft of the Bill, the definition of "disease of the mind" included "mental disability".[245] This was later

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[239] Driedger, at 81.
[240] *Shorter Oxford English Dictionary* (London: Oxford University Press, 2007) at 702.
[241] *The Dictionary of Canadian Law* (Toronto: Carswell, 2011) at 374(hereinafter Dictionary of Canadian Law).
[242] Dictionary of Canadian Law at 374.
[243] J. Ellis and R. Luckasson, "Mentally Retarded Criminal Defendants" (1985) 53(3-4) George Washington Law Rev. 414 at 423 (hereinafter Ellis & Luckasson).
[244] Ellis & Luckasson, at 424.
[245] See Bill C-228*, An Act to Amend the Criminal Code (mental disorder)*, 3rd Sess, 34th Parl, 1991.

removed, however. There is no mention in the *House of Commons Debates* as to why this decision was made. However, at several opportunities in the debates, it was mentioned that there was no intention to change the defence except to modernize the language in s 16.[246] Further, the Justice Department stated that "the amendments do not attempt to alter the judicial interpretation of the insanity test itself."[247]

In a letter from the Department of Justice, Bernard Starkman (then Senior Counsel, Family and Youth Law Policy Section) indicated that "disability of the mind" was removed from the final draft of the mental disorder amendments of the *Criminal Code* at the request of the provinces. The provinces were concerned that "disability of the mind" might be interpreted as including disabilities caused by intoxication and non-insane automatism. In an effort to reduce points of disagreement, the federal government deleted the reference to "disability of the mind". Further, it was Mr. Starkman's position that "disease of the mind" may well include "disability of the mind" based on the broad definition of "disease of the mind" provided in *Cooper* (discussed above). As well, in the case of *R* v *Gray,* the British Columbia Supreme Court held that developmental disorders such as Fetal Alcohol Syndrome (FAS) and alcohol related neurodevelopmental disorders (ARND) were disorders that warranted psychiatric assessments.[248] Subsequently, *R v CPF* and *R v RF* found that FAS and FASD were mental disorders but, as previously discussed, the accused persons in those cases were unable to provide that they did not the nature and quality of the act. These cases indicate that the courts may be willing to recognize that developmental disorders can be considered diseases of the mind and apply section 16 if an accused could provide evidence that he was unable to appreciate the nature and quality of the act due to a developmental disorder.

Finally, the fact that the medical profession separates mental illness from mental handicaps is not determinative of a legal question.[249]

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[246] For example, Canada, House of Commons, *Commons Debates* (October 4, 1991) at 3296.
[247] Canada, Minister of Justice and Attorney General, *Information Paper: Mental Disorder Amendments to the Criminal Code*, September, 1991 at 3 (hereinafter Minister of Justice *Information Paper*).
[248] [2002] BCJ No 1989 (discussed in Chapter 5).
[249] Letter from Bernard Starkman to Alberta Civil Liberties Research Centre (June 4, 1993) Ottawa.

The situation in the United States is somewhat enlightening. In 1843, the *M'Naghten* formula included "defect of reason" when it referred to "insanity". The psychiatric community at the time regarded "imbecility" as a form of insanity.[250] The *M'Naghten* test as developed in England was applied in the United States. For many years, some form of the two-prong *M'Naghten* test appeared in the laws of all but two of the states that recognized a defense of non-responsibility due to mental disability.[251] Where mental handicap is accepted as a mental defect for the purposes of the insanity defence, this is a precondition to finding the person not guilty by reason of insanity. The trier of fact must also consider whether the mental condition was such that the person was not able to know the nature and quality of the act or to know that it was wrong. As a result, courts in the United States have held that evidence of mental handicap is insufficient to justify an acquittal or even, in some cases, to warrant a jury instruction on insanity.[252]

In 1954, the *Durham* test was formulated in response to the perceived harshness of the *M'Naghten* test. A defence was created for acts that were the "product of mental disease or defect". "Defect" signified a "permanent condition, either congenital or the result of an injury, or the residual effect of mental or physical disease."[253] Consequently, mental handicaps would be considered in applying the insanity test. Several years later, the same court cautioned that the passage in *Durham* was intended to differentiate between the two kinds of disabilities (mental disease and mental defect) and not as definitions of the terms. The court ruled that the judges were to decide what constituted a disease or defect and were not to be bound by *ad hoc* definitions formulated by experts.[254]

The *Durham* rule was abandoned in 1972 in favour of the American Law Institute (ALI) Test. Currently, in the United States, the ALI test is used in almost half of the

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[250] Williams, *Criminal Law (The General Part),* 2nd ed. (1961) as cited in Stuart, at 330.
[251] Fitch, W.L., "Mental Retardation and Criminal Responsibility" (Chapter 6) in Conley, R., Luckasson, R., and Bouthilet, G., eds. *The Criminal Justice System and Mental Retardation,* Toronto: Paul Brookes Publishing Co., 199 at 122 (hereinafter Fitch).
[252] Ellis and Luckasson, at 434.
[253] *Durham*, at 875.
[254] *McDonald v United States*, 312 F.2d 847 (DC Cir 1962).

states.[255] It continues to incorporate the inability to distinguish right from wrong, but is not as broad as the *Durham* test. The ALI test states that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law". [256]

Courts employing the ALI test have held that the term "mental defect" includes mental handicap.[257] In addition, both the American Bar Association and the American Psychiatric Association have proposed modifications to the insanity defence that would expressly include mental handicap as an applicable threshold condition.[258] Further, more than 20 states have developed a separate verdict of guilty but mentally ill.[259] In Georgia, a person who is mentally handicapped may be found guilty but mentally ill or guilty but mentally handicapped.[260] Persons who are found guilty but mentally ill are generally imprisoned but their sentence will most likely include treatment and rehabilitation.[261]

The amendments to the Canadian legislation have excluded any explicit reference to "disability of the mind". Consequently, it is not clear whether the s. 2 definition of mental disorder as a "disease of the mind" includes mental handicaps, brain injuries and the like. Although the position of the Government seems to be that it is up to the courts to decide what constitutes a "disease of the mind", mental handicap has seldom been considered by the judiciary. This is likely because the issue was not raised by lawyers. Since the most compelling reason for not raising the argument that a client is not criminally responsible on account of mental disorder no longer exists (liability to an indeterminate sentence ending only when the person is "cured"), many lawyers may wish to pursue this plea. Although the case law in this area is almost

[255] Worrall 199.
[256] *Proposed Official Draft* (May 4, 1962), s 4.01.
[257] e.g., *In re Ramon M*, 584 P. 2d 524 (Cal. 1978); *United States v Shorter*, 343 A 2d 569 (DC 1975) as cited in Ellis and Luckasson, at 437.
[258] Fitch, at 124.
[259] Worrall, at 216.
[260] 2010 Georgia code, Title 17, Chapter 7, Article 6, Part 2, s 17-7-131 http://law.justia.com/codes/georgia/2010/title-17/chapter-7/article-6/part-2/17-7-131
[261] Worrall, at 216.

exclusively centred on persons with mental illness, there is a possibility that courts will extend this area of law to individuals with mental handicaps.

Lawyers with clients who have mental handicaps may be interested in the discussion in Chapter Seven, Lack of Intent Due to Mental Disability.

(d) Automatism

(i) Developments in the Common Law

Automatism is a very complex state. The defence of automatism must be distinguished from the medical state of automatism, called dissociation. At law, automatism is an unconscious, involuntary act, where the mind does not follow the act that is being committed. The person is not conscious of what he or she is doing.[262] Although automatism may invalidate the argument that the accused had the required mental element for a crime, it is said to deny the accused's *actus reus*. That is, the accused argues that he or she was not able to exercise his will to perform an act.[263] All acts involve an operation of the will, which, in turn, involves conscious choice. Depending on its cause, automatism may result in an absolute defence to a criminal charge (non-insane automatism). If automatism is the result of a “disease of the mind” (insane automatism) or it is caused by the involuntary consumption of alcohol, it will not, in itself, result in an acquittal.[264]

There is some disagreement as to whether the person must be unconscious at the time of the offence in order to utilize the automatism defence. One can foresee circumstances where a person was conscious, but her/his actions were involuntary (e.g., person A forced person B to hit person C by pushing her/his arm). However, the weight of authority seems to suggest that unconsciousness is the essence of the automatism defence.[265]

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[262] *Rabey.*
[263] M. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 83-84 (hereinafter Schiffer).
[264] *Stone*
[265] *Bratty.* See also: *R v Bergamin* [1996] AJ Np 965 (CA), (QL), where the accused argued that the defense of non-insane automatism should include involuntary actions by a conscious person. The court held that although there was evidence to raise a reasonable doubt as to the voluntariness of the accused’s actions it was not prepared to overturn the trial judge’s finding that there was not sufficient evidence to raise a

Automatism is said to fall somewhere between criminal responsibility and legal insanity.[266] In *R v Stone*, the Supreme Court of Canada discusses the two forms of automatism that are recognized at law: non-mental disorder automatism and mental disorder automatism.[267] Non-mental disorder automatism occurs when the involuntary action does not result from a disease of the mind.[268] In this type of case, the accused will be entitled to an acquittal. Under mental disorder automatism, the involuntary action results from a disease of the mind. Mental disorder automatism generally becomes subsumed by the s 16 defence of mental disorder.[269]

If the behaviour of the accused at the time of the offence indicates automatism, the defence counsel will usually try to argue first that the accused suffered from non-insane automatism, entitling him to be acquitted from the charges.[270] Failing this argument, counsel will likely raise the alternative argument that the accused suffered from automatism caused by a "disease of the mind". Evidence of automatistic behaviour may afford the accused the mental disorder exemption and result in the special verdict of not criminally responsible on account of mental disorder. The difference between the two is important because if an accused is able to successfully argue a non-insane automatism defence, he/she is neither subject to the special verdict nor the detention

reasonable doubt.

[266] *Rabey*.

[267] *Stone*. Note that in *R v Tom* [1998], 112 BCAC 155, 129 CCC (3d) 540, the British Columbia Court of Appeal discussed a case where the accused's level of intoxication was so extreme that it closely resembled automatism. However, intoxication itself is not a form of automatism. See also: R v T (B.J.), 2000 SKQB 572, [2001] 4 WWR 741.

[268] *Stone.* For cases which discuss non-insane automatism, see: *R v Haslam* (1990), 56 CCC (3d) 491 (BCCA); *R v Berger* (1975), 27 CCC (2d) 357 (BCCA), leave to appeal to SCC dismissed 27 CCC (2d) 357; *R v Meyers* (1979), 31 NSR (2d) 444 (CA); *R v King* (1982), 67 CCC (2d) 549 (ONCA); *R v Minor* (1955), 21 CR 377 (SKCA); *Bleta v The Queen,* [1964] SCR 561, reversing [1964] 1 OR 485 (CA) [*Bleta*]; *Armstrong v Clarke,* [1957] 2 QB 391; *James; R v K,* [1971] 2 OR 401 (Ont HC); *Parnerkar; R v Cullum* (1973), 14 CCC (2d) 294 (Ont Co Ct); *R v Mulligan* (1974), 26 CRNS 179 (ONCA), aff'd (1976), 66 DLR (3d) 627 (SCC); *R v Wasserman* (1986), 17 WCB 311 (Ont HC); *R v Adkins* (1987), 21 BCLR (2d) 219 (CA); *R v Wild* (1993), 24 BCAC 241 (CA); *R v Grant* (1993), 22 C.R. (4th) 61 (BCCA); *R v Hawrelak*, [1998] AJ No 568, (Prov Ct); *R v Poslowsky*, [1997] BCJ No 2585 (BCSC). See also *R v McQuarrie*, [1998] AJ No 803 (CA), in which the Alberta Court of Appeal held that the assertion of a lack of memory of relevant event is by itself insufficient to find a defence of non-insane automatism. The evidential burden rests on the accused to show the existence of some evidence of a condition or physical state that is capable of causing involuntary, automatic behaviour.

[269] In *R v Fontaine*, [2004] 1 SCR 702, 183 CCC (3d) 1, the Supreme Court held that the accused bears both an evidential and persuasive burden when proving the defence of mental disorder automatism.

[270] *Bratty; Parks.*

that may be the result of a successful section 16 argument.

The relationship between non-insane automatism and automatism for the purposes of the mental disorder exemption is unclear. The courts discern whether the accused can rely on mental disorder automatism or non-mental disorder automatism by determining the cause of the automatistic state. If the cause is internal, the accused may rely upon the mental disorder exemption. External causes permit a defence of non-insane automatism.[271] Some examples of internal causes include epilepsy, arteriosclerosis, and brain tumour.[272] External causes include such events as a blow to the head, hypoglycemia, a psychological blow[273] (although this has also been considered an internal cause), involuntary intoxication, consumption of drugs[274] delirium, somnambulism (sleep walking), stroke, and perhaps hypnosis.[275]

In *Revelle,* the accused was charged with attempted robbery, using a firearm and pointing a firearm.[276] At the time of the offence the accused was suffering from several conditions. He was suffering a grief reaction from the death of his wife and had consumed a considerable amount of alcohol. He was also in poor health and had brain damage that caused memory lapses from a fractured skull he had incurred as a child. The combination of these and other factors resulted in a dissociative state. At trial, the judge permitted the jury to consider the defence of non-insane automatism in addition to insanity and drunkenness and the accused was acquitted.

The Ontario Court of Appeal ordered a new trial. The court held that in this case "the dissociative state would not have occurred but for the brain damage."[277] In this case, the dissociative state, if it existed, was caused by a disease of the mind and the defence of non-insane automatism was not open to the accused. The Supreme Court of

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[271] *Rabey.*
[272] See previous discussion of "disease of the mind".
[273] See *R v Favretto*, [1997] OJ No 5128 (Gen Div), (QL).
[274] See *R v Vickberg*, [1998] BCJ No 1034 (SC), (QL) where the court held that the accused's consumption of drugs raised a reasonable doubt as to whether or not he ingested them voluntarily. The court concluded the accused was in a state of involuntary induced impairment when he attacked the victim and, therefore, the defense of automatism is available.
[275] See: Schiffer, at 99 - 112, and P. Knoll, *Criminal Law Defences* (Toronto: Carswell, 1987) at 106 (hereinafter Knoll).
[276] *Revelle*.
[277] *Revelle,* at para 16.

Canada endorsed this view.

In *Rabey,* the Ontario Court of Appeal stated that it was necessary to define "disease of the mind" in order to differentiate between insane and non-insane automatism. Automatism caused by a disease of the mind is part of the defence of mental disorder.[278] Martin J.A. discussed the difference between unconscious behaviour arising from a "disease of the mind" as opposed to that arising from an external source:

> Any malfunctioning of the mind or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not) may be a 'disease of the mind' if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind....Particular transient mental disturbances may not, however, be capable of being properly categorized in relation to whether they constitute 'disease of the mind' on the basis of a generalized statement and must be decided on a case-by-case basis. [279]

The accused's dissociative state was held to be caused by his internal emotional or psychological makeup and therefore constituted a disease of the mind rather than non-insane automatism. In the result, a new trial was ordered. An appeal to the Supreme Court of Canada was dismissed, with the majority adopting the reasoning of the Ontario Court of Appeal.

In *MacLeod*, the Crown appealed the accused's acquittal on the basis that the trial judge erred by leaving the defence of non-insane automatism to the jury. In ordering a new trial based upon this error, the British Columbia Court of Appeal summarized the principles provided in *Rabey* as follows:

> (1) 'Disease of the mind' is a legal term not a medical term although medical testimony regarding '... the abnormal mental condition from which the accused is alleged to have suffered...is highly relevant to the judicial determination of whether such a condition is capable of constituting a 'disease of the mind'.

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[278] See also: *R v Luedecke* [2005], OJ No 5088.

[279] *Rabey,* at para 61; see also *Oakley.*

> (2) What mental states or conditions constitute 'a disease of the mind' is a question of law for the Judge.
>
> (3) The term 'disease of the mind' includes not only mental disorders which have organic or physical causes but also includes purely functional disorders which have no physical cause.
>
> (4) The mental disorder may be permanent or temporary.
>
> (5) A mental disorder may be a 'disease of the mind' whether it is recurring or non-recurring.
>
> (6) 'Dissociative state' may result from a disease of the mind or it may not.
>
> (7) The state of automatism which arises from the psychological or emotional make-up of the accused (that is, internal factors) is a disease of the mind whereas automatism which is brought about by an external factor such as drugs or a blow to the head causing concussion is not a disease of the mind.
>
> (8) If the 'dissociative state' is due to an internal factor the defence of insane automatism is available, but the defence of non-insane automatism is not. On the other hand, if the 'dissociative state' is due to an external factor, e.g. a blow to the head, the defence of non-insane automatism is available.[280]

Since *Rabey,* a number of accused men acting in a jealous rage against their female companions have unsuccessfully tried to use automatism arguments.[281]

In *Oakley*, the accused committed a number of criminal offences after he had developed hallucinations and suffered from an acute paranoid episode during which he believed he would be attacked by the devil. At trial, the accused was acquitted of on the basis of non-insane automatism. In ordering a new trial for some of the offences, the

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[280] *MacLeod,* at para 21.

[281] *R v Campbell* [1987], OJ No 1584 (Ont Dist Ct); *R v Dukeshire,* [1985] BCD Crim Conv 5270-01 (BC Co Ct) as cited in R. Rogers and C. Mitchell, *Mental Health Experts and the Criminal Courts,* (Toronto: Thomson Professional Pub, 1991) at 137-8 (hereinafter Rogers & Mitchell).

Ontario Court of Appeal provided:

> In the present case, there was no evidence that the respondent's acts were unconscious and involuntary. They were the product of his delusions, but they were not involuntary within the definition of automatism. The fact that the respondent, as the result of his delusions, did not have the capacity to form a rational judgment, or that under the dominance of his delusions, which distorted his perceptions of reality, he considered that he had no choice other than to do what he did, does not constitute involuntary behaviour.[282]

Thus, the defence of non-insane automatism should not have been available to this accused at trial.

The Supreme Court of Canada also dealt with the issue of automatism in a "sleep walking" case. In *Parks*, the accused stabbed and beat his mother and father-in-law while in a somnambulistic state (sleep-walking). He was charged with the murder of his mother-in-law and with the attempted murder of his father-in-law.[283] The accused relied on the defence of non-insane automatism. Medical experts were called by the defence and testified that sleep-walking is not regarded as a disease of the mind, but rather a sleep disorder. The trial judge decided to instruct the jury as to non-insane automatism, which would entitle him to an outright acquittal, rather than instructing the jury as to insanity under section 16, which would have led to the special verdict of not guilty by reason of insanity. The accused was acquitted of murder and attempted murder on the basis of non-insane automatism.

On appeal, the Crown argued that the jury should have been instructed as to the defence of insanity rather than non-insane automatism. After citing the definition of "disease of the mind" provided by the Supreme Court of Canada in *Cooper*, the Ontario Court of Appeal (per Galligan J.A.) stated:

> The conclusion that should be drawn from the uncontradicted evidence of the medical witnesses is that at the relevant time the respondent's faculties of reason, memory and

[282] *Oakley,* at para 22.
[283] *Parks*.

> understanding were in fact impaired. In order for that impairment to amount to a 'disease of the mind', it must, in my view, have been caused by an illness, disorder or abnormal condition. I emphasize that the cause of the impairment of the mind must have been an illness, disorder or abnormal condition. There is no evidence that the respondent was suffering from any illness at the relevant time. [284]

The Crown's appeal from the acquittals was dismissed. The accused was entitled to rely upon the defence of non-insane automatism.

The Supreme Court of Canada upheld the accused's acquittal. The Supreme Court of Canada considered other decisions that had found that sleepwalking was a disease of the mind.[285] Because there was no evidence that the accused's sleepwalking caused his state of mind, the Supreme Court held that the trial judge was correct in instructing the jury about the defence of automatism rather than insanity. Three points considered important by Lamer C.J. were: Parks was sleepwalking at the time of the incident; sleepwalking is not a neurological, psychiatric or other illness and there is no medical treatment for sleepwalking apart from good health practices.[286] The Supreme Court stated that there may be other cases in which sleepwalking is considered a disease of the mind, but in this case, it was not.[287]

Some authors opine that there are difficulties with using the distinction between an external and internal cause of automatism in order to determine the defence available to the accused. First, it is often difficult to distinguish between an external and an internal cause.[288] Second, in some cases, the internal cause theory leads to absurd results.[289] For example, if a diabetic goes into a state of automatism as a result of not taking his insulin, the court will classify this as insane automatism because it results

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[284] *Parks* at para 51.
[285] See: *R v Burgess,* [1991] 2 All ER 769 (CA).
[286] E. Kenny, "Sleepwalking Defence in Murder Case Upheld" *[Toronto] Globe and Mail* (August 28, 1992).
[287] *Parks*, at 205. See also P. Ridgway, "Sleepwalking-Insanity or Automatism" (1996) E-Law, Murdoch University Electronic Journal of Law 3:1.
[288] Tollefson & Starkman, at 54.
[289] Tollefson & Starkman, at 54.

from diabetes, an internal cause.[290] On the other hand, if he goes into a state of automatism as a result of taking too much insulin, the courts will classify this as non-insane automatism because it is the result of an external cause (the insulin).[291] Alternatively, if he fails to take enough sugar after taking insulin and then becomes automatistic, this could be classified as an internal cause, resulting in insane automatism.[292] Third, the internal cause theory leads to labelling as insane automatism a number of medical conditions that most people would not consider a mental disorder (e.g., epilepsy and convulsions).[293] Finally, in some cases, the courts have classified what appear to be external causes (e.g., a psychological blow caused by reading a letter) as being of internal cause if an ordinary person would not have responded in the way that the accused did.[294] This is contrary to the legal principle that in looking at a person's state of mind, the court looks at what it was, rather than how it should have been if he had been a reasonable person.[295]

In a subsequent case, *R v Stone*, the Supreme Court of Canada restated the substantive law of automatism and some of its evidentiary aspects.[296] The Court was split 5-4. The conclusions of Bastarache J, who gave reasons for the majority, can be stated in the following propositions:

> 1. Where the evidence points to involuntariness, the judge must determine, as a first question of law, whether a jury could find on a balance of probabilities that such involuntariness was caused by automatism.
>
> 2. If yes, the judge must then decide a second question of law regarding whether such probable automatism was caused by mental disorder. The trial judge should presume that the accused suffered from a disease of the mind and then decide whether the evidence distinguishes the instant case from mental disorder. The judge should consider two points in this regard. “Under the internal cause theory, the

[290] Tollefson & Starkman, at 54.
[291] Tollefson & Starkman, at 54.
[292] Tollefson & Starkman, at 54.
[293] Tollefson & Starkman, at 54.
[294] Tollefson & Starkman, at 54.
[295] Tollefson & Starkman, at 54. See *Favretto* where the issue was whether the accused’s response to the actions of another could reasonably be said to have occurred without reference to some internal weakness.
[296] *Stone*.

trial judge must compare the accused's automatistic reaction to the way one would expect a normal person to react in order to determine whether the condition the accused claims to have suffered from is a disease of the mind" (an objective test).[297] Second, *any* claim of automatism must be considered mental disorder if the underlying condition presents continuing danger.

3. The judge may then leave a determination of sane *or* insane automatism to the jury, *but not both*. In either case, the judge must instruct the jury that a verdict of not guilty cannot be returned on the basis of automatism unless it is proved on a balance of probabilities.

However, Patrick Healy has raised concerns regarding the judgment in *Stone*, stating that

> [a] claim of automatistic involuntariness must be considered a claim of mental disorder in every case *except* one in which evidence of an extremely shocking nature would establish that a normal person would have reacted to it by entering into an automatic state.[298] [Therefore] the viability of non-insane automatism will be nil unless the judge decides, as a matter of law, that the average sane person would react to the events in issue by a dissociation of mind and body as expressed in involuntary physical behaviour. The effect of this will be to eliminate the defence of non-insane automatism because it is a standard that cannot be met. Defences of mental disorder or automatism are, by definition, highly specific to the mental make-up of individual persons. To demand that the average sane person would react to the events in issue in a specified way is to preclude, by law, the possibility that this accused person actually *did* react to shocking events by a dissociation of mind and body, *even if* the average sane person might not have done so.[299]

Healy also notes that the majority insists on expert evidence, but then implies that even with such evidence, there will rarely be a good defence. The Court expresses a view of the evidentiary burden in this defence that is in contrast to that expressed by Bastarache J in *R v Charemski*.[300] Ultimately, the Supreme Court in *Stone* reversed the

[297] *Stone,* at 390.
[298] P. Healy, "Automatism Confined" (2000) 45 McGill LJ 87 at 91 (hereinafter Healy).
[299] Healy, at 97. See also: Ronald J. Delisle, "Stone: Judicial Activism Gone Awry to Presume Guilt" (1999), 24 CR (5th) 91; David Paciocco, "Death by Stone-ing: The Demise of the Defence of Simple Automatism" (1999), 24 CR (5th) 273 and "Editorial, Rewriting Automatism" (1999), 4 Can Crim LR 119.
[300] [1998] 1 SCR 679.

onus of proof on the common law defence of non-insane automatism.

In sum, automatism is defined an unconscious, involuntary behaviour. A finding of non-insane automatism will result in outright acquittal, whereas automatistic behaviour under s 16 of the *Criminal Code* will result in a verdict of not criminally responsible on account of mental disorder. In order to differentiate between these two types of automatism, the court will examine the cause of the mental disorder to determine if its cause was internal or external. If it was external, the defence of non-insane automatism is available. A psychological blow resulting in a dissociative state may trigger automatism but this would be an internal cause and would not be non-insane automatism.[301]

(ii) Recommendations for Legislation about Automatism

Because there are a number of concerns about the complexities in the legal effects of finding that the accused was suffering from automatism, there have been recommendations for amendments to the *Criminal Code* to clarify this area of the law. In a White Paper released in June, 1993, the Minister of Justice recommended changes to the way that the *Criminal Code* deals with automatism.[302]

The *Criminal Code* does not currently mention automatism, except in section 672.21(3)(e). This section provides that a statement made by an accused during a psychiatric assessment to determine whether she was suffering from automatism at the time of the offence may be admissible evidence in court.

The majority in *Stone* referred to the White Paper when they discussed the burdens that should attach to a claim of automatism: "[T]he Minister of Justice recommended that the legal burden of proof in all cases be on the party that raises the issue on a balance of probabilities."[303] The majority then proceeded with a discussion of the burdens on extreme intoxication and insane automatism, which led to the

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[301] For further information, see R.F. Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility* (Cambridge: Cambridge University Press, 1991) and A. Brudner, "Insane Automatism: A Proposal for Reform" (2000) 45 McGill LJ 65-85.

[302] Canada, Minister of Justice, *Proposals to Amend the Criminal Code (General Principles)* (Ottawa: 1993) as reproduced in Tollefson and Starkman at 212 *et seq* (hereinafter White Paper).

[303] Cited in *Stone*, at 375.

conclusion that the legal burden should be on the accused to establish non-insane automatism. The White Paper ultimately went nowhere and it was followed by two subsequent initiatives concerning reform of the General Part of the criminal law. These initiatives did not lead to legislation either. However, Healy notes that in one of them there was no mention of a reverse burden on automatism, and in the other the option for a reverse burden was one option among several.[304] Thus, the issue of where the legal burden of proof falls when an accused claims automatism as a defence has conflicting conclusions within current law.

(e) Irresistible Impulse in Canada

The use of irresistible impulse as part of the insanity defence causes some difficulties in Canada. Mental disorder is only a defence if the accused can show that he or she is unable to choose between right and wrong because of an inability to understand the difference. The inability to stop oneself from doing what one knows to be wrong is called "irresistible impulse." Unfortunately, the meaning of this term within Canadian law is not altogether clear. There are a few English cases in which irresistible impulse has afforded the defence of insanity.[305] According to Schiffer, "it would seem that the expression is applicable in situations where the accused appreciates the nature and quality of his act and knows that it is wrong, but through mental disease, is unable to control his actions."[306]

Canadian courts refuse to recognize irresistible impulse as a form of mental disorder in and of itself.[307] However, they recognize that irresistible impulse can be evidence of a disease of the mind. In *A.G. South Australia v Brown,* the Judicial Committee for the Privy Council held that while there is no legal presumption of insanity merely from the existence of an irresistible impulse, medical evidence may be given to

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[304] Healy, at 104.
[305] *R v Oxford* (1840), 9 C & P 525; *R v Hay* (1911), 22 Cox CC 268; *R v Grill* 2 Hamilton and Godkin's Leg. Med 248; *R v Fryer* (1915), 24 Cox CC 403 as cited in Schiffer, at 139.
[306] Schiffer, at 139.
[307] *NG*; *R v Creighton* (1908), 14 CCC 349 (Ont HC) (hereinafter *Creighton*); *R v Jessamine,* [1912] 21 OWR 392 (CA) (hereinafter *Jessamine*); *R v Wolfson,* [1965] 3 CCC 304 (Alta CA) (hereinafter *Wolfson*); *Dion v The Queen,* [1965] Que QB 238 (CA), appeal to SCC dismissed [1965] SCR v; *R v Borg* (1969), 7 CRNS 85 (SCC) (hereinafter *Borg*); *R v Leech* (1973), 21 CRNS 1 (Alta SCTD), aff'd [1973] 1 WWR 744 (Alta CA) (hereinafter *Leech*); *R v Courville* (1985), 46 CR (3d) 90 (SCC).

show that the accused's irresistible impulses are symptoms of a disease of the mind and that these impulses might prevent him from appreciating the nature and quality of his act or from knowing that it was wrong.[308] This ruling was approved by Hall J. (dissenting) in *Borg*.[309] In *Abbey,* the majority of the Supreme Court of Canada recognized that irresistible impulse may be a symptom or manifestation of a disease of the mind that may give rise to a defence of insanity.[310]

Thus, while an irresistible impulse does not, in and of itself, amount to a defence, it may be a symptom of a disease of the mind.[311]

(f) Irresistible Impulse and Mentally Handicapped Defendants

One difficulty for mentally handicapped people is the lack of recognition of the defence of irresistible impulse in Canada. People with mental handicaps are often described as impulsive or as having poor impulse control.[312] This difficulty is said to be related to lack of attention span, focus and selectivity.[313]

The causes of this inability to control impulses are likely related to their mental impairment. Ellis and Luckasson have noted that, "the ability to control impulsive behaviour is related to the ability to understand both the nature of behaviour and the social circumstances that make an action appropriate or inappropriate to a particular occasion".[314] Therefore, impulsivity may simply reflect a lack of education about what is expected in certain situations. The inability to control one's impulses is quite common among people who have been institutionalized and whose behaviour has been totally dictated by those who care for them. When left to exercise their own judgment, they may act without control because they have not been given guidance and experience in this area.[315]

Because this trait is very common among people with mental handicaps, and

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[308] [1960] AC 432 (PC) 449-50 (hereinafter *Brown*).
[309] *Borg*, at 103.
[310] *Abbey,* at 207. See also: *R v Charest* (1990), 76 CR (3d) 63 (Que CA) (hereinafter *Charest*).
[311] See also: *Ng*; *Jessamine*; *Creighton.*
[312] Ellis & Luckasson, at 429. See also *Ng*.
[313] Ellis & Luckasson, at 429.
[314] Ellis & Luckasson, at 439.
[315] Ellis & Luckasson, at 439.

because it is not well tolerated by the public as an excuse for actions, mentally handicapped people are often the victims of their own impulses. In the United States, a number of jurisdictions have either declined to adopt a defence of mental disorder that provides an excuse on the basis of control impairment or that have revised their insanity defence to eliminate an excuse based on control impairment. Rejection control impairment as part of the insanity defence has been explained on the ground that recognition of such an excuse is threatening to the concept of freedom in that there is no easy line between those mentally incapable of resisting urges and those who merely fail to resist the strong urges. Thus, this basis for the excuse is rejected because the question is answerable only by moral guesses.[316]

2. "Rendered the Person Incapable of Appreciating the Nature and Quality of the Act or Omission"

It is not enough that the party alleging mental disorder prove that the accused had a "disease of the mind" at the relevant time. It must also be proved that the "disease of the mind" rendered the accused incapable of appreciating the nature and quality of his or her act or omission or, alternatively, of knowing that it was wrong. These alternatives are sometimes referred to as the "first arm" and the "second arm" of the exemption. The party alleging mental disorder need only prove one of the two arms to meet the requirements of subsection 16(1). If the accused has a disease of the mind, yet still appreciates the nature and quality of the act, the first arm of the exemption will not be available.[317]

Although it would appear that arriving at a conclusion as to whether the accused had a disease of the mind at the time of the crime is a difficult task, many judges have stated that the pivotal issue is whether the disease of the mind rendered the accused incapable of appreciating the nature and quality of the act or of knowing that it was wrong.[318]

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[316] Myron Moskovitz, "Criminal Law Defenses-1998 Pocket Part" (1997) Fn 56.5.
[317] *Chartrand*. This case also stands for the proposition that evidence that the accused has a pathological mental makeup falling short of insanity does not assist as our law does not recognize diminished responsibility short of insanity. See also: *Hem*.
[318] *Rabey,* at 474 (CA); *Cooper,* at 118. See also: *R v Romeo* (1991), 117 NBR (2d) 271 (NBQB), the new

The "nature and quality" of an act refers to the physical characteristics and consequences. This means that an accused will be able to rely upon the first arm of the exemption if he/she can show that he/she did not appreciate the physical characteristics and consequences of the act.[319]

There has been much jurisprudence surrounding the interpretation of the word "appreciating". Basically, the court will examine whether the accused had the capacity to understand what she was physically doing. The Royal Commission on the Law of Insanity as a Defence in Criminal Cases pointed out, "the word 'appreciating', not being a word that is synonymous with 'knowing', requires far reaching legal and medical considerations when discussing Canadian law."[320]

There are two Supreme Court of Canada decisions that form the basis for the current law in this area, *Cooper* and *Barnier*.[321] In *Cooper*, the issue of the difference between "knowing" and "appreciating" was discussed by the majority of the Supreme Court of Canada (per Dickson J.) as follows:

> The two are not synonymous. The drafsman [sic] of the Code, as originally enacted, made a deliberate change in language from the common law rule in order to broaden the legal and medical considerations bearing upon the mental state of the accused and to make it clear that cognition was not to be the sole criterion. Emotional as well as intellectual awareness of the significance of the conduct is in issue. [322]

The majority of the Supreme Court of Canada went on to discuss the difference:

> To 'know' the nature and quality of an act may mean merely to be aware of the physical act, while to 'appreciate' may involve estimation and understanding of the consequences of that act.

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trial as ordered by SCC in (1991), 119 NR 309.

[319] *R v Landry* (1991), 2 CR (4th) 268 (CC) (hereinafter *Landry*); *Abbey; R v Harrop* (1940), 74 CCC 228 (MNCA); *R v Cracknell* (1931), 56 CCC 190 (ONCA) (hereinafter *Cracknell*). Tollefson & Starkman, at 23, argue that in some cases the insane delusion might so affect the accused's rational capacity that she was incapable of appreciating the "physical nature" as opposed to the "physical consequences" of an act. For example, if a person killed what she thought was the devil disguised as a man, she would not appreciate the physical nature of what she was doing. This, too, should afford the mental disorder defence.

[320] McRuer Report, at 12; see also: *R v Baltzer* (1974) 27 CCC (2d) 118 (NSCA) (hereinafter *Baltzer*).

[321] *R v Cooper* (1979), 13 CR (3d) 97, 51 CCC (2d) 129 (SCC); *R v Barnier* (1979), 13 CR (3d) 129, 51 CCC (2d) 193 (SCC).

[322] *Cooper*, at para 54.

> In the case of the appellant, as an example, in using his hands to choke the deceased he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking he was able to appreciate its nature and quality, in the sense of being aware that it could lead to or result in her death. In the opinion of the medical expert who testified at the trial, the appellant could have been capable of intending bodily harm and of choking the girl, but not of having intended her death.
>
> Our Code postulates an independent test, requiring a level of understanding of the act, which is more than mere knowledge that it is taking place; in short, a capacity to apprehend the nature of the act, and its consequences…
>
> The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact and results of a physical act. An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being. This is simply a restatement, specific to the defence of insanity, of the principle that mens rea, or intention as to consequences of an act, is a requisite element in the commission of a crime. [323]

The dissenting judgment in *Cooper* (per Martland J.) emphasized that the psychiatric evidence was given in relation to the defence of lack of *mens rea* rather than to address the defence of insanity. Section 16 is "not concerned with intent" and will only come into operation after proof that "an offence was committed".[324] "In this case there was evidence that the accused appreciated the nature of his act (the choking), its quality (the cutting off of the victim's airway) and also that he was causing bodily harm."[325] The dissenting justices held that lack of capacity to appreciate that death might ensue should not establish the defence of insanity.[326]

In *R v Barnier*, the Supreme Court of Canada discussed the difference between

[323] *Cooper*, at paras 54-55, 58.
[324] *Cooper*, at para 25.
[325] Stuart, at 234-435.
[326] *Cooper*, at paras 34-35.

"appreciating" and "knowing".[327] During a trial on a murder charge, the judge had instructed the jury that the words "appreciating" and "knowing" in s 16 have the same meaning. The jury found the accused guilty. The Court of Appeal of British Columbia set aside the conviction and ordered the accused be held at the pleasure of the Lieutenant Governor because it was of the view that the accused was insane at the time of the murder. The Supreme Court of Canada dismissed the Crown's appeal. After stating that Parliament intended two different meanings by using two different terms, Estey J., speaking for the court, stated:

> In the ordinary usage of these words in the language, therefore, it would appear that to appreciate embraces the act of knowing but the converse is not necessarily true. This lies behind the comment in *Black's Legal Dictionary,* 4th ed., 1951, at p. 130:
>
>> Appreciate may be synonymous with 'know' or 'understand.'
>
> The verb 'know' has a positive connotation requiring a bare awareness, the act of receiving information without more. The act of appreciating, on the other hand, is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another. It is therefore clear on the plain meaning of the section that Parliament intended that for a person to be insane within the statutory definition, he must be incapable firstly of appreciating in the analytical sense the nature and quality of the act or of knowing in the positive sense that his act was wrong. [328]

Stuart asserts that there are still ambiguities surrounding the approach to be taken to the appreciating limb of the mental disorder exemption.[329] The tests outlined by the Supreme Court will be unlikely to cause difficulty where there is clear evidence of severe mental disorder; however, there will be difficulties in the borderline cases,

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[327] (1979), 13 CR (3d) 129, 51 SCC (2d) 193 (SCC) (hereinafter *Barnier*).
[328] *Barnier,* at 1137. See also: *R v Kjeldson*, [1981] 2 SCR 617 which held that the absence of appropriate feelings about conduct is not a lack of appreciation.
[329] Stuart, at 435.

especially those involving antisocial personality disorders or "psychopaths".[330]

In *R v Kjeldsen*, the Supreme Court of Canada dealt with the meaning of "appreciating". [331] The accused was charged with the first degree murder of a taxi driver whom he had hired to drive him to Banff from Calgary while on a day pass from a mental hospital. All of the medical experts were of the opinion that the accused was a dangerous psychopath [now called antisocial personality disorder] with sexually deviant tendencies. At issue was whether the accused could appreciate the nature and quality of his acts. The trial judge instructed the jury that the defence of insanity was unavailable to the accused if he merely did not have the appropriate feelings of concern for his victim (see the above note regarding the *Simpson* case). On the other hand, the defence of insanity was open if the accused did not appreciate the physical consequences of his actions. The majority of the Alberta Court of Appeal held that the trial judge's directions on this point were accurate. However, the Court of Appeal substituted a verdict of second degree murder because the trial judge had failed to instruct the jury properly on the difference between first and second degree murder.

In dismissing the appeal, the Supreme Court of Canada followed the reasoning in *Cooper* and *Barnier*. The Court also adopted the reasoning of Martin J.A. in *Simpson*, which it quoted as:

> While I am of the view that s. 16(2) exempts from liability an accused who by reason of disease of the mind has no real understanding of the nature, character, and consequences of the act at the time of its commission, I do not think the exemption provided by the section extends to one who has the necessary understanding of the nature, character and consequences of the act, but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feeling stems from 'disease of the mind'. Appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people [citations omitted]. No doubt the absence of such feelings is a common characteristic of many

[330] See, for example: *R v Adamcik* (1977), 38 CRNS 101 (BC Co Ct). See also *Stuart,* at 435.
[331] [1981] 2 SCR 617 (Alta) (hereinafter *Kjeldsen*).

> persons who engage in repeated and serious criminal conduct. [332]

These cases illustrate the difficulty involved for the accused when his only mental condition is antisocial personality disorder. There is a pattern whereby the defence of insanity on the grounds of antisocial personality disorder has been unsuccessful unless there is evidence of some other mental disorder.[333]

In *Abbey,* the accused was charged with importation and possession of cocaine for the purposes of trafficking.[334] After his arrival at the airport from Lima, Peru, the accused's bag was searched and was found to contain cocaine. He admitted to carrying the cocaine, but raised the defence of insanity. The psychiatric testimony indicated that the accused had a disease of the mind (hypomania) that involved a delusional belief that he was committed to a course of action, that no harm would come to him and that he would not be punished. The accused appreciated the nature and quality but failed to appreciate the penal consequences of his act. The trial judge found the accused not guilty by reason of insanity because he failed to appreciate the penal consequences of his act. The Court of Appeal of British Columbia dismissed the Crown's appeal.

In ordering a new trial, the Supreme Court of Canada held that the trial judge had confused the ability to perceive the consequences, impact and results of a physical act with a delusional belief that the legal consequences of an act did not apply to one's behaviour. A delusion that renders the accused incapable of appreciating the nature and quality of his act affects the required mental element of the offence, and would result in a verdict of not guilty by reason of insanity. The mental element of an offence is the intention, foresight or knowledge required in order to do the act. Intending the consequences of an act is a required element for several crimes. However, punishment is not an element of the offence itself, and an inability to appreciate that the act has penal consequences does not bring the accused within the first arm of the insanity test.

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[332] *Kjeldsen,* at para 12.
[333] *Leech; Craig*; *Borg; Chartrand; Irwin; R v Hayden (No 1)* (1990), 105 NBR (2d) 287 (TD), leave to appeal refused (1990), 112 NBR 133 (CA).
[334] See also: *Lutz.*

Dickson J., speaking for the Supreme Court stated:

> A delusion which renders an accused 'incapable of appreciating the nature and quality of his act' goes to the mens rea of the offence and brings into operation the 'first arm' of s. 16(2); he is not guilty by reason of insanity. A delusion which renders an accused incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not go to the mens rea of the offence, does not render him incapable of appreciating the nature and quality of the act, and does not bring into operation the 'first arm' of the insanity defence.[335]

Finally, the case *R v LaFrance* held that the failure of the judge to explain the meaning of "appreciating", a word in common usage, does not necessarily amount to a defective instruction.[336]

There are a few cases from Alberta in which the defence argued that the accused did not appreciate the nature and quality of his act. In *R v White,* the accused was charged with aggravated assault and attempted murder of his mother.[337] The accused was a diagnosed paranoid schizophrenic and two psychiatrists testified that he did not know that he was hitting the victim. The Alberta Provincial Court held that the accused was incapable of appreciating the nature and quality of his acts. Thus, the accused was not capable of forming criminal intent and was found not criminally responsible on account of mental disorder.

The first arm of the exemption, which would permit the special verdict of not criminally responsible on account of mental disorder, applies where the trier of fact (judge or jury) finds that the disease of the mind rendered the accused incapable of appreciating the nature and quality of the act or omission. This area of the law is fairly definite as to what consequences are *not* part of "appreciating the nature and quality" of one's act (e.g., the fact that the accused did not appreciate that there were penal

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[335] *Abbey*, at 203-4.
[336] (1972), 19 CRNS 80 (ONCA).
[337] [1992] AJ No 687 (Alta Prov Ct). See also: K. Lunman, "Court Finds Man Insane in Beating of Mother" *Calgary Herald* (July 30, 1992) B2; H. Dolik, "Assailant's Sanity in Dispute" *Calgary Herald* (June 12, 1992) B2.

consequences will not assist). However, it is not clear at what stage the analysis of the accused's *mens rea* becomes relevant and how the level of *mens rea*, or lack thereof, affects the application of the first arm of the mental disorder exemption. It would seem the most logical approach would be to enter into the inquiry after the trier of fact determines that the accused had committed the offence and had the required *actus reus* and *mens rea.* Then, the trier of fact could determine whether the accused could nevertheless be exempted from criminal responsibility because she had a mental disorder that prevented her from appreciating the nature and quality of the act or from knowing that it was wrong. This analysis could apply to either the *mens rea* or the *actus reus* because there are situations in which the accused's disorder affects her ability to know consciously what she was doing.[338]

3. "Appreciating" and the Mentally Handicapped Accused

There are very few decisions in Canada where it has been argued that a mentally handicapped accused was unable to appreciate the nature and quality of his or her act due to a disease of the mind. However, assuming the section 16 exemption applies to mentally handicapped persons, some considerations may differ from those that apply to persons who are mentally ill. Generally, people who are mentally disabled have a disability that "reduce[s] [their] ability to cope with and function in the everyday world."[339] The reduced ability is found in every aspect of the individual's functioning, including their "language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation".[340] Some of the most substantial intellectual impairments resulting from mental handicap are in logical reasoning, strategic thinking, and foresight. For example, the ability to anticipate consequences is a skill that requires intellectual and developmental ability.[341] As a result, mentally

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[338] See previous discussion under B. Background about the nature of the insanity defence.
[339] *City of Cleburne v Cleburne Living Center*, 473 US 432 (1985).
[340] Brief of American Association on Mental Retardation et al. as Amici Curiae in support of Petitioner in re *Johnny Paul Penry v James A. Lynaugh Director, Texas Department of Corrections* (1988) USSC, in Conley, Luckasson, and Bouthilet at 262 (hereinafter Brief of American Association on Mental Retardation in Conley, Luckasson & Bouthilet).
[341] Brief of American Association on Mental Retardation in Conley, Luckasson, and Bouthilet, at 262.

handicapped individuals are limited in their ability to understand causation and predict consequences.[342]

The general characteristics of mentally handicapped individuals have a direct bearing on their ability to appreciate the nature and quality of their actions. Since that arm of the s 16 exemption requires the accused to have been unable to measure and foresee the physical consequences of the act, it may be asserted that a mentally handicapped person is unable to do so.[343]

Unfortunately, there is not much guidance in the way of legal precedent in Canada or other jurisdictions. There are very few American cases, other than the most serious murder cases, where defendants with mental handicaps were argued to be not guilty by reason of mental disorder. As with the Canadian defence bar, American attorneys are reluctant to raise this plea except in murder cases because the result can be the permanent or long-term commitment of their client to a maximum security psychiatric hospital.[344]

4. "Rendered the Person Incapable of Knowing that the Act or Omission was Wrong"

The second arm of the exemption for mental disorder is available to the accused where she can prove that the disease of the mind rendered her incapable of knowing that the act or omission was wrong.

The level of *mens rea* required for "knowing" is different from traditional *mens rea* and from "appreciating" and has been set out above. To "know" is merely to be aware of the physical character of the act without necessarily having ability to perceive the consequences, impact and results of the physical act, as are necessary for appreciation.[345]

The judicial interpretation of the word "wrong" has enjoyed an interesting history. Currently, in Canada, "wrong" has a wide meaning and likely includes both legal and moral wrongness. However, this was not always the case. The English position has

[342] Brief of American Association on Mental Retardation in Conley, Luckasson & Bouthilet, at 263.
[343] See: *Cooper*.
[344] E. Wertlieb, "Individuals with Disabilities in the Criminal Justice System" (1991) 18(3) Criminal Justice and Behaviour 332 at 341 (hereinafter Wertlieb).
[345] *Barnier; Cooper*.

been that "wrong" means "legally wrong", while the Australian position is that "wrong" has the broader meaning of "morally wrong".[346] Canada has vacillated between these two positions.

In *R v O,* the accused woman hanged her four children in the laundry room.[347] All but one died. The evidence was that the woman was a devoted mother but was suffering from a grave mental illness. McRuer C.J.H.C. discussed the meaning of "wrong" in his address to the jury (which found the woman not guilty on account of insanity):

> [I]f you find on a mere preponderance of probability, based on the evidence taken as a whole, you come to the conclusion that the accused was labouring under a disease of the mind to such an extent that she was incapable of knowing that the act was wrong – and by that I do not mean merely legally wrong, but wrong in the sense that it was something that she ought not to do and for which she would be condemned in the eyes of her right-thinking fellow men – you should find her not guilty on account of insanity.[348]

This interpretation of the meaning of "wrong" in the broader sense than merely legally wrong, was overruled in *R v Schwartz.*[349] In *Schwartz,* the accused had been convicted of the non-capital murder of two persons. At trial, the judge had instructed the jury that "wrong" in s. 16 meant legally wrong. An appeal to the British Columbia Court of Appeal on the issue of interpreting "wrong" was dismissed.

On appeal, the Supreme Court of Canada discussed the meaning of "wrong":

> The test as to knowledge of "wrong" which is stated by Dixon, C.J., in the *Stapleton* case [(1952), 86 CLR 358 (HC)] is as to whether the accused knew that his act was wrong according to the ordinary principles of reasonable men. I find it difficult to see how this test really differs from the test as to whether he knew he was committing a crime. Surely, according to the ordinary principles of reasonable men, it is wrong to commit a crime. This must be so in relation to the

[346] English position: *R v Windle*, [1952] 2 QB 826; Australian position: *Stapleton v R* (1952), 86 CLR 358 (HC).
[347] (1959), 3 Crim L Q 151 (Ont HC) as described in *Simpson.*
[348] Regina v O (1959), 3 CR LQ 151 at 153 (ON), cited in *R v Schwartz* (1976), 29 CCC (2d) 1 (SCC), at para 23 (hereinafter *Schwartz*).
[349] *Schwartz*; followed in *Abbey; R v Augustus* (1977), 5 AR 499 (CA) (hereinafter *Augustus*); *Atkinson*.

> crime of murder. If there is a difference between these tests, and it could be contended that the commission of a particular crime, though known to be illegal, was considered to be normally justifiable in the opinion of ordinary men, I do not see why a person who committed a crime in such circumstances should be protected from conviction if suffering from disease of the mind, and not protected if he committed the crime when sane.[350]

The dissenting justices disagreed. They held that "wrong" should be interpreted in the popular sense to mean morally wrong rather than contrary to law. If any other meaning had been intended, Parliament could have used the word "illegal" or "unlawful" as it did in various other provisions of the *Criminal Code.* If, as a result of a disease of the mind, the accused had completely lost the capacity to make moral decisions and acts under a delusion brought about by mental illness, he should not be held criminally accountable.

In the result, the accused's appeal was dismissed because there was no evidence that he did not know that the act was "wrong", whatever the meaning of the word. The majority's narrow meaning for "wrong" (i.e., legally wrong) was followed, until very recently, by all Canadian courts including the Supreme Court.

In *Chaulk,* the Supreme Court of Canada reversed its own opinion on the meaning of the term "wrong" and adopted the dissenting judgment in *Schwartz*. Lamer C.J.C., speaking for the majority stated:

> ...it is plain to me that the term 'wrong' as used in s. 16(2) must mean more than simply legally wrong. In considering the capacity of a person to know whether an act is one that he ought or ought not to do, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law. A person may well be aware that an act is contrary to law but, by reason of 'natural imbecility' or disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society. This would be the case, for example, if the person suffered from a disease of the mind to such a degree as to know that it is legally wrong to kill but, as described by Dickson J. in *Schwartz*, kills 'in the belief that it is

[350] *Schwartz,* at para 30. This meaning was followed in *Budic (No 3)*.

> in response to a divine order and therefore not morally wrong' (p.13).[351]

The Supreme Court of Canada allowed the accused's appeal and ordered a new trial. The Court's interpretation that "wrong" means "morally wrong", rather than "legally wrong", is now the correct interpretation of law that is followed by Canadian courts.[352]

In *Landry*, the accused admitted to planning a murder and carrying out this plan upon his victim. He admitted that he had committed the physical act of killing the victim, but argued that he should be found not guilty by reason of insanity because he suffered from a severe psychosis that made him believe that he was God and had a mission to destroy all forces of evil on Earth.[353] He suffered from the further delusion that his victim was "Satan" and that he had to kill him in order to rid the world of all evil forces. At trial, the judge instructed the jury to consider the insanity defence, stating that the accused should not be convicted if he lacked the capacity to appreciate the nature or quality of his act or to know that the act was *legally* wrong. The Quebec Court of Appeal set aside the conviction and substituted a verdict of not guilty by reason of insanity.

The Crown appealed to the Supreme Court of Canada. The Supreme Court dismissed this appeal, holding that the accused suffered from a disease of the mind to the extent that he was rendered incapable of knowing that the act was morally wrong in the circumstances.

In *Ratti*, the accused was charged with the first-degree murder of his wife. He

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[351] *Chaulk,* at 230 - 231.

[352] *Ratti*; *Landry.* See also: *R v Ulayuk,* [1992] NWTR (NWTCA); *R v Huk* (January 18, 1993) OJ 522 (QL) (Ont Prov Ct); *R v Wild* (March 24, 1993) V01110 (BCCA), and *R v W. (J.M.)* (1998), 123 CCC (3d) 245 (BCCA). In *R v W. (J.M.)*, the British Columbia Court of Appeal held that an accused will not be excused from criminal responsibility if they understand what society views as right or wrong in a particular circumstances but either does not care or, because of a delusion, decides to act in contravention of society's views. In *R v Worth* (1995), 40 CR (4th) 123, 98 CCC (3d) 133, the Ontario Court of Appeal held that an accused will be exempt from criminal responsibility if he or she proves on a balance of probabilities that they are suffering from a disease of the mind that has left them incapable of knowing that his or her act was legally or morally wrong.

[353] *Landry*.

had decided that his family should return to India and his wife refused to go.[354] Psychiatrists testified that he suffered from paranoid schizophrenia. This mental disorder caused the accused to believe that he was a prophet who had been called by God to lead the world in forming an international government. Voices also told him that his family was cursed and that they should return to India. He believed that his wife would be corrupted if she did not return to India, and so he killed her so that she would be "reborn" in India. At trial, the judge instructed the jury that "wrong" meant "legally wrong". The accused was convicted of first-degree murder. An appeal to the Ontario Court of Appeal was dismissed.

In ordering a new trial, the Supreme Court of Canada held that in light of the new *Chaulk* formulation, there was misdirection to the jury. The correct direction should have been that the accused should be found not guilty by reason of insanity if, because of a disease of the mind, he lacked the capacity to know that his act was morally wrong in the circumstances.[355]

In *R v Hamilton,* the accused suffered from a psychotic mental illness and had delusions that he was being controlled by a transmitter implanted in his brain.[356] He shot and killed his sister and was charged with murder. The trial Judge defined the word "wrong" as legally wrong and the accused was found guilty of murder. After the verdict and before the appeal, "wrong" was later redefined to include morally wrong. The accused appealed his conviction.

The Manitoba Court of Appeal dismissed the appeal. The Court held that although the judge's charge to the jury was wrong, there was no substantial miscarriage of justice. There was no evidence that the accused believed he was morally justified in killing his sister. He did not feel threatened by her and did not believe that she was responsible for or had control over the "transmitter" in his head or that her death

[354] *Ratti*.
[355] See also: *Oommen* in which the Alberta Court of Appeal held that s. 16(1) of the *Criminal Code* deals with accused's ability to apply the knowledge about whether an act is right or wrong in a rational way to the alleged criminal act, at the time the act was committed. If, at the time the act was committed, a mental disorder prevented the accused from having the capacity to rational perception about the rightness or wrongness of the act in question, the accused will be exempt from criminal responsibility.
[356] (1992), 13 CR (4th) 122 (MNCA) (hereinafter *Hamilton*).

would bring the operation of the transmitter to an end.

Similarly, in the case of *R v Campione*, the Ontario Court of Appeal found that a not criminally responsible exemption could not be supported by the accused's mere belief that his conduct was justifiable. The accused must be able to establish that he was incapable of knowing that the conduct would be viewed as morally wrong according to the standards of society and, as a result, was unable to decide whether or not to act in accordance with those moral standards.[357]

The inability to comprehend that an action is morally wrong extends to persons that, as a result of a mental disorder, are unable to rationally perceive the circumstances surround the conduct. In that case, the accused is unable to make a rational decision based on the rightness or wrongness of his actions, even when he/she knows the difference between right and wrong and that the act is illegal.[358]

Consequently, an accused may know that a particular act is legally wrong, but her/his disease of the mind might render her incapable of knowing that it was wrong in the eyes of society. If the accused does not rationally appreciate that an act is morally wrong in the circumstances, she/he may be found not criminally responsible on account of mental disorder. While the test for "wrong" varies from country to country, in Canada, the current meaning is the broader one that incorporates moral wrongness.[359]

5. "Incapable of Knowing that the Act or Omission was Wrong" and Mental Handicap

It may also be possible to argue that a mentally handicapped accused should be found not criminally responsible because he/she was incapable of knowing that his/her act or omission was wrong. Again, assuming that the s 16 exemption applies to people with mental handicaps, it is evident that persons who are mentally handicapped may have difficulty understanding blameworthiness or causation.[360] Moral reasoning ability

[357] *R v Campione*, 2015 ONCA 67 at para 41.
[358] *R v Szostak* (2012), 94 CR (6th) 48 (ONCA).
[359] Tollefson & Starkman argue that these cases substitute "morally wrong" for "legally wrong" (at 26). They go on to argue that there are several problems with the interpretation given to the word "wrong" by the Supreme Court. First, "morally wrong" was not intended by those who originally drafted the *M'Naghten* test. Second, the court will now be required to determine what popular morality is, making the test very difficult to implement (at 26-34).
[360] Ellis & Luckasson, at 429.

develops in stages over time and is dependent on an individual's intellectual ability and developmental level.[361] Mental handicaps limit the ability of individuals to reach full moral reasoning ability.[362] Sometimes mentally handicapped individuals are unable to distinguish between an incident that is the result of blameworthy behaviour and one that results from an unforeseeable accident. The consequences for the accused can be serious. For example, a mentally handicapped accused may plead guilty to a crime because he/she believes that blame should be assigned to someone and he is unable to understand his role in the incident.[363] An American example of a case in which the mentally handicapped individuals may not have fully understood the implications of their actions occurred when the ringleaders of a shoplifting scheme used some disabled individuals to return stolen merchandise to a store for refunds. In this particular case, the mentally handicapped people were not arrested. However, it illustrates some of the possible difficulties in identifying whether a person knew what he was doing was legally or morally wrong.[364]

Although the inability to reason fully may or may not affect a mentally handicapped person's ability to know that her/his actions were wrong for the purposes of s 16, it is certainly worth examining. Alternatively, defence counsel may be able to argue that this inability affected her client's culpability and may therefore amount to a complete defence or result in a finding of guilt for a lesser included offence.[365]

6. Specific Delusions—Old *Criminal Code* Provision s. 16(3) (Now Repealed)

Formerly, the *Criminal Code* dealt with specific delusions in a separate section that read:

> 16 (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

[361] Brief of American Association on Mental Retardation in Conley, Luckasson, and Bouthilet, at 264.
[362] Brief of American Association on Mental Retardation in Conley, Luckasson, and Bouthilet, at 264.
[363] Ellis & Luckasson, at 430.
[364] Wertlieb, at 340.
[365] See the discussion in Chapter Seven, Lack of Intent due to Mental Disability.

Section 16(3) has since been repealed. However, before it was amended, s 16(3) provided a defence for a person who was sane in all respects except for a specific delusion. Originally, the section was interpreted to mean that a person not suffering from a disease of the mind under former subsection 16(2) could still rely on former subsection 16(3) if he/she suffered from a specific delusion. The idea that a person might suffer from specific delusions, and yet remain otherwise unaffected mentally, seems to have its basis in the now rejected concepts of phrenology and monomania. Monomania was the theory that a person could have one insane idea while the rest of the mind remained normal. Phrenology envisioned the brain consisting of 27 different organs, each capable of producing separate personality traits in the person.[366]

Former subsection 16(3) was infrequently discussed in jurisprudence. In *Whitelaw v Wilson,* the defendant and his wife had made a suicide pact to ingest arsenic.[367] The wife took the arsenic in the presence of the defendant and while she was still suffering from its effects, the husband also took the poison. He recovered, however, but she died leaving a will giving all of her estate to the defendant. The defendant wrongly believed that he was suffering from a fatal disease but was found liable in law for failing to provide the necessaries of life to his wife and for aiding her in the commission of suicide. As such, he could not benefit from his wrong by receiving his wife's estate. His defence was that at the time of the offences he was suffering from a specific delusion. In finding that the defendant should not receive his wife's estate, the court held that although he suffered from the specific delusion that he was dying, this did not justify or excuse his actions. In other words, even if he were dying, he would not be justified in counselling his wife to commit suicide or in failing to obtain assistance for her when she was dying. Consequently, he could not rely on the insanity provisions to show that he had done nothing wrong.

In *Budic (No 3),* the accused suffered from the delusion that he was being poisoned by his girlfriend and others and that his physician was part of a conspiracy to

[366] Schiffer, at 137, 72.
[367] (1934), 62 CCC 172 (Ont SC).

prevent him from obtaining treatment.[368] After unsuccessfully seeking help from doctors in Canada and Yugoslavia and consulting the police, the accused decided to kill his physician. At the murder trial, a psychiatrist testified that the accused was suffering from an atrophy of the brain that manifested itself in the specific delusion. In setting aside the accused's conviction and substituting a verdict of not guilty on account of insanity, the Alberta Court of Appeal held that the accused was suffering from a disease of the mind that rendered him incapable of knowing that what he was doing was wrong.

Considerable argument had been raised regarding the application of former s 16(3). The Alberta Court of Appeal held that an accused with specific delusions that did not satisfy the requirements of former s 16(3) could rely alternatively on former s 16(2) and be found to be suffering from a disease of the mind. Further the court held that if the accused were relying on former s 16(3) alone, it may be that his belief that his doctor was preventing him from receiving treatment would not justify or excuse the murder.

In *Mailloux,* at the Ontario Court of Appeal, one psychiatrist testified that the accused suffered from a toxic psychosis that made him believe irrationally that he was acting in self-defence when he shot and killed a young woman and a child.[369] Another psychiatrist testified that the toxic psychosis produced specific psychotic delusions that caused the accused to believe that he was being set up by the victims and that he had to kill the people in order to save himself. At trial, the jury convicted him of two counts of second degree murder.

On appeal, the accused argued that the trial judge improperly instructed the jury about whether the accused's irrational act of self-defence arising from a disease of the mind would satisfy the insanity defence provided in former subsection 16(2). The Ontario Court of Appeal held that something more is required to meet former subsection 16(2). An irrational act of self-defence arising from a disease of the mind would not satisfy former subsection 16(2) unless the disease of the mind also rendered the accused incapable of appreciating the nature and quality of the act or of knowing

[368] *Budic (No 3)*.
[369] *Mailloux*.

that it was wrong. Further, evidence of the accused's specific delusion that he was in danger of immediate death or was being set up and that he had to protect himself could support the conclusion that the accused did not appreciate the nature and quality of his act or know that it was wrong (under former subsection 16(2)).

Over the years, most authors asserted that former subsection 16(3) was redundant and there was no theoretical justification for special treatment of specific delusions. Consequently, they argued for its removal from the *Criminal Code*.[370] In 1956, the Royal Commission on the Law of Insanity recommended that former s. 16(3) be dropped from the *Criminal Code*. The Report stated:

> The preponderance of medical evidence condemned the wording of this subsection on the ground that it describes a person who could not exist. The opinion of the witnesses was that no one who has 'specific delusions' could be 'in other respects sane'. We think that from a medical point of view the arguments put forward in support of this opinion are conclusive. The medical evidence convinces us that any defence that could be raised under subsection (3) could be successfully raised under subsection (2), and that subsection (3) is unnecessary.[371]

In *Working Paper No 29,* the Law Reform Commission of Canada also recommended that this section be repealed.[372] The LRC felt that the section required that the accused be "sane in his insanity", and was therefore unworkable.

More recent decisions tended to view former s 16(3) as clarifying the meaning of former s. 16(2), rather than as providing an alternative to the insanity defence. For example, in *Abbey* the Supreme Court of Canada held that any defence that could be raised under former subsection 16(3) could also be raised under former subsection 16(2). In *Chaulk,* the Supreme Court of Canada stated:

> In my view, it is not necessary for this court to engage in the difficult and perhaps impossible task of deciphering the plain meaning of s. 16(3) or of fathoming the intention of Parliament

[370] See: D. Klink, "Specific Delusions in the Insanity Defence" (1983) 25 CLQ 458; Schiffer, at 136. But see: Rogers & Mitchell.
[371] McRuer Report, at 36.
[372] At 48.

> in enacting the provision. As a result of this court's reconsideration of the meaning of the word 'wrong' in s. 16(2), there can be no doubt that any successful attempt to invoke the insanity defence under s. 16(3) would also succeed under s. 16(2). Furthermore, if an accused fails to satisfy the conditions set out in s. 16(2), he or she will not be able to benefit from s. 16(3). It would not, therefore assist an accused in any way if s. 16(3) was indeed held to constitute a separate and independent defence. [373]

The impact of the former s. 16(3) was dealt with by the Alberta Court of Appeal in *R v Oommen.*[374] In 1991, Oommen shot and killed a friend. The accused suffered from a psychosis of a paranoid delusional type. He had a false and fixed belief that he was the target of a conspiracy. At the time of the offence, the accused had a specific belief that the members of his local union had conspired to destroy him. At trial, the accused argued unsuccessfully that he was incapable of appreciating the nature of his act or of knowing that it was wrong. He was convicted of murder and appealed.

The Alberta Court of Appeal allowed the accused's appeal and ordered a new trial. The Court held that whenever the defence relied upon a specific fact delusion under the former subsection 16(3), the accused should be acquitted only if the trier of fact was satisfied on a balance of probabilities that: the accused had a delusion; the delusion derived from a disease of the mind; and, assuming the delusion were true, the killing was justified in law.

The majority of the Court also commented on the repeal of former subsection 16(3), saying that the Supreme Court in *Chaulk* held that former subsection 16(3) was superfluous, not that the defence should not be available. The Supreme Court held that a defence that was available under former subsection 16(3) would also be available under former subsection 16(2) [now subsection 16(1)]. The Court of Appeal held that the accused's view of the facts might affect his ability to apply his knowledge of right and wrong and therefore cause him to lack the capacity to know that what he did was wrong. The Court held that where the accused suffers from a specific delusion, the trier

[373] *Chaulk*, at 235.
[374] *Oommen*.

of fact should consider whether this accused lacks the capacity, because of his disease and the resulting delusions, to apply his knowledge of right and wrong in any meaningful way.

In *Chaulk*, the majority of the Court also held that in order to rely upon the new subsection 16(1) in cases where the accused had a specific delusion, and assuming the accused's version of the facts were true, the defence must show a defence (e.g., self-defence, justification) would be available.

The dissenting justice agreed that the repeal of subsection 16(3) left some grave puzzles in the law. However, the justice was not prepared to conclude that "knowing that it was wrong" in the current subsection 16(1) did not extend to mistakes of a factual nature. He recommended that Parliament clarify the *Criminal Code* or re-enact subsection 16(3).

III. Effects on the Client of the Verdict of Not Criminally Responsible on Account of Mental Disorder

When contemplating whether to pursue a defence of not criminally responsible on account of mental disorder, it may be useful to know the possible effects of the verdict upon the client. There are both legal and practical consequences of a finding of not criminally responsible on account of mental disorder. The consequences of pleading guilty or of pursuing a civil commitment are discussed in Chapter Two, Diversion.

A. Legal Effect of the Verdict

1. The Current Regime

(a) General

Section 672.34 of the *Criminal Code* contains the verdict of not criminally responsible on account of mental disorder. It reads:

> 672.34. Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering

> from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.[375]

In order to render a verdict of not criminally responsible on account of mental disorder ("NCRMD"), the trier of fact must find: a) that the accused committed the act or made the omission that formed the basis of the offence charged, and b) that the accused, at the time of the act or omission, suffered from a mental disorder that rendered him incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. A NCRMD verdict acknowledges that the accused committed the act or made the omission in question. However, it excuses the accused from criminal responsibility for the offence in question based on the nature and extent of their mental disorder that existed at the time of the offence.

Once the court has rendered the special verdict, whether for an indictable or for a summary conviction offence, the trial court may hold a disposition (sentence) hearing and make a disposition pursuant to section 672.45. Sections 672.54 to 672.63 designate the types of dispositions which may be made by courts and Review Boards following mental disorder verdicts. Where the trial court fails to make a disposition, a Review Board may make a disposition under sections 672.47 to 672.49.[376] Section 672.72 provides that any party may appeal against a disposition made by a court or Review Board if the disposition was made on any ground of appeal that raises a question of law or fact or of mixed law and fact.[377] If a Review Board has made any disposition in

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[375] *Criminal Code*, s 672.34. In *R v David* (2002), 7 CR (6th) 179, 169 CCC (3d) 165, the Ontario Court of Appeal held that it is preferable to instruct the jury to consider a verdict of not criminally responsible on account of mental disorder ("NCRMD") only if they were satisfied beyond a reasonable doubt that the accused committed the offence and before deciding whether the accused has the mental element for the offence in question. However, it is not always wrong to instruct a jury to consider the defence of NCRMD only after they have decided the accused is guilty of first or second degree murder or manslaughter.

[376] *Criminal* Code, ss 672.47, 672.48, 672.49. These provisions are discussed in more detail in Chapter Twelve, Sentencing. Note: a Review Board is considered a court of competent jurisdiction under s. 24(1) of the *Charter*, which means that they may review and decide constitutional questions that arise in the course of its proceedings. See *R v Conway*, [2010] 1 SCR 765, 255 CCC (3d) 506 (hereinafter *Conway*).

[377] *Criminal Code*, s 672.72. See *Mazzei v British Columbia (Adult Forensic Psychiatric Services, Director)* (2004), 185 CCC (3d) 196 (BCCA); reversed on other grounds [2006] 1 SCR 326, 206 CCC (3d)

respect of the accused other than an absolute discharge, they are required to hold mandatory hearings no later than 12 months after making a disposition, and every 12 months thereafter for as long as the disposition remains in force.[378]

Section 672.54(a) provides that a court or Review Board may direct that an accused found NCRMD be discharged absolutely if they are of the opinion that the accused is not a significant threat to the safety of the public.[379] "Threat" has a future connotation.[380] Furthermore, there is a distinction between a threat to public safety and a "significant threat".[381] The accused's right to an absolute discharge cannot be foreclosed simply because he or she may be a threat to public safety. A "significant" threat is difficult to define, although in *Chambers v British Columbia (Attorney General)* the Court of Appeal specifically stated that a significant threat refers to criminal conduct.[382] Richard Schneider reveals that the concept of "significant threat" may be assessed from a number of different perspectives, including references to time, quantitative or qualitative factors.[383] Schneider claims it is questionable that the sole aim of the *Criminal Code* is to prevent or protect against "crime" and argues that the protection of the public against perceived dangerous behaviour of the accused should also be protected.[384] In *Winko*, the Supreme Court determined that a significant threat to the safety of the public requires that there must be a real risk of physical or psychological harm to individuals in the community and that the potential harm must be serious.[385] A miniscule risk of great harm will not suffice, nor will a high risk of trivial

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161. In *R v Pare* (2001), 159 CCC (3d) 222 (ONCA), the Ontario Court of Appeal held that there is no right of appeal from a Review Board finding that the accused is fit to stand trial.

[378] *Criminal Code*, s 672.81.

[379] *Criminal Code*, s 672.54(a). See *Conway*, where the Supreme Court held that in cases where a mental disordered detainee is found to be dangerous, a Review Board does not have authority under the *Criminal Code* or the *Charter* to grant an absolute discharge.

[380] *Orlowski v British Columbia (Attorney General)* (1992), 75 CCC (3d) 138 (BCCA), (QL) (hereinafter *Orlowski*).

[381] *Orlowski.*

[382] (1997), 116 CCC (3d) 406 (BCCA).

[383] R. Schneider, "Mental Disorder in the Courts: Significant Threat" (1997) Ontario Criminal Lawyer's Association Newsletter 18:4 (hereinafter Schneider).

[384] Schneider refers to the case of *Chambers*, where the accused was returned to the hospital by the Board as a result of her use of drugs, alcohol and her return to prostitution. The accused was HIV positive.

[385] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. See also *R v Wodajio* (2005), 194 CCC (3d) 133 (ABCA), where the Alberta Court of Appeal held that the "significant threat"

harm.[386]

In *Winko and R v LePage*, the courts held that s. 672.54 does not offend s 15 of the *Charter*.[387] Further, the court in *Winko* held that s. 672.54 does not offend sections 7, 9 or 12 of the *Charter*. However, in *R v T.J.* the Court observed that the provisions of s. 672.54 that allow for absolute discharge of NCRMD accused, but do not provide the same options for an accused found unfit to stand trial, are discriminatory and offend s 15(1) of the *Charter*.[388] In *Demers*, the court confirmed this and also and held that ss. 672.54, 672.33 and 672.81(1) of the *Criminal Code* are discriminatory and offend s 7 of the *Charter*.[389]

(b) Effect of the Special Verdict

The amendments to the *Criminal Code* specifically outline the legal effects of the special verdict of NCRMD, as well as its use in certain subsequent proceedings and employment applications.

Sections 672.35 and 672.36 provide:

> 672.35. Where a verdict of not criminally responsible on account of mental disorder is rendered, the accused shall not be found guilty or convicted of the offence, but
>
> (a) the accused may plead *autrefois acquit* in respect of any subsequent charge relating to that offence;
>
> (b) any court may take the verdict into account in considering an application for judicial interim release or in considering what dispositions to make or sentence to impose for any other offence; and
>
> (c) the National Parole Board or any provincial parole board may take the verdict into account in considering an application by the accused for parole or for a record suspension under the

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does not have to relate directly to the accused's mental disorder. Rather, it relates to the accused's mental condition at the time of the hearing.

[386] *R v Owen* (2001) 42 CR (5th) 362, 155 CCC (3d) 82; reversed on other grounds [2003] 1 SCR 779, 174 CCC (3d) 1.

[387] *R v LePage*, [1999] 2 SCR 744.

[388] [1999] YJ No 57 (Terr Ct), (QL).

[389] *Demers*.

> *Criminal Records Act* in respect of any other offence.
>
> 672.36. A verdict of not criminally responsible on account of mental disorder is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is provided by reason of previous convictions.

The special verdict therefore bars a finding of guilt for the same offence. The verdict also permits an accused to raise a plea of *autrefois acquit*, which means that he/she has received a verdict on the offence and cannot therefore be tried again for the same offence based on the same circumstances. The special verdict can be considered in deciding whether to release the accused before his/her trial when he/she is charged with another offence, and it may also be considered in imposing sentences for other offences. The parole authorities may take the special verdict into account when deciding the accused's application for parole or a records suspension with regard to any other offence. Finally, the special verdict cannot be considered as a previous conviction for the purposes of any federal offence that attracts a greater punishment if there are previous convictions.

Section 672.37, which came into force in 1991, forbids questions on applications for federal employment about whether the accused had a charge or finding that resulted in the special verdict, if the accused has been discharged absolutely or is no longer subject to any disposition in respect of the offence.[390]

Therefore, the verdict does have some legal implications for the accused.

2. The Previous Regime

Until February 1992, when an accused was charged with an indictable offence and found not guilty on account of insanity, it was then ordered under s. 614(2) [now repealed] that the accused be kept in strict custody, in the manner in which the presiding judge directed, until the pleasure of the Lieutenant Governor was known. The supervision of “insane” persons was governed by former s 617 and the review of their cases by former s 619. Under former s. 617(2), the Lieutenant Governor (or his/her

[390] *Criminal Code*, s 672.36.

agent) could issue a warrant that authorized the transfer of the accused to any other place in Canada for rehabilitative treatment. The Lieutenant Governor could also appoint a board to review the continued detention of the accused. Former s 619 outlined the composition and duties of the Board of Review.

If the person was found not guilty by reason of insanity and if proceedings were for an indictable offence, the person was automatically detained. There was no provision for a hearing or other determination to consider if the accused was dangerous at the time of acquittal or needed detention. She/He was automatically ordered into strict custody.

The procedure with regard to summary convictions offences was less clear. The case law indicated that if the accused successfully argued that she/he was insane at the time of the offence, the only recourse available was an acquittal.[391] Former section 795 stated that the provisions of the former Part XX of the *Criminal Code* applied to summary conviction offences. Therefore, if the accused was charged with an offence punishable by summary conviction, she/he could be remanded for observation under former s 615. Further, under former subsection 615(7), an accused found unfit to stand trial could be held indefinitely until the pleasure of the Lieutenant Governor was known, even if she/he was charged with a summary conviction offence. Under former section 614, an accused charged with an offence and found insane at the time of the offence could be ordered held in strict custody at the pleasure of the Lieutenant Governor. However, former section 795 clearly exempted former section 617 from applying to summary conviction offences. Former section 617 listed the powers of the Lieutenant Governor with respect to transfer. Apparently, under the old regime, the accused could be ordered detained indefinitely under former subsection 614(2) but the Lieutenant Governor could not transfer the person under former s 617. Therefore, if an accused was tried under a summary conviction offence, the *Criminal Code* provided that he or she could be detained indefinitely under the former subsection 614(2).[392] Thus,

[391] *R v Crupi* (1986), 17 WCB 24 (Ont Prov Ct). See also: Knoll, at 84, §98.
[392] Tollefson & Starkman (at 132) argue that s. 731 (now s. 795) permitted the court to order that the accused be indefinitely detained if found not guilty by reason of insanity when charged with a summary

although the case law indicated that the only recourse for an accused charged with a summary conviction offence and found not guilty on account of insanity was an acquittal, the *Criminal Code* seemed to provide for indeterminate detention.

Under the old regime, a person found not guilty by reason of insanity could be detained for an indefinite period that could surpass the sentence he/she would have received if found guilty of the same offence. Therefore, making a decision whether or not to plead insanity always involved a weighing of the consequences for the accused of a finding of not guilty on account of insanity as opposed to a guilty verdict. Further, he/she would have to live with the stigma of being held to be insane and perhaps thought of as a criminal and may have faced conditions worse than those in prison.[393]

With an indictable offence, the accused could appeal a verdict of not guilty on account of insanity under former section 675. Arguably, the Crown could appeal the verdict under former s 676.[394] With a summary conviction offence, both the Crown and the accused would have had to try to appeal directly to the provincial court of appeal under former section 830, which permitted appeals on narrow grounds based on the transcript of the trial. Former section 813, which was the usual section relied upon for Summary Conviction Appeals, did not appear to apply to the verdict of not guilty on account of insanity.

B. Social and Practical Effects of the Verdict

A verdict of not criminally responsible on account of mental disorder may have social consequences for the accused. He or she may feel that there is a stigma in our society with regard to being found mentally disordered. Thus, the offender may vehemently deny that he/she has a disorder, even if it has been found to be true. The offender may feel shame or despair that he/she has been found to have had a mental disorder. The offender's illness or disability may prevent him/her from cognitively accepting that he/she is mentally ill or disabled. Consequently, he/she may have some difficulty accepting the verdict or agreeing to proceed with the plea of not criminally

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conviction offence.
[393] *Swain*, at 547.
[394] This issue is discussed at length in Chapter Ten, Jury Trials and Appeals.

responsible on account of mental disorder. These difficulties may not only be the result of the stigma attached to mental illness and mental disability in our society, but also the result of thought processes that render him/her incapable of accepting that he/she has a difficulty.

The offender may also find that because she/he has been considered to have an "unsound mind", she/he may not be able to pursue certain employment or directorships.[395] For example, she/he may be disqualified from being a director under the *Business Corporations Act.*[396]

IV. Conclusion

Although previously lawyers may have hesitated to raise the issue of mental disorder for fear that their clients would be faced with indefinite detention under a Lieutenant Governor's Warrant, the new disposition procedures (discussed in Chapter Twelve) may result in an increase in the use of this defence. While clients may continue to be reluctant to raise the issue of their mental disability because of the stigma attached to mental disability in our society, if the defence applies, it may have positive aspects for the client that may outweigh these negative connotations.

There have been some important strides made in amending the procedures, but the mental disorder exemption itself does not clearly address whether mentally handicapped persons may rely upon s 16. Consequently, there may need to be further amendments to address this issue.

The trier of fact (judge or jury) determines whether the accused was suffering from a disease of the mind at the time of the offence. Usually, expert testimony will be required in order to assist the trier of fact to make this determination. There are numerous issues that arise because the trier of fact must rely upon expert evidence. These are discussed in Chapter Nine, Expert Evidence.

[395] For a discussion of this issue see Schneider, at 26.
[396] RSA 2000, c B-9, s 105(1)(b).

Appendix

Forms

The following forms pertaining to not criminally responsible are contained in the Criminal Code.

FORM 48

Assessment Order

(Section 672.13)

Canada,
Province Of
(Territorial division)

Whereas, I have reasonable grounds to believe that evidence of the mental condition of (name of accused), who has been charged with ....may be necessary to determine*

[] whether the accused is unfit to stand trial

[] whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code* at the time of the act or omission charged against the accused

[] whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, if the accused is a female person charged with an offence arising out of the death of her newly-born child

[] if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused pursuant to section 672.54, 672.58 or 672.64 of the *Criminal Code* or whether the court should, under subsection 672.84(3) of that Act, revoke a finding that the accused is a high-risk accused

[] if a verdict of unfit to stand trial has been rendered in respect of the accused, whether the court should order a stay of proceedings under section 672.851 of the *Criminal Code*

I hereby order an assessment of the mental condition of (name of accused) to be conducted by/at (name of person or service by whom or place where assessment is to be made) for a period of __________days

This order is to be in force for a total of __________ days, including travelling time, during which time the accused is to remain*

[] in custody at (place where accused is to be detained)

[] out of custody, on the following conditions:

(set out conditions, if applicable)

Dated this .... day of ....A.D.
................, at ....

....
(Signature of justice or judge or clerk of the court, as the case may be)

* Check applicable option.

FORM 48.2

(Subsection 672.5(14))Victim Impact Statement — Not Criminally Responsible

This form may be used to provide a description of the physical or emotional harm, property damage or economic loss suffered by you arising from the conduct for which the accused person was found not criminally responsible on account of mental disorder, as well as a description of the impact that the conduct has had on you. You may attach additional pages if you need more space.

Your statement must not include

- any statement about the conduct of the accused that is not relevant to the harm or loss suffered by you;
- any unproven allegations;
- any comments about any conduct for which the accused was not found not criminally responsible;
- any complaint about any individual, other than the accused, who was involved in the investigation or prosecution of the offence; or
- except with the court's or Review Board's approval, an opinion or recommendation about the disposition.

The following sections are examples of information you may wish to include in your statement. You are not required to include all of this information.

Emotional impact

Describe how the accused's conduct has affected you emotionally. For example, think of

- your lifestyle and activities;
- your relationships with others such as your spouse, family and friends;
- your ability to work, attend school or study; and
- your feelings, emotions and reactions as these relate to the conduct.

Physical impact

Describe how the accused's conduct has affected you physically. For example, think of

- ongoing physical pain, discomfort, illness, scarring, disfigurement or physical limitation;
- hospitalization or surgery you have had because of the conduct of the accused;
- treatment, physiotherapy or medication you have been prescribed;
- the need for any further treatment or the expectation that you will receive further treatment; and

- any permanent or long-term disability.

Economic impact

Describe how the accused's conduct has affected you financially. For example, think of

- the value of any property that was lost or damaged and the cost of repairs or replacement;
- any financial loss due to missed time from work;
- the cost of any medical expenses, therapy or counselling; and
- any costs or losses that are not covered by insurance.

Please note that this is not an application for compensation or restitution.

Fears for security

Describe any fears you have for your security or that of your family and friends. For example, think of

- concerns with respect to contact with the accused; and
- concerns with respect to contact between the accused and members of your family or close friends.

Drawing, poem or letter

You may use this space to draw a picture or write a poem or letter if it will help you express the impact that the accused's conduct has had on you.

[] I would like to read or present my statement (in court or before the Review Board).

To the best of my knowledge, the information contained in this statement is true.

Dated this day of 20 , at .

Signature of declarant

2015, c. 13, s. 36.

FORM 49

WARRANT OF COMMITTAL
DISPOSITION OF DETENTION
(Section 672.57)
Canada,
Province Of
(Territorial division)

To the peace officers, in the said (*territorial division*) and to the keeper (*administrator, warden*) of the (*prison, hospital or other appropriate place where the accused is detained*).

This warrant is issued for the committal of A.B., of ....(occupation), hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged*);

And whereas the accused was found*

[] unfit to stand trial

[] not criminally responsible on account of mental disorder

This is, therefore, to command you, in Her Majesty's name, to take the accused in custody and convey the accused safely to the (*prison, hospital or other appropriate place*) at .... and there deliver the accused to the keeper (*administrator, warden*) with the following precept:

I therefore command you the said keeper (*administrator, warden*) to receive the accused in your custody in the said (*prison, hospital or other appropriate place*) and to keep the accused safely there until the accused is delivered by due course of law.

The following are the conditions to which the accused shall be subject while in your (prison, hospital or other appropriate place):

The following are the powers regarding the restrictions (and the limits and conditions on these restrictions) on the liberty of the accused that are hereby delegated to you the said keeper (*administrator, warden*) of the said (*prison, hospital or other appropriate place*):

Dated this .... day of ....A.D.
................, at ....

....
(Signature of judge, clerk of the court, provincial court judge or chairperson of the Review Board)

*Check applicable option.

FORM 50

WARRANT OF COMMITTAL
PLACEMENT DECISION
(Section 672.7(2))

Canada,
Province Of
(territorial division)

To the peace officers, in the said (*territorial division*) and to the keeper (*administrator, warden*) of the (*prison, hospital or other appropriate place where the accused is detained*).

This warrant is issued for the committal of A.B., of ....(*occupation)*, hereinafter called the accused.

Whereas the accused has been charged that (set out briefly the offence in respect of which the accused was charged);

And whereas the accused was found*

[] unfit to stand trial
[] not criminally responsible on account of mental disorder

And whereas the Review Board has held a hearing and decided that the accused shall be detained in custody;

And whereas the accused is required to be detained in custody pursuant to a warrant of committal issued by (*set out name of the Judge, Clerk of the Court, Provincial Court Judge or Justice as well as the name of the court and territorial division*), dated the .... day of ....in respect of the offence that (*set out briefly the offence in respect of which the accused was charged or convicted*);

This is, therefore to command you, in Her Majesty's name, to*

[] execute the warrant of committal issued by the court, according to its terms
[] execute the warrant of committal issued herewith by the Review Board

Dated this .... day of ....................................A.D.
.................., at ....

....
(Signature of chairperson of the Review Board)

*Check the applicable option.

(*Signature of judge, clerk of the court, provincial court judge or chairperson of the Review Board*)

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