

**A COMPARATIVE ANALYSIS OF MENTAL ILLNESS AS A DEFENCE IN
CRIMINAL LAW**

by

SIZAKELE ELIAS SITOLE

submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM

In Criminal Justice

in the

Faculty of Law

at the

Nelson Mandela Metropolitan University

January 2007

PORT ELIZABETH

SUPERVISOR : Prof S. Hoor

TABLE OF CONTENTS

	Page
Acknowledgements	(i)
Declaration	(ii)
Summary	(iii)

Chapter 1: Introduction

1.1	Introduction	1
1.2	Aim of the study	1
1.3	Research Method	1
1.4	Historical Background	3
1.4.1	Definitions	4
1.4.2	Assumptions	4
1.4.3	Limitations	5
1.4.4	Development of the study	6

Chapter 2: English Law

2.1	Introduction	7
2.2	Presumption of sanity	7
2.3	Disease of the mind	7
2.4	Defect of reason	8
2.5	Insanity prior to trial	9
2.6	Unfitness to plead	10
2.7	Burden of proof	11
2.8	Human Rights Act 1998	12
2.9	Diminished Responsibility	15
2.10	Impact of the 1991 Act	17
2.11	Conclusion	17

Chapter 3: United States of America Law

3.1	Introduction	20
3.2	Short history of the insanity defence	20
3.3	Mental disease or defect as a disability	21
3.4	Incapacity to stand trial	21
3.5	Insanity law in California	21
3.6	Insanity law in Nevada	22
3.7	The rules of appreciation	22
3.8	Forcible drugging before trial	30
3.9	The myths about the insanity defence	31
3.10	Diminished capacity	36
3.11	Conclusion	37

Chapter 4: South Africa Law

4.1	Introduction	39
4.2	Defining mental illness	39
4.3	Fitness to stand trial	40
4.4	Provisions of Sec 77 of the Act	41
4.5	Provisions of Sec 78 of the Act	45
4.6	Psychiatric Investigation	47
4.7	Burden of proof	48
4.8	Diminished responsibility	53
4.9	Provisions of Sec 79 of the Act	54
4.10	Conclusion	58

Chapter 5: Conclusion

5.1	Introduction	60
5.2	Findings and Recommendations and Comparison	60

ACKNOWLEDGEMENTS

I wish to express my sincere thanks to all the people who have helped me in making this dissertation a success. My indebtedness and gratitude is especially dedicated to the following people:

My supervisor, Prof S. Hoor for his supportive and motivating guidance. His continuous supervision and constructive criticism helped me to realize that learning is a continuous effort: no one can learn and increase one's knowledge without hard work;

To SANDF, Chief Military Legal Services, for financial support ;

To my family, for the support they have constantly given me in my life especially my late grandmother Miss Nozimanga Maggie Sithole ;

To my wife, Lilitha who motivated me continuously to carry on when I was on the verge of giving up.

I hope my work will serve as an inspiration to my children, Zimkitha, Kuhle, Siyamthanda and Samora

DECLARATION

I, Sizakele Elias Sitole, declare that a Comparative Analysis of Mental illness as a Defence in Criminal law is my own work, that all sources used or quoted have been indicated and acknowledged by means of complete references, and that this dissertation was not previously submitted by me for a degree at another university

.....

SIZAKELE ELIAS SITOLE

SUMMARY

This dissertation deals with the comparative analysis of mental illness as a defence in criminal law.

The mental illness / insanity defence is deemed applicable when the accused does not have mens rea or lacks criminal responsibility or is afflicted by the inability to appreciate the wrongfulness of his act and act accordingly, at the time of the commission of the offence due to a pathological disturbance of the mental faculties.

A review of the law in South Africa, English Law and United States of America law was done with regard to their approach in connection with the matter.

The legal systems of South Africa, English Law and the United States of America were compared and analyzed because English Law and United States of America are developed countries and I decided to compare their approach to insanity defence with reference to South Africa, which is a developing country.

Similarities were drawn between South Africa and English Law and this could be attributed to the fact that South African law emanated from English law.

This is an important research topic on comparative analysis of mental illness as a defence in criminal law.

The law applicable today in South Africa in respect of the defence of mental illness is combined in the provisions of the Criminal Procedure Act 51 of 1977, which replaced the criteria as set out in the M’Naghten rules and the irresistible impulse test.

In all the three countries law that were compared the burden of proof has always been on the accused to prove his case on a balance of probabilities but in South Africa the position now is he who alleges must prove because of the legislative amendments.

United States of America law allows for the forcible medication with drugs of the mentally ill defendants who are charged with crimes so that they can be fit to stand trial.

This is the only country in the ones that were analyzed, which practices such a barbaric

and inhuman acts.

iii.

In the USA , the defendant has the burden of proving the defence of insanity by clear and convincing evidence, and the finding in not guilty by reason of insanity, English law, South African law has the same finding in insanity cases.

The most common diagnosis used in support of a defence of insanity continues to be schizophrenia in South Africa and in English law system.

In the English law system, the Home Secretary has the power to order defendant to be detained in a hospital on the basis of reports from at least two medical practitioners that the defendant is suffering from mental illness, if the minister is of the opinion that it is in the public interest to do so.

In South Africa, the accused will be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers.

The detention of those found not guilty by reason of insanity could be challenged under the Human Rights Act in English law because the legal definition of insanity is far wider than the medical concept of mental disorder.

The Drs under English Law have to use the legal, not the medical understanding of the mental disorder.

The placing of a burden of proof on the defendant may be challengeable under European Convention of Human Rights as contrary to the presumption of innocence that is protected under convention.

Finally this is a controversial subject on mental illness but the position in South Africa has been clear for a long time, and I did not come across any deficiencies in our law. I submit that South African law position on mental illness is good.

Table of Legislation

English Law

Criminal Procedure (Insanity) Act of 1964.
Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991.
Homicide Act of 1957.
Mental Health Act of 1983.
Trial of Lunatics Act of 1883.

European Law

European Convention on Human Rights Act of 1998.

United States of America

Alaska Statutes (supp 1987).
ALI Model Penal code (MPC) of 1962.
California Penal Code (supp 1987).
Insanity Defence Reform Act of 1984.
Nevada Constitution 1995 Amendments (NRS 174.035).

South Africa

Constitution of the RSA Act 108 of 1996.
Criminal Procedure Act 51 of 1977 (as amended).
Criminal Law Amendment Act 105 of 1997.
Judicial Matters Amendment Act 55 of 2002.
Mental Health Act 18 of 1973.
Mental Health Act 17 of 2002.
Legal Aid Amendment Act 20 of 1996.

Table of Cases

English Law

M’Naghten 1843 10 Clark & Fin 200 (HL).
AG of Northern Ireland v Bratty 1963 AC 385 (HL).

R v Sullivan 1984 AC 156 (HL).
R v Kemp 1957 (1) QB 399 at 406 (CCA).
R v Dickie 1984 (3) 173 All ER(CCA).
R v Grant 2002 QB 1030 EWCA Crim 2611.
R v Antonie 2001 (1) AC 340(HL).

v.

R v Egan (Michael) 1998 1 CR APP 121(HL).
R v H 2003 HRLH 19 (HL).
R v Carr-Briant 1943 KB 607 (CCA).
Attorney- General's Reference no.3 of 1998 ,1999 (3) All ER 40(CCA).
R v Vinagre 1979 69 CR.App.R104 (CCA).
R v Byrne 1960 (2) QB 396 (HL).
R v Ali, R v Jordan 2001 (1) All ER 1014(CCA).

European Case Law

Winterwerp v Netherlands (2) EHRR 387 (1979).

United States of America

US v Brawner 471 F 2d 969 (1972).
Drope v Missouri 420 U.S 162, 171 (1975).
Dusky v US 362 US 402 (1960).
People v Wells 33 Cal. 2d 330 (1949).
People v Bobo 221 Cal. 1432 (1990).
People v Conley Cal. 2d 310 (1966).
People v Wolf, 61 Cal 2d 795.
People v Sturges, 178 Cal. App.2d 435.
Andrea Yates trial (Slobogin, American Journal of Criminal law (2003)315.
Finger v State (Supreme Court of Nevada 117. Nev.548.27.p.3d.66 (2001).
Parsons v State 81 Ala.577.2 SO 854 (1887).
State v White (Supreme Court of Idaho) 1969, 93 Idaho 153,456,p.2d, 727.
Jackson v Indiana (Supreme Court of the US) 1972, 406,SU 715,92 SCT 1845,32.
Sell v US 123 SCT 2174 (2003).
Washington v Harper 494 US 210 (1990).
Riggins v Nevada 504 US 127,1992.
People v Skinner 39 Cal 3d 765, 217 Cal PPTR 685.
US v Hinckley 33 US DC 356 (1989).
US v Lyons 1984 731 F 2 D 243.
Jones v US 463 us 354 (1983).
Foucha v Louisiana 112 SCT 1780 (1992).
Sinclair v State 132 SO 581 (1931).
State v Lange 123 SO 639 (1929).

Re Christian 7 Cal 14th 768 (1994).
Leland v Oregon 343 US 790-798 US (1952).

vi.

South Africa

Queen v Hay 1899 16 SC 290.
S v Stellmacher 1983 (2) SA 181 SWA 187.
S v Kavin 1978 (2) SA 731 (W).
S v April 1985 SA 639 (NC).
S v Van As 1989 (3) 881 (W).
S v Van Graan 2002 JDR 0815 (C).
S v Sindane 2002 JDR 0584 (T).
S v Mahlinza 1967 (1) SA 408 (A).
S v Tsafendas (unreported) discussed at pg 291 Strauss article vol 29-30 1996-1997.
S v Mc Bride 1979 (2) SA 313 (W).
S v Gouws 2001 (1) SACR 192.
S v Malcolm 1998 JDR 0148 (E).
S v Matjhesa 1981 (3) SA 854 (O).
S v De Beer 1995 (1) SACR 128 (SE).
S v Sindane and another 1992 (2) SACR 223 (A).
S v Martin 1996 (2) SACR 378 (W).
S v Mphela 1994 (1) SACR 488 (A).
S v Kok 2001 (2) SACR 117.
S v Sithole 2005 (1) SACR 311 (W).
S v Volkman 2005(2) SACR 402.

CHAPTER ONE

1.1 Introduction

In this treatise I will engage in a comparative analysis of mental illness as a defence excluding criminal capacity in criminal law.

Chapter one is an introductory chapter which explains the concepts of insanity and criminal capacity and sets out a brief history of the South African position prior to 1977. According to Burchell, a mental disease or defect may deprive persons of the capacity to appreciate the wrongfulness of their conduct i.e. cognitive capacity. Alternatively it may deprive them of the capacity to control their conduct i.e. conative capacity. A person who suffers from a mental condition that has such an effect is said to be insane.¹ In South African criminal law mens rea or guilt on the part of the perpetrator is usually a requirement for criminal responsibility. Mens rea here means a blameworthy state of mind with which the perpetrator acts. It is clear that if a person perpetrates an act without a blameworthy state of mind, he should not be held criminally responsible for the act.²

1.2 Aim of the study

This study was undertaken to make a comparative analysis of mental illness as a defence in criminal law;

To highlight the plight which is often faced by mentally ill people when they have committed offences;

¹ Burchell, *Principles of Criminal Law* (2005) 370.

² Snyman, *Criminal Law* (2002) 169-175.

To give an exposition of a more theoretical approach to the problem and the way our courts have dealt with the defence of mental illness.

1.3 **Research Method**

I will start by first giving a historical background to mental illness or insanity. I will next review the relevant sources of law with reference to textbooks, articles and decided cases. This will be limited to comparative analysis of mental illness as a defence excluding capacity in criminal law.

1.4 **Historical background**

As a starting point, insanity in some form was an excuse in most ancient systems of law, Ancient Mohammedan law applied punishment only to individuals who had attained majority and who were in full possession of their faculties.³

In ancient Hebraic law, it was recognized that idiots were not responsible for their actions.

A similar approach was adopted during the latter period of Roman Empire.⁴

In the 13th century, Bracton defined an insane person as one who lacks sense and reason and

in the 17th century, Lord Coke stipulated that to be insane the accused must not have known what he was doing and lack the ability of mind and reason.⁵

A century later Lord Hale demanded an absence of understanding and will, at the same time, Justice Tracy equated the insane with wild beasts and required a total deprivation of ...understanding and memory for an acquittal on mental disorder grounds.⁶

The early 1800's saw the advent of the right- wrong test that eventually developed into the M'Naghten test ; under this test winning an insanity claim was very difficult.⁷

³ Gorr et al, Controversies in Criminal Law (1992)127.

⁴ Gorr et al, supra (n 3)127.

⁵ Slobogin, "The Integrationist Alternative to the Insanity Defence"American Journal of Criminal Law (2003) 315.

⁶ Slobogin, supra (n 5) 315.

⁷ Slobogin, supra (n 5) 315.

The South African law in respect of insane offenders developed from two systems i.e. Roman and Roman-Dutch law on the one hand and English law on the other.

The excusing nature of mental illness was recognized in Roman law where mentally ill persons were categorized together with young children as *doli incapax* (lacking criminal capacity) and thus not liable to punishment.⁸

The Roman-Dutch authorities held that mentally ill persons should not be punished, but they were imprisoned for their own safety and that of the community in general.⁹

In English law, mentally ill offenders were convicted but granted an automatic pardon and later it was held that person who was 'insane' should be held not responsible but detained in asylums.¹⁰

Since the old authorities are derived from times when there was as yet no proper scientific approach to criminal law and when medical knowledge was very limited, they provided little assistance in determining the limits of excusability. As a result, our courts have leaned heavily upon the English law in this regard.¹¹

In **Queen v Hay**,¹² Chief Justice De Villiers (as he was then) stated that the difference between English Law and Roman-Dutch Law was that in the latter it was held that no criminal offence could be committed where the offence was committed by an insane person, but the question whether insanity did or did not exist was treated as a question of fact and not of law.

In contrast, under the English law insanity was a good defence to criminal prosecution, but the test as to the existence of insanity has been treated rather as a question of law than of fact.

Thus, the difference in the approaches is that in the Roman-Dutch authorities the existence of insanity was treated as a question of fact whilst in English law it was treated as a question of law.

⁸ Burchell and Milton, Principles of Criminal Law (1991) 204.

⁹ Burchell and Milton, *supra* (n 8)204.

¹⁰ Burchell and Milton, *supra* (n 8)204.

¹¹ Burchell and Hunt, South African Criminal Law and Procedure Vol 1: General Principles (1970) 196.

¹² 1899 16 SC 290.

The criteria for determining insanity were essentially whether the accused was able to distinguish between ‘good’ and ‘evil’ or ‘right’ and ‘wrong’.¹³

The classic formulation of the test was set out in the so-called M’Naghten rules which originated in English law.

The M’Naghten rules were based upon the belief that persons were insane if they suffered from ‘delusion’ and thus, applying the paradigm of mistake, excused person who, as a result of mental illness, were unable to understand the nature of their actions. The rules did not allow for the case of an accused who understood the nature of his act but proceeded to do what he did under the compulsion of his mental illness.¹⁴

The M’Naghten rules were taken over in South Africa, but extended beyond the capacity to distinguish right from wrong to include a test based upon whether the mentally ill person had acted under an irresistible and uncontrollable impulse to commit the crime, even though she possessed the capacity to understand the nature of the act and appreciate its wrongfulness (the so-called irresistible impulse test).¹⁵

Subsequently, the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (the Rumpff Commission, which was named after its chairman Mr Justice F.L.H Rumpff) concluded that the law should be changed so as to provide that an accused who in respect of an alleged crime was not capable on account of mental disease or mental defect of appreciating the wrongfulness of his act, or of acting in accordance with such appreciation, shall not be responsible.¹⁶

As a result of this recommendation, a statutory formulation of the rules for determining the criminal responsibility of the mentally ill was included in the Act.¹⁷

In writing this treatise, I will refer to relevant definitions, assumptions and limitations as they are listed below:

¹³ Burchell and Milton, supra (n 8)204.

3.

¹⁴ Burchell and Milton, supra (n 8)205.

¹⁵ Burchell and Milton, supra (n 8)205.

¹⁶ Burchell and Milton, supra (n 8)205.

¹⁷ Criminal Procedure Act 51 of 1977 (as amended sec 77,78,79) as discussed in Chapter 4.

4.

1.4.1 Definitions:

Mental illness – the term refers to a pathological disturbance of mental faculties and not to a temporary clouding of the mental faculties which cannot be ascribed to a mental disease but merely to external stimuli such as alcohol, drugs or even provocation.¹⁸

Mens Rea – guilt on the part of the perpetrator, the blameworthy state of mind with which the perpetrator acts. Mens rea presupposes the presence of mental faculties which enable the person not to have willed his crime. The law takes the view that a person who is not responsible owing to some morbid mental disorder or defective mental development is not punishable.¹⁹

Delusion – is a false belief or a belief that the patient has which is not shared by others of his culture or religion. If a person under the influence of his delusion supposes another man to be in the act of attempting to take away his life and he kills that man, as he supposes, in self defence, he would be exempt from punishment.²⁰

Criminal Responsibility – refers only to the mental ability which the accused must have in order to be liable for the crime.²¹

1.4.2 Presumptions

There is a legal presumption that states that “every person is presumed to be sane, and therefore the onus of proving mental illness rests on the accused”.²²

1.4.3 Limitations

¹⁸ Snyman, supra (n 2) 169.

¹⁹ Visser and Vorster, General Principles of Criminal Law Through the Cases (1982) 214.

²⁰ Strauss, “The person with schizophrenia and criminal justice: Some aspects” Comparative and International Law Journal of Southern Africa (1996) 289.

²¹ Snyman, supra (n 2) 170.

²² Milton, “Law Commission Project 89: Declaration and detention of state patients” South African Journal of Criminal Justice (1998) 230 (as discussed in Chapter 2).

I will limit my research to the comparative analysis of mental illness as a defence in criminal law and the position in South Africa, England and the United States of America will be compared and analyzed. Hence, I will select cases and restrict them to that particular instance. I will not be discussing mental illness as a defence excluding voluntariness or as a defence excluding fault only as a defence excluding criminal capacity.

1.4.4 Development of the study

This is an introductory chapter (chapter one) and the next chapters will deal with the following topics:

Chapter two deals with the English law position with reference to decided cases,
Chapter three deals with the United States of America with reference to decided cases,
Chapter four deals with the South African Law position with reference to decided cases,
Chapter five deals with conclusions and comparisons

CHAPTER TWO

2.1 Introduction

In this chapter the position in English law will be reviewed with reference to decided cases.

According to Ashworth, one of the fundamental presumptions of criminal law and criminal liability is that the defendant is normal i.e. is able to function within the normal range of mental and physical capabilities. Moreover, a person who is mentally disordered may fall below the assumed standards of mental capacity and rationality and this may make it unfair to hold him responsible for his behaviour.²³

The point in contention at many trials is whether an accused acted as he did because he was suffering from a mental disorder. Insanity may also be an issue at the beginning of the trial, in that the accused seeks to establish that he is unfit to plead to the charge.²⁴

The defence of insanity is still governed by the M’Naghten rules which today operate largely as a restriction on what might otherwise be a complete defence based on the lack of mens rea, only where the accused falls under that limb of the rules which requires him not to know that his act is ‘wrong’ do the rules provide any defence additional to that which would be available.²⁵

2.2 The origin of the presumption of sanity (the 1st M’Naghten rule)

M’Naghten,²⁶ is the leading English case that gave rise to the famous M’Naghten rules. Daniel M’Naghten shot and killed Prime Minister Sir Robert Peel’s secretary Drummond.

At the time he was suffering from persecutory delusions as well as hallucinations. The word schizophrenia had not been invented during that time. According to a modern expert view M’Naghten was under the influence of a form of mental disorder

²³ Ashworth, *Principles of Criminal Law* (1991) 180.

²⁴ Bloy and Parry, *Criminal Law* (1996) 183.

²⁵ Murphy, *Blackstone’s Criminal Practice* (2000) 44.

²⁶ 1843 10 Clark and Fin 200 (HL).

symptomized by delusions of persecution in which Peel appeared as one of the persecutors.²⁷

In order to establish a defence of insanity it must be proved that, “the accused was labouring under a defect of reason, from a disease of the mind, as not to know what he was doing was wrong.”

The M’Naghten rules were laid down by the judges in their advice to the House of Lords in this case. Their advice was sought in consequence of the acquittal of M’Naghten, who was found to be insane.

The rules can be summarized as follows;

- (i) “There is a rebuttable presumption that everyone is sane;
- (ii) Proof of insanity requires proof of a defect of reason;
- (iii) The defect of reason must emanate from a disease of the mind;
- (iv) It must be proved that the defect of reason either caused the defendant to be unaware of the nature and quality of his act or caused the defendant not to know that his act was wrong.²⁸
- (v) Finally, when the insanity defence is raised by the accused, the onus of proof is on him and he may rebut the presumption of sanity by adducing evidence, which satisfies the jury on the balance of probabilities that he was insane within the terms of the M’Naghten rules when he committed the alleged offence”.²⁹

2.3 Disease of the mind

The starting point is that the phrase “disease of the mind” is to be given its normal meaning; it is not a medical term, it must be shown that the defendant was suffering from a disease, which affected the functioning of the mind.³⁰ Lord Denning in **Bratty**,³¹ suggested that a disease of the mind was a mental disorder which manifested itself in violence and was prone to reoccur. This was however rejected in **Sullivan**,³² that there was vast evidence to suggest that a ‘disease of the mind’ need not be prone to recur nor manifest itself in violence.

Furthermore, a disease of the mind need not be a disease of the brain. Arteriosclerosis, brain tumor, epilepsy, diabetes, sleepwalking, pre-menstrual syndrome and all other

²⁷ Strauss, supra (n 20)291.

²⁸ Simester et al, Criminal Law Theory and Doctrine, 2nd Ed(2004) 575.

²⁹ Card et al, Cases and Statutes on Criminal Law(1977) 75.

³⁰ Herring , Criminal Law Text, Cases &Materials (2004)651.

³¹ 1963 AC 385 (HL).

³² 1984 AC 156 (HL).

physical diseases may amount in law to a disease if they produce the relevant malfunction of the mind.³³

Ormerod contends that a disease of the mind may have an organic cause or it may simply involve a functional disturbance and organic causes may include diseases of the brain, brain damage due to external agency like boxing or liquor etc.³⁴

In **R v Kemp**,³⁵ the defendant made an entirely motiveless and irrational attack on his wife with a hammer. He was charged with grievous bodily harm with intent to murder her. It transpired at the time that he suffered from arteriosclerosis, which caused a congestion of blood in his brain.

In this case Devlin J held the defendant was suffering from a disease of the mind and asserted that; “The law is not concerned with the brain but with the mind, in the sense that mind is ordinarily used, the mental faculties of reason, memory and understanding. If one reads for “disease of the mind”, ‘disease of the brain’, it would follow that in many cases pleas of insanity would not be established because it could not be proved that the brain had been affected in any way, either by degeneration of the cells or in any other way.”³⁶

In his judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent.³⁷

In **Sullivan**,³⁸ the defence to a charge of assault occasioning actual bodily harm was that the defendant attacked the plaintiff while recovering from a minor epileptic seizure and did not know what he was doing. The House of Lords held that the judge had rightly ruled that this raised the defence of insanity.

Lord Diplock stated, obiter that a disease of the mind might not cover ‘temporary impairments (of mental faculties resulting from an external factor such as a blow to the head...or the therapeutic) administration of an anaesthetic.’³⁹

³³ Ormerod, Smith and Hogan Criminal Law (2005) 258.

³⁴ Ormerod, *supra* (n 33) 258.

³⁵ 1957 1 QB 399(CCA).

³⁶ *supra* at (n 35) 400 and cited by Smith, Smith and Hogan Criminal Law (1999) 198.

³⁷ Smith, *supra* (36) 198.

³⁸ *supra* (n 32) 156.

³⁹ *supra* (n 32) 157.

He agreed with Devlin J, in that the M’Naghten rules are used in the ordinary sense of the mental faculties of reason, memory and understanding.⁴⁰

If the effect of disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matter not whether the aetiology of the impairment is organic, as in epilepsy or functional, or whether the impairment itself is permanent or is transient or intermittent.⁴¹

2.4 Defect of Reason

The disease of the mind must give rise to a defect of reason and the defendant’s power of reasoning must be impaired.⁴²

It is not enough to show the power of reasoning was available but not used e.g. he did not know the nature and quality of the act he committed or he did not know that he did a wrong thing. A distinction is to be made between a defect of reason and everyday absent-mindedness.⁴³

2.5 Insanity prior to trial

This may occur where insanity is a factor prior to the trial and result in removal to a mental hospital by order of Home Secretary .

According to the provisions of the Mental Health Act of 1983, the Home Secretary, if satisfied on the basis of reports from at least two medical practitioners that the defendant is suffering from mental illness or severe mental impairment, may order that the defendant be detained in hospital if the minister is of the opinion that it is in the public interest to do so.⁴⁴ In practice this is reserved for cases of profound derangement or disability, situations where it is obvious that any trial would serve no useful purpose

⁴⁰ supra (n 32)157.

⁴¹ supra (n 32)158.

⁴² Herring , supra (n 30)251.

⁴³ Herring ,supra (n 30)251.

⁴⁴ According to sec 4 of the Criminal Procedure (Insanity)Act (CP) (1) A 1964 as substituted by sec 2 of the Criminal Procedure (Insanity) and Unfitness to Plead Act (CP) IUP (A) 1991.

given the current condition of the defendant. Should the defendant make a sufficient recovery, the practice is for the defendant then to be brought to trial.⁴⁵

2.6 Unfitness to plead

Under sections 4 and 4 A of the Criminal Procedure (Insanity) Act (as amended by the Criminal Procedure (Insanity) and Unfitness to Plead) Act of 1991, a finding may be made on the initiative of the defence, prosecution or judge, that the defendant is unfit to plead.

The majority of those found unfit to plead are not sent to hospital but receive community disposals, particularly supervision and treatment orders etc.

In **R v Dickie**,⁴⁶ it was held that in certain exceptional circumstances a judge can of his own volition raise an issue of insanity and leave the issue to the jury to decide if there is relevant evidence which goes to all the factors involved in the M'Naghten rules.

However before the judge leaves the issue of insanity to the jury he should give counsel for the defence and for the prosecution the opportunity to call such evidence as they deem necessary, having regard to his expressed intention to deal with the issue, even if that involves an adjournment of the case so that such evidence can be raised.

There is no precedent for the right of the prosecution to raise the issue of insanity.⁴⁷

In practice the matter will be dealt with on arraignment before the trial begins and a plea is entered. If the jury returns a finding at this stage that the defendant is fit to stand trial, a new jury is empanelled for the trial itself.

Should the defendant be found unfit to plead he will be at the disposal of the court and may suffer a significant loss of liberty because until 1991, a person found unfit to plead was held at the disposal of the Home Secretary and there were cases where persons detained for a very considerable period of time despite considerable doubt as to the basis of the allegations made against them.⁴⁸

⁴⁵ Simester et al, supra (n 28)573.

⁴⁶ 1984 (3) 173 All ER (CCA).

⁴⁷ Leigh et al, "Insanity" International Encyclopedia of Laws, Vol 5, (1993) 74.

⁴⁸ Simester et al, supra (n 28)573.

A significant reform introduced by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 provides that the jury shall decide on such evidence already given (if any) and such evidence introduced by the prosecution or defence whether the defendant did the act or made the omission charged against him as the offence.⁴⁹

It is submitted by Simester et al, that the insanity plea is not widely used and if the insanity plea proves successful a special verdict is returned and the accused is found not guilty by reason of insanity.⁵⁰

The court possesses the following powers consequent to that finding:

- (i) “To order that the accused be admitted to hospital or;
- (ii) To make a guardianship order within the meaning of the Mental Health Act of 1983 or;
- (iii) To make a supervision and treatment order within the meaning of the Mental Health Act of 1983 or;
- (iv) To make a supervision and treatment order within the meaning of schedule 2 to the Criminal Procedure (IUP) Act 1991 or;
- (v) To order absolute discharge”.⁵¹

In the case of **R v Grant**,⁵² the police were called to the defendant’s flat, where her boyfriend had received a stab wound from which he died later that evening.

The defendant said that he had been stabbed by intruders but she later admitted that she had stabbed him after losing her temper during a quarrel, she was charged with murder. A jury found her to be under a disability so as to be unfit to be tried under sec 4 of the Criminal Procedure (Insanity) Act of 1964.

The judge made an order that she be admitted to a hospital, together with a direction equivalent in effect to a restriction order under section 41 of the Mental Health Act of 1983 without limitation of time.

In the case of **Regina v Antonie**,⁵³ the defendant was charged with murder and manslaughter. At the trial he was found by the jury, under section 4 (5) of the Criminal

⁴⁹ Simester et al, supra (n 28)573.

⁵⁰ Simester et al, supra (n 28)573.

⁵¹ Sec 2 of the Criminal Procedure (Unfitness to Plead)Act of 1991.

⁵² 2002 QB 1030 EWCA Crim 2611.

⁵³ 2001 (1) AC 340(HL).

Procedure (Insanity) Act 1964, as substituted, to be under a disability so as not to be fit to stand trial.

The judge held on appeal that that once a jury had determined, pursuant to section 4 (5) of the 1964 Act, that the accused was under a disability he was no longer liable to be convicted of murder.

In the case of **R v Egan (Michael)**,⁵⁴ the defendant had been charged with theft and a jury had found that he was unfit to plead.

In **R v H**,⁵⁵ the appellant was charged with two offences of indecent assault committed against a girl aged 14. A jury was convened to decide whether he was fit to stand trial. Though it was decided that he was unfit, at a further hearing a different trial found that he had committed the acts alleged.

2.7 Burden of proof

The presumption of sanity requires the defendant to prove her defence of insanity.⁵⁶ Proof is discharged on a balance of probabilities and not beyond any reasonable doubt.⁵⁷

In the case of **Attorney- General's Reference**,⁵⁸ the defendant forced his way into a house at night while armed with a snooker cue and assaulted the occupier.

At the time he was suffering from delusions and believed that he was in danger from the evil people who were trying to harm him. He was charged with aggravated burglary. It was agreed that at the time when the offences were committed he was legally insane.

The judge ruled that, in determining for the purpose of sec 2 (1) of the Trial of Lunatics Act 1883, whether the defendant “did the act or made the omission charged,” the Crown had the burden of proving all the relevant elements of the offence including mens rea.

Since psychiatric evidence showed that at the time of the offences the defendant had been unable to form a criminal intent the judge directed the jury to acquit him.

⁵⁴ 1998 (1) CR APP 121(HL).

⁵⁵ 2003 HRLH 19 (HL).

⁵⁶ Herring, *supra* (n 30)651.

⁵⁷ **R v Carr-Briant** 1943 KB 607(CCA).

⁵⁸ 1999 (3) All ER 40 (CCA).

2.8 The Human Rights Act 1998 and the definition of insanity

According to Article 5 of the European Convention on Human Rights:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedures prescribed by law...

The lawful detention... of persons of unsound mind⁵⁹...

The European Court of Human Rights in **Winterwerp v Netherlands**⁶⁰

explained that; in the court's opinion, 'except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of unsound mind'.

The very nature of what has to be established before the competent national authority that is, a true mental disorder, calls for objective medical expertise.⁶¹

Further, the mental disorder must be of a kind or degree warranting compulsory confinement.⁶²

What is more, the validity of the continued confinement depends upon the persistence of such a disorder.⁶³

In the light of this decision on Article 5 the present law on the detention of those found not guilty by reason of insanity could be challenged under the Human Rights Act.⁶⁴

The following arguments could be made:

- (i) The legal definition of insanity is far wider than the medical concept of mental disorder.⁶⁵
- (ii) The Winterwerp requirement that there be 'objective medical expertise' could be used to challenge the English law on the basis that the doctors under English law have to use the legal, not medical, understanding of the mental disorder.⁶⁶
- (iii) A defendant is presumed sane unless the contrary is proved, the burden of proving the defence falls on the defendant on the balance of probabilities. This is a departure from the normal rules governing defences, where the prosecution must disprove any defence raised by the defendant. The placing of a burden of proof on the defendant may be challengeable

⁵⁹ Herring, supra (n 30) 647.

⁶⁰ 2 EHRR 387 (1979).

⁶¹ supra (n 60) 387.

⁶² supra (n 60) 388.

⁶³ Herring, supra (n 30) 653.

⁶⁴ Herring, supra (n 30) 653.

⁶⁵ Herring, supra (n 30) 653.

⁶⁶ Herring, supra (n 30) 653.

as contrary to the presumption of innocence that is protected under Article 6(2) of the European Convention of Human Rights.⁶⁷

2.9 Diminished Responsibility

This defence is also available in English Law and it is submitted by Hogget that this defence was introduced to mitigate the mandatory sentences of death or life imprisonment for murder.⁶⁸

It is accepted that the judge may agree to the plea without trial where the evidence is not challenged.⁶⁹

The accused must be suffering from such abnormality (whether arising from a condition or arrested or retarded development of mind or any inherent cause or induced by disease), which has substantially impaired his mental responsibility for his acts or omission in doing or being a party to the killing.⁷⁰

According to the case of **R v Byrne**,⁷¹ abnormality of the mind has been widely construed as a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal.

If the defendant wishes to raise a defence of diminished responsibility the burden of proof is on him on a balance of probabilities.⁷²

In practice, if the defendant pleads guilty to manslaughter on the ground of diminished responsibility the prosecution will often accept such a plea and not seek to disprove it.

In **R v Ali**, **R v Jordan**,⁷³ these appeals concerned the defence of diminished responsibility provided by sec 2 of the Homicide Act 1957, and in particular the requirement, in sec (2) that the defendant to prove that he was suffering from the diminished responsibility which reduced the offence of murder to that of manslaughter.

Sec 2 of the 1957 Act provides that:

⁶⁷ Herring, *supra* (n 30)653.

⁶⁸ Hogget, *Mental Health Law* (1996)114.

⁶⁹ *R v Vinagre* 1979 69 CR. APP R. 104 (CCA).

⁷⁰ Sec 2 (1) of the Homicide Act of 1957.

⁷¹ 1960 2 QB 396.

⁷² Herring, *supra* (n 30)254.

⁷³ 2001 (1) All ER 1014-1018.

- (1) “Where a party kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
- (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
- (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it”.⁷⁴

Since 1957 under sec 2 it has been established that the defendant is required to prove that he is suffering from diminished responsibility in accordance with sec 2 (1) and that the standard of proof is on the balance of probabilities.

The appellants relied on the right to a fair hearing conferred by Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; on the presumption of innocence conferred by Article 6 (2) on those charged with a criminal offence; and on the requirement in sec 3 of the 1998 Act that a statutory provision had to be read and given effect in a way that was compatible with the convention rights.

The court held that in determining whether a statutory provision in criminal proceedings which placed the burden of proof on the defendant was compatible with article 6 of the convention, the court could legitimately take into account the problem that the legislation was designed to address, with a fair balance being struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual.

It was held that sec 2 of the 1957 Act did not contravene Article 6 of the Convention. The alternative provided by sec 2 was not an ingredient of the offence of murder, either in form or substance.

⁷⁴ Sec 2 of the Homicide Act of 1957.

If the defendant did not seek to rely on it, he would not be required to prove anything. In these two appeals, the jury rejected the contention of the defence that they should be found not guilty of murder but guilty of manslaughter by reason of diminished responsibility under sec 2 (2) of the Homicide Act of 1957.

The issue has to be determined by the jury, which may disagree with the medical evidence.

I concur with the above submissions but my only point of concern is with regard to the jury having a right to disagree with the medical evidence. In this regard, I submit this part of the provision is unsound.

2.10 The impact of the Act 1991 on the defence of insanity

It seems that this statute which came into operation on January 1, 1992, resulted from major dissatisfaction with the way in which those found unfit to plead not guilty by reason of insanity were dealt with under the Criminal Procedure (Insanity Act of 1964). Although the 1991 Act did not change the legal test for insanity, which remains governed by the M’Naghten rules, it did introduce much-needed flexibility of the disposal. This meant that in addition to the indefinite hospitalization under the 1964 Act, the court was given the discretion (except where the charge is murder) to order admission to hospital without the equivalent of restrictions, or to make a guardianship order under the Mental Health Act 1983, or a supervision and treatment order, or an order for an absolute discharge of the accused.⁷⁵

The Secretary of State no longer has a role in deciding whether or not such defendants who unfit to plead are admitted to hospital because this is a matter for the court based on the relevant medical evidence.⁷⁶

It is also stated that expert testimony is required in all insanity cases.⁷⁷

The results of the study of the unfit to plead defendants under the second 5 years of the Act seem to support the following conclusion:

⁷⁵ Mackay et al, “Yet more facts about the insanity defence” The Criminal Law Review, Vol 5 (2006) 399.

⁷⁶ Mackay et al, *supra* (n 75)410.

⁷⁷ Mackay et al, *supra* (n 75)399.

The operation of the Act from 1997 – 2001 has resulted in a continued but gradual increase in the use of the insanity defence, offences against the person once again are more prevalent and there continues to be a small number of murder cases.⁷⁸

The most common diagnosis used in support of a defence of insanity continues to be schizophrenia.⁷⁹

The majority of those found unfit to plead continue not to be sent to hospital but receive community disposals, particularly supervision and treatment orders.⁸⁰

Many reports fail to make express mention of M’Naghten but in turn impliedly refer to the rules by relying expressly or impliedly on one or both limbs.⁸¹

2.11 Conclusion

I assessed the English law position on insanity and I submit that the provisions are sound. There is no reason for the reform of their insanity law because of the following reasons:

Even though the burden of proof is on the defendant to prove his case on a balance of probabilities.

The English law responded to perceived problems and gave more guidance to the courts.

The English law although based on M’Naghten rules the reforms were made.

Since the 1991 Act the following were the advantages:

Although it did not change the legal test of insanity which remains governed by the M’Naghten rules, it introduced much needed flexibility, take for instance the court had a discretion to order admission to hospital without the equivalent of restrictions, to make a guardianship order etc.

⁷⁸ Mackay et al, supra (n 75) 399.

⁷⁹ Mackay et al, supra (n 75) 410.

⁸⁰ Mackay et al, supra (n 75) 410.

⁸¹ Mackay et al, supra (n 75) 410.

As regards the fact that the jury has a right to disagree with the medical evidence when the accused is suffering from diminished responsibility, It is submitted that this part of the provision is unsound and needs to be revisited.

CHAPTER THREE

3.1 Introduction

In this chapter the position in United States of America insanity law will be reviewed with reference to decided cases.

According to Fletcher, ‘criminal law expresses respect for the autonomy of the sane as much as it shows compassion for the insane, the line between the two may shift over time, our theories of sanity may change, but one remains, if the criminal law is an institution expressing respect as well as compassion, its institution must be able to both punish the guilty and excuse the weak’.⁸²

I concur with the above statement, the M’Naghten rules have been adopted in many countries in cases of insanity as a legal test of insanity.

In the United States of America and most of the different state jurisdictions still apply the M’Naghten rules, although some have changed their theories.

I have assessed the United States of America insanity law in all states but I put emphasis on California and Nevada as examples of different reforms that took place.

3.2 Mental Disease or defect as a disability

According to Robinson, the disability requirement of the insanity defence is a mental disease or defect, and what constitutes a mental disease or defect is a question for the jury.⁸³

The disability requirement is a legal concept, not a medical one, but the expert witnesses that they hear will no doubt influence the jury.

Many experts called to testify as to whether the defendant suffers from a mental disease or defect will rely on the classification system contained in the Diagnostic and Statistical Manual of the American Psychiatric Association (APA), now in its fourth Edition.⁸⁴

⁸² Fletcher, Rethinking Criminal Law (1978) 846.

⁸³ Robinson, Criminal Law (1997) 511.

⁸⁴ Robinson, *supra* (n 83)511.

3.3 Incapacity to stand trial: Mental disability at the time of trial

Incapacity to stand trial is a traditional common-law concept prohibiting prosecution of those who lack the capacity to understand the criminal proceedings against them and to assist in their own defence.⁸⁵

It differs from the verdict of “not guilty by reason of insanity” in that incapacity at the time of trial does not excuse criminal responsibility.⁸⁶

Instead, it recognizes that regardless of one’s mental condition at the time of the offence one should not face the criminal justice system while presently incapable of comprehending the proceedings.⁸⁷

According to **Drope v Missouri**,⁸⁸ a state’s failure adequately to protect one from trial while incompetent deprives him of his due process right to a fair trial.

Although the right is of constitutional dimension, the states are free to adopt any test that adequately protects the right.⁸⁹

Some have followed the test adopted by the United States Supreme Court for use in all federal courts.⁹⁰

In **Dusky v US**,⁹¹ the court held that it is not enough that the defendant is oriented to time and place and has some recollection of events. The test must be whether he has sufficient present ability to consult with his lawyer within a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

The individual states were not restricted in their development of their mental disability tests. The United States Constitution does not mandate the use of a particular test for

⁸⁵ Monahan et al, Mentally Disordered Offenders (1983) 247.

⁸⁶ Monahan et al, *supra* (n 85) 247.

⁸⁷ Monahan et al, *supra* (n 85) 247.

⁸⁸ 420 US 162, 171 (1975).

⁸⁹ Monahan et al, *supra* (n 85) 248.

⁹⁰ Monahan et al, *supra* (n 85) 248.

⁹¹ 362 US 402 (1960).

determining criminal responsibility. The choice is left to each state as a reflection of scientific knowledge and basic policy.⁹²

3.5 Insanity law in California

According to Moscovitz, it is a fundamental to the California system of jurisprudence that a person cannot be convicted for acts performed while insane.⁹³

In California the M’Naghten test is also used to determine the question of insanity.⁹⁴

A defendant is entitled to a verdict of not guilty by reason of insanity if at the time he committed the act he was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know what he was doing was wrong.⁹⁵

In **People v Wells**,⁹⁶ the defendant was charged with the crime of assault by a life-term prisoner with “malice aforethought”. The court held that the evidence of his mental abnormality short of insanity was admissible to show that he did not act with “malice aforethought”. Evidence that showed insanity, however, would be admissible only in the insanity phase of the trial. Thus, if the proffered evidence tends to show not merely that he did or did not, but rather that because of legal insanity he could not, entertain the specific intent or other essential mental state, then that evidence is inadmissible under the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity.⁹⁷

In **People v Bobo**,⁹⁸ the defendant was charged with first-degree murder of her 3 children. She killed the children because she had a delusion that some men were going to torture and kill her and the children, “that they were going to have a worser death”. She claimed that she was not guilty, because of her paranoid schizophrenia caused the delusion, which negated both “malice aforethought” and premeditation. The jury found her guilty and the Court of Appeal affirmed.

⁹² Monahan et al, *supra* (n 85)258.

⁹³ Moscovitz, Cases and Problems in Criminal Law (2003)360.

⁹⁴ Fricke et al, California Criminal Law (1977) 66.

⁹⁵ *People v wolf*, Cal. 2d 795 and *People v Sturges* 178 Cal.App. 2d 435.

⁹⁶ 33 Cal. 2d 330 (1949).

⁹⁷ Moscovitz, *supra* (n 93)353.

⁹⁸ 221 Cal. 3d 1432 (1990).

From the above it is clear that the state of California is very strict in the application of insanity law, and the defence is thus unlikely to succeed frequently.

3.6 Insanity law in Nevada

Prior to the 1995 legislative session, Nevada's statutes codified the rule that a person cannot be convicted of a criminal offence if they lack the capacity to appreciate the wrongfulness of their Act.⁹⁹

The Nevada Statute 194.010 provided, in part that:

All persons are liable to punishment except those belonging to the following classes;

Children under 8 years ;

Children between 8- 14 yrs, in the absence of clear proof that at the time of committing

The act charged against them they knew its wrongfulness;

Idiots;

Lunatics and persons who committed the act or made the omission charged in a state of insanity;

In determining what constitutes legal insanity, Nevada courts apply the M'Naghten rules.¹⁰⁰

In the case of **Finger v State**,¹⁰¹ the appellant was charged with one count of open murder with the use of a deadly weapon. He was accused of murdering his mother by stabbing her in the head with a kitchen knife. He intended to assert legal insanity as a defence.

At the arraignment, the district court denied his request to enter a plea of "not guilty by reason of insanity" as the 1995 Nevada Legislature has abolished that plea.

Subsequently, he entered a plea of guilty but mentally ill to a charge of second-degree murder and he was convicted.

He challenged his conviction on constitutional grounds, alleging that the abolition of insanity as an affirmative defence violates the 8th and 14th amendments to the United States Constitution and article 1, section 6 and 8 (5) of the Nevada Constitution.

He asserted that punishing an insane individual constitutes cruel and unusual punishment

⁹⁹ Perkins, Criminal Law and Procedure, Case and Materials (2004)771.

¹⁰⁰ Perkins, *supra* (n 99)772.

¹⁰¹ Supreme Court of Nevada 117 Nev.548,27.P.3d.66(2001).

While prohibiting an accused from asserting a defence of legal insanity violates due process requirements. The court dismissed his appeal because the 1995 Nevada statute had abolished the insanity plea.

3.7 The Rules of Appreciation

The various rules applied in the United States jurisdiction with respect to insanity are discussed.

3.7.1 The M’Naghten Rules¹⁰²

These rules are still in force in the majority of common-law jurisdictions and I have cited them in chapter two.

3.7.2 The irresistible impulse

Mental illness, it was observed, can take away the power to choose as effectively as it does the knowledge of what is right and what is wrong.¹⁰³

It argues that a person may have known an act was illegal, but because of a mental impairment, they could not control their actions.¹⁰⁴

To permit a defence in cases of such loss of the power to choose, a “control prong” was introduced by adding the irresistible impulse test to M’Naghten.¹⁰⁵

In the late nineteenth century some states and federal courts in the United States, were dissatisfied with the M’Naghten rule, adopted the irresistible impulse test. This test, which had first been used in Ohio in 1834, emphasized the inability to control one’s actions. A person who committed a crime during an uncontrollable “fit of passion” was considered insane and not guilty under this test.¹⁰⁶

In such cases, mentally ill defendants who acted without prior contemplation would potentially qualify for an insanity defence. The central question is whether the defendant could exercise self-control.¹⁰⁷

¹⁰² Already cited in chapter two.

¹⁰³ *Parsons v State*, 81 Ala. 577 SO 854.(1887).

¹⁰⁴ Robinson, *supra* (n 83)511.

¹⁰⁵ Robinson, *supra* (n 83) 513.

¹⁰⁶ Wright et al, “Insanity and Diminished Responsibility as a Defence to Criminal Liability” *Encyclopedia of Criminology* , Vol 2 (1986) 735.

¹⁰⁷ Wright et al, *supra* (n 106) 735.

Under this modification, an actor is given an insanity defence if he or she satisfies the requirements of the M’Naghten defence or:

- (i) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong; and avoid doing the act in question, as that his free agency was at the time destroyed.
- (ii) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it if solely.

This formulation remains popular in the United States as an addition to the M’Naghten test.¹⁰⁸

3.7.3 The Durham Rule

The Durham rule or product test was set forth by the United States Court of Appeals for the District of Columbia circuit in 1954 and states that “...an accused is not criminally responsible if his unlawful act was the product of mental disease or defect”.¹⁰⁹

Monte Durham was a 23 year old who had been in or out of prison and mental institutions since he was 17 years old. He was convicted of housebreaking in 1953, and his attorney appealed, although the district Court Judge had ruled that Durham’s attorneys had failed to prove he did not know the difference between right and wrong, the federal appellate judge chose to use the case to reform the M’Naghten rule. Citing leading psychiatrists and jurists of the day, the appellate judge stated that M’Naghten rule was based on “an entirely obsolete and misleading conception of the nature of insanity”. He overturned the Durham’s conviction and established a new rule.¹¹⁰

The federal courts eventually rejected this, because it cast too broad a net. Alcoholics, compulsive gamblers, and drug addicts had for instance, successfully used the defence to defeat a wide variety of crimes.

¹⁰⁸ Robinson , supra (n 83) 513.

¹⁰⁹ 214 F 2d 862 D.C. Cir. 1954.

¹¹⁰ supra (n 109)864.

After the 1970's the United States jurisdictions have tended to not recognize the Durham rule as it places emphasis on "mental disease or defect" and thus relies heavily on testimony by psychiatrists and is argued to be somewhat ambiguous.

Critics of the Durham rule have argued that the mental illness is a "but for" cause of the offence, mental illness must cause a certain minimum degree of impairment of capacity sufficient to render the defendant blameless for the offence.¹¹¹

In **State v White**,¹¹² the defendant was changing her second child, a three-month-old infant. As she afterwards told the doctor at the hospital emergency room where they were taken, 'the baby was screaming, my mind snapped, and I threw her on the floor'. She then picked up the baby and put her in the crib, an hour later the baby died from what was determined to be a large skull fracture on the left side of the head, causing massive blood clot pressure on the brain and the cessation of life functions.

She was charged with and acquitted of the criminal offence of voluntary manslaughter on the defence of insanity. The state appealed the acquittal. The case was marked by a disagreement between the expert witnesses Drs. Levy and Pullen which took the following form. Dr Levy gave his opinion that Mrs. White's depression after the incident was a normal shock reaction and that she did feel remorse at the first interview. He concluded that Mrs. White was not schizophrenic because he found that she had good contact with her environment and was not prone to daydreaming.

Dr Pullen gave his opinion that the incident represented a break with reality in response to mental illness, that Mrs. White at the time of the incident had neither the capacity to distinguish right from wrong nor the capacity to conform her conduct to the requirements of the law.

The court gave instructions, which relate to the defence of insanity:

- (i) "Insanity as used in these instructions means mental disease or defect, which causes lack of substantial capacity either to appreciate the wrongfulness of one's conduct to the requirements of the law.

¹¹¹ Robinson , supra (n 83)514.

¹¹² Supreme Court of Idaho, 1969, 93 Idaho 153, 456 p.2d,727.

- (ii) The defendant has interposed insanity as a defence. The law presumes that a defendant is sane. This presumption is rebuttable.
- (iii) The law presumes that all men are sane and responsible for their acts in this case, the defendant has interposed the defence of insanity. The law does not place upon her the burden of proving beyond a reasonable doubt that she was insane at the time the act charge was committed, but only places a burden upon her to raise in your minds a reasonable doubt as to the sanity of the defendant at the time of the commission of the act alleged in the information.
- (iv) Should you first find the defendant wrongfully killed her child, then the court instructs you that the true test and the standard of accountability is had the defendant sufficient mental capacity to appreciate the character and quality of her acts, did she know and understand that it was in violation of the rights of another and in itself wrong”.¹¹³

The appeal by the state was dismissed.

In the case of **Jackson v Indiana**,¹¹⁴ the petitioner was charged in the Criminal Court of Marion County, Indiana with separate robberies of two women. The offences were alleged to have occurred the preceding July. The first robbery involved property to the value of four dollars while the second robbery concerned five dollars in money. The record sheds no light on the charges since, upon receipt of not guilty pleas from Jackson, the trial court set in motion the Indiana procedures for determining his competency to stand trial.

As the statute requires the court appointed two psychiatrists to examine Jackson. A competency hearing was subsequently held at which petitioner was represented by counsel. The court received the examining doctor's joint written report and oral testimony and testimony from a deaf- school interpreter through whom they had attempted to communicate with the petitioner. The report concluded that Jackson's almost non-existent communication skills together with his lack of hearing and his mental deficiency left him unable to understand the nature of the charges against him or to participate in his defence. On this defence, the trial court found that Jackson lacked comprehension sufficient to make his defence and ordered him committed to the Indiana Department of Health until such time as that Department certified that he is fit to stand trial.

¹¹³ supra (n 112)456.

¹¹⁴ Supreme Court of the US 1972, 406 SU 715, 92 SCT 1845, 32.

Andrea Yates trial¹¹⁵

She took the lives of her 5 children by drowning them one by one, in a bathtub. At her trial on capital murder charges 9 months later, she pleaded insanity. Despite very credible evidence that she had long suffered from serious mental disorder, a Texas jury convicted her of murder and sentenced her to life in prison. Her tragic and controversial case led to question whether the so-called M’Naghten test for insanity, which forms the basis for the insanity defence in Texas, adequately defines the exculpatory effect of mental disorder. During her second murder trial in 2005 for 2001 bathtub drowning of her young children, she was found not guilty by reason of insanity. She was committed to a state mental hospital and held until she is no longer deemed a threat.

United States of America v Hinckley¹¹⁶

He fired six times at President Reagan as he left the Hilton Hotel in Washington DC. He did not attempt to flee and was arrested at the scene. Reagan survived his wound after surgery.

At the trial in 1982 where he was charged with thirteen offences, Hinckley was found not guilty by reason of insanity. The psychiatric reports found him to be insane while the prosecution reports declared him legally sane. He was confined at St Elizabeth Hospital in Washington DC.

The verdict led to widespread dismay, as a result, the US congress and a number of states re-wrote the law regarding the insanity defence. Idaho, Kansas, Montana and Utah have abolished the defence altogether.

3.7.4 The Brawner rule

The Brawner rule by the District of Columbia Appeals Court set aside the Durham ruling arguing the ruling’s requirement that a crime must be a “product of mental disease or defect” places the question guilt on expert witnesses and diminished the jury’s role in

¹¹⁵ As discussed in Slobogin, *supra* (n 5) 315.

¹¹⁶ 333 U.S APP.DC 1989 356.

determining guilt. Under this proposal, juries are allowed to decide the “insanity question as they see it fit”.¹¹⁷

Basing its ruling on the American Law Institute’s (ALI) Model penal code, the court ruled that for a defendant to not be criminally guilty for a crime the defendant, lacks substantial capacity to appreciate that his conduct is wrongful, or lacks substantial capacity to conform his conduct to the law.¹¹⁸

The American Legal Institute’s (ALI) Model Penal Code (MPC) test of insanity was an attempt to modernize the emerging variations of M’Naghten and to incorporate more clinical input.

The ALI test is a more liberal test of insanity in that it allows for acquittal on cognitive or volitional grounds, but exempts repeated criminal behaviour a qualifying mental defect.¹¹⁹

The ALI test reverts to the structure of the M’Naghten plus irresistible impulse test in specifically noting that the dysfunction may affect either cognitive or control capacities.

The test has gained wide acceptance, rivaling or surpassing the popularity of M’Naghten and M’Naghten- plus irresistible impulse formulations.¹²⁰

3.7.5 The Insanity Defence Reform Act of 1984 (U.S)

The statutory formulation of mental illness defence was enacted by congress in 1984 in response to the verdict in the Hinckley trial, and codified at Title 18, U.S code, section 17, states that a person accused of a crime can be judged not guilty by reason of insanity if “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 act”.

This act is also notable because of its shift of the burden of proof from the prosecution proving a defendant sane declaring; “the defendant has the burden of proving the defence of insanity by clear and convincing evidence”.¹²¹

¹¹⁷ US v Brawner 1972 F2d 471 969.

¹¹⁸supra (n 117)969.

¹¹⁹ Wright et al , supra (n 106)735.

¹²⁰ Wright et al, supra (n 106)735.

¹²¹ Robinson , supra (n 83) 515.

3.8 **Forced drugging of insane defendants before the trial**

The US Supreme court limited the right of the government to force mentally ill patients charged with non-violent crimes to take anti-psychotic drugs so that they are able to stand trial.¹²²

In 6-3 decisions, Justice Breyer writing for the majority said that, “involuntary administration of drugs solely for trial competence should occur in limited circumstances”.¹²³

In **Sell v United States**,¹²⁴ the defendant, Dr Charles Sell, a dentist, had a long history of mental illness. He was first hospitalized for mental illness in 1982, after telling doctors, that the gold he used for fillings had been contaminated by communists.

In 1984 he was again hospitalized after calling the police and reporting he saw a leopard board a bus. In 1997 he told law enforcement personnel that God spoke to him and said that for every FBI agent he killed, a soul would be saved.

In May 1997, he was charged with submitting fictitious insurance claims for payment. After a magistrate received the psychological evaluation on 14 April 1999, he was found, by a preponderance of the evidence that he was suffering from a mental disease that rendered him harmless to himself and others and competent to stand trial.

The court set up a strict standard but should have held that forcible medication of a mentally ill defendant solely to render him competent to stand trial would always violate his liberty interest and deprive the defendant of a right to a fair trial.¹²⁵

Prior to the above decision, in **Washington v Harper**,¹²⁶ the court concluded that the due process clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is found to be dangerous to himself or others and the treatment is in the inmate’s best medical interest.

¹²² Sell v US 123 SCT 2174 (2003).

¹²³ supra (n 122)2174.

¹²⁴ supra (n 122) 2174.

¹²⁵ Hayes, “Enough to Forcibly Medicate a Defendant” Supreme Court Review, Vol 94 (2004) 686.

¹²⁶ 494 US at 210 (1990).

In Riggins v Nevada,¹²⁷ the court reiterated that an individual has a constitutionally protected liberty interest to avoid involuntary administration of antipsychotic medication. This case involved the forced administration of antipsychotic drugs to a defendant in a criminal trial.

3.9 The Myths about the Insanity Defence

Research indicates that the use of the insanity defence is completely overestimated by the American public. In reality the defence is used in only about one percent of all felonies and is successful about one quarter of the time.¹²⁸

The insanity defence is used primarily in murder cases, though the data reveals that murder accounts for less than one third of successful insanity pleas.¹²⁹

There are claims that those acquitted on the grounds of insanity are released quickly from hospital, but this is not the case.¹³⁰

According to Mackay, it is true that such persons spend less time in custody than those convicted in the ordinary way of identical offences. Moreover the reality is that many of those found not guilty by reason of insanity spend around twice the time in hospital than ordinary offenders spend in prison.¹³¹

There are claims that those who plead insanity are often faking but the research reveals that those who plead insanity are likely to have a history of serious mental illness and prior hospitalizations.¹³²

A further myth claims that insanity defence trials often involve major disagreements amongst expert witnesses while this occurred in the Hinckley case, such disagreements are rare and many findings of not guilty by reason of insanity are uncontested.¹³³

The final myth is that the defence counsel uses the insanity defence to beat the rap in order to avoid a deserved conviction. The research reveals, lawyers...enter an insanity plea to obtain

¹²⁷ 504 US 127,1992.

¹²⁸ Mackay, Mental condition Defences in Criminal Law (1995) 112.

¹²⁹ Mackay, *supra* (n 128)112.

¹³⁰ Mackay, *supra* (n 128)112.

¹³¹ Mackay, *supra* (n 128)112.

¹³² Mackay, *supra* (n 128)112.

¹³³ Mackay, *supra* (n 128)112.

immediate mental health treatment of their client, as a plea bargaining device to ensure that their clients receives a mandatory mental health care, and to avoid malpractice litigation but this type of attitude stands in marked contrast to the position in England where the defence of insanity had become virtually redundant.¹³⁴

3.10 The Mental illness defence in the post-Hinckley period

The states in the United States which have recently made changes in relation to the insanity defence can be conveniently divided into five major groups in which they will be discussed below. There are those states which have opted to change their legal test of insanity, enacted an alternative verdict of guilty but mentally ill, altered the rules of evidence, including the allocation and the quantum of the burden of proof, the disposal consequences of an insanity acquittal or opted to abolish a separate insanity defence.¹³⁵

3.10.1 Changing the test

According to Mackay, a number of jurisdictions in the US have opted for a change in the substance of the insanity defence itself, this has taken the form of a move away from volitional tests, especially that originally proposed by the ALI, towards a so-called tightening up of the insanity plea.¹³⁶

Ironically, the M’Naghten test, which was formerly the target of so much criticism in the US, has re-emerged as influential.¹³⁷

Thus, the federal law, under which the jury acquitted Hinckley in 1982, was altered by the Insanity Defence Reform Act of 1984 which enacts a new test that is something of a cross between M’Naghten and the cognitive branch of the ALI test, and provides a defence if the defendant as a result of a severe mental disease or defect was able to appreciate the nature and quality of the wrongfulness of his acts.¹³⁸

In California, the ALI test has been abandoned in favour of an apparently ‘conjunctive’ M’Naghten test, which provides that ‘the accused must prove, by the preponderance of the evidence

¹³⁴ Mackay, *supra* (n 128) 113.

¹³⁵ Mackay, *supra* (n 128) 113.

¹³⁶ Mackay, *supra* (n 128) 113.

¹³⁷ Mackay, *supra* (n 128) 113.

¹³⁸ Insanity Defence Reform Act of 1984 18 USC Sec 20

that he was incapable of knowing or understanding the nature and quality of his act and of distinguishing right from wrong at the time of the offence'.¹³⁹

Although this test was approved by the electorate after a referendum, the California Supreme Court held in **People v Skinner**,¹⁴⁰ that the new test must be read in the disjunctive, as creating two distinct and independent limbs upon which an insanity plea may be based.

In Alaska the ALI test was repealed in 1982 and replaced with a test, which is restricted to the first limb of the M'Naghten rules. The new test provides; 'in a prosecution for a crime, it is an affirmative defence that when the defendant was unable, as a result of mental disease or defect, to appreciate the nature and quality of the conduct'.¹⁴¹

In **US v Lyons**,¹⁴² the court unilaterally decided to abandon the ALI test, saying 'we conclude that the volitional prong of insanity defence, a lack of capacity to conform one's conduct to the requirements of the law does not conform with current medical and scientific knowledge, which was retreated from its earlier, sanguine expectations'. Consequently, we now hold that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of the mental disease or defect, he is unable to appreciate the wrongfulness of that conduct.¹⁴³

We do so for several reasons, first, as we have mentioned, a majority of psychiatrist now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self control or for calibrating the impairment of that capacity.¹⁴⁴

In addition, the risks of fabrication and moral mistakes in administering the insanity defence are greatest when the experts and the jury are asked to speculate whether the defendant had the capacity to control himself or whether he could have resisted the criminal impulse...Moreover, psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act... it appears, moreover that there is considerable overlap between a psychotic person's inability to understand and his ability to control his behaviour. Most psychotic persons who fail the volitional test would also fail a cognitive test, thus rendering the volitional test superfluous for them.¹⁴⁵

¹³⁹ California Penal Code, supp 1987 Sec 25(b).

¹⁴⁰ 39 Cal. 3d 765, 217 Cal RPTR 685.

¹⁴¹ Alaska Statutes Sec 12.47.010 (supp 1986) and Mackay, supra (n 128) 113.

¹⁴² 1984 731 F2d 243.

¹⁴³ supra (n 142)243.

¹⁴⁴ supra (n 142)244.

¹⁴⁵ supra (n 142)244.

3.10.2 Rules of Evidence including the Standard and Burden of Proof

The starting point is that questions surrounding the proper allocation of the standard of proof for insanity received a great deal of publicity during and immediately after the trial of John Hinckley.¹⁴⁶

The reason for this was that under the federal laws as it then stood in the District of Columbia the prosecution was required to prove beyond reasonable doubt that Hinckley was sane at the time he shot President Reagan before the insanity defence could be rejected and he could be convicted.¹⁴⁷

This was viewed as a major reason why he was found ‘not guilty by reason of insanity’, around two thirds of the states which accept the insanity plea now place the burden of proof on the defendant, usually by a preponderance of the evidence.

Federal law and that of the state of Arizona have been changed to require the defendant to prove his insanity by clear and convincing evidence, but these provisions have since survived the constitutional challenge.¹⁴⁸

The American Psychiatric Association pointed out in their statement on the insanity defence, that “it is commonly believed that the likely effect of assigning the burden of proof to the defendants rather to the state in insanity trials will be to decrease the number of such successful defences”. Seemingly altering the burden of proof is more effective way of reducing the use of the insanity defence than changing the test.¹⁴⁹

3.10.3 Guilty but mentally ill (GBMI)

Twelve states have enacted provisions providing for an alternative verdict of guilty but mentally ill e.g. Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, New Mexico, Pennsylvania, South Carolina, South Dakota and Utah.

The first state to establish this new verdict was Michigan in 1975, well before the Hinckley verdict.¹⁵⁰

¹⁴⁶ Mackay, supra (n 128) 117.

¹⁴⁷ Mackay, supra (n 128) 117.

¹⁴⁸ Mackay, supra (n 128) 117.

¹⁴⁹ Mackay, supra (n 128) 117.

¹⁵⁰ Mackay, supra (n 128) 119.

The Michigan law, upon which many other GBMI statutes are modeled, is designed to offer a compromise to the jury whenever a defendant pleads insanity. He may be found guilty but mentally ill provided it is proved beyond reasonable doubt that the defendant is guilty of the offence charged, was mentally ill at the time of the commission of the offence, and was not legally insane at the time of the commission of the offence.¹⁵¹

The Michigan GBMI provision defines mental illness as ‘a substantial disorder of thought or mood which significantly impairs judgment, behaviour and capacity to recognize reality or ability to cope with the ordinary demands of life’. By way of contrast Pennsylvania defines mental illness in precisely the same way as the Michigan ALI based insanity defence.¹⁵²

According to Mackay, the reason why such a definition of mental illness is regarded in Pennsylvania as appropriate is to trigger off a finding of GBMI, because that state adheres to the M’Naghten rules as a basis of its insanity defence.¹⁵³

3.10.4 Disposal Consequences

The most prevalent type of reform during the post-Hinckley period has been in relation to the commitment and release procedures for insanity acquittees, although these procedures vary widely within the United States, the trend has undoubtedly been towards stricter disposition schemes.¹⁵⁴

The case of **Jones v US**,¹⁵⁵ which was decided a year after the Hinckley verdict, has been influential, in this case the defendant had in March 1976 pleaded not guilty by reason of insanity to attempted petty larceny of a jacket, an offence punishable by a maximum prison sentence of one year.

The plea was uncontested and as a result Jones was automatically committed to St Elizabeth Hospital pursuant to the District of Columbia statutory provision.

The issue before the Supreme Court was the constitutionality of committing Jones beyond the maximum term for the offence in question on the basis of his future dangerousness.

¹⁵¹ Mackay, supra (n 128) 119.

¹⁵² Mackay, supra (n 128)119.

¹⁵³ Mackay, supra (n 128)119.

¹⁵⁴ Mackay, supra (n 128)122.

¹⁵⁵ 463 US 354 1983).

The decision in Jones, predictably led to a number of state and federal law, to provide for automatic and indeterminable hospitalization of those acquitted on the grounds of insanity.¹⁵⁶

In **Foucha v Louisiana**,¹⁵⁷ it was decided that a person found not guilty by reason of insanity could not be detained if he was no longer mentally ill, even though he might still be considered dangerous.

3.10.5 Abolition

According to Mackay, the proposals for the abolition of a separate insanity defence have not only been taken seriously in the US but have also been adopted in several jurisdictions, moreover the Hinckley verdict has again been important in this connection in that it rekindled the abolitionist debate.¹⁵⁸

Abolition may mean one of the following things, either total or partial abolition. By total abolition means any evidence of the accuser's mental abnormality during the guilt phase of The trial will be disallowed completely, while with partial abolition, the court may permit psychiatric testimony to be admissible but only within the traditional framework of actus reus and mens rea.¹⁵⁹

In **Sinclair v State**¹⁶⁰ and in **State v Lange**¹⁶¹ the Supreme Courts of Mississippi and Louisiana respectively, reviewed insanity abolition statutes and declared them unconstitutional.

Apparently total abolition is too extreme a measure even post-Hinckley, and not without good reason. To refuse to permit psychiatric testimony even on the issue of mens rea seem tantamount to penalizing the defendant for the fact that he was mentally disordered at the time of the offence.¹⁶²

¹⁵⁶ Mackay, supra (n 128)122.

¹⁵⁷ 112 SCT 1780 (1992).

¹⁵⁸ Mackay, supra (n 128) 123.

¹⁵⁹ Mackay, supra (128)124.

¹⁶⁰ 132 SO 581 (1931).

¹⁶¹ 123 SO 639 (1929).

¹⁶² Mackay, supra (n 128)125.

A few jurisdictions have abolished their insanity defence, although each continues to allow mental disease or defect to provide a defence if it negates a required offence element.

A constitutional challenge to abolition of the defence has been successful in some cases but not in others.

Whether or not the federal constitution bars it, abolition is a questionable policy.¹⁶³

3.10 Diminished Capacity

The starting point is that diminished capacity allows psychiatric testimony on the degree of culpability or mens rea as a mitigation strategy. A defendant can introduce clinical testimony on mens rea without entering an insanity defence. This may reduce his degree of blameworthiness from an intentional crime to one of negligence.¹⁶⁴

According to Moscovitz, the history of California's handling of diminished capacity has been turbulent and fascinating.¹⁶⁵

In Cal. Penal Code s 1026, the legislature determined that, where insanity is pleaded there should be a bifurcated trial, first try the issue of guilt, then the issue of insanity.

This was meant to make it easier for the jury to understand the case, to ensure that the defendant would be sent to a mental hospital if his insanity defence succeeded, to give the defendant the opportunity to avoid his fate if for example he had a valid alibi defence.¹⁶⁶

The California Supreme Court held that the defendant could raise his mental disease as a defence or mitigation in the guilt phase, and this might reduce his culpability to the point that he could leave with his sentence (e.g. manslaughter instead of murder) and not rely on winning the insanity defence in the second phase.

According to Morse, who was at the Southern California law school, he described diminished capacity 'as undiminished confusion' and the California legislature in 1981

¹⁶³ Robinson, supra (n 83)516.

¹⁶⁴ Wright et al, supra (n 106)735.

¹⁶⁵ Moscovitz, supra (n 93) 353.

¹⁶⁶ Moscovitz, supra (n 93)353.

abolished diminished capacity as a defence to the crime largely on the writer's arguments.¹⁶⁷

In **People v Conley**,¹⁶⁸ the court held that the evidence of the defendant's mental problems was admissible to negate the "malice aforethought" required for murder.

In **re Christian**,¹⁶⁹ the court held that California elimination of diminished capacity did not eliminate the "imperfect self defence" doctrine, whereby an honest but unreasonable belief that it is necessary to defend oneself may reduce murder to voluntary manslaughter.

3.11 Conclusion

It seems that even in the United States of America a person should not face the criminal justice system whilst he is incapable of understanding the proceedings because of insanity. This is recognized in almost all the states but some states have abolished insanity defence by legislation.

They have different states there is no uniformity in their insanity defence e.g. some states apply M'Naghten and others not.

The practice of providing drugs to insane defendants under the pretext of healing them so that they can be fit to stand trial is inhumane.

The onus of proof has always been on the defendant to prove his case on a balance of probabilities, and this common law rule that an accused is burdened with the onus of proving the defence of insanity has passed constitutional muster in the U.S.¹⁷⁰

After the controversy surrounding Hinckley acquittal there are states which have opted to change their legal test of insanity and enacted an alternative verdict of guilty but mentally ill, altered the rules of evidence including the proper allocation of the quantum of the burden of proof, the disposal consequences of an insanity acquittal or opted to abolish a separate insanity defence e.g. Montana moved to abolish the insanity defence and Idaho and Utah later adopted similar laws.

¹⁶⁷ Morse, "Is diminished capacity really dead" Journal of Psychiatry and Law, Vol 20 (1992)1.

¹⁶⁸ 64 Cal.2d. 310 (1966).

¹⁶⁹ 7 Cal. 4, 768 (1994).

¹⁷⁰ Leland v Oregon 343 US 790-798 (1952).

Finally their provisions on insanity are good the only problem is the forcible giving of drugs to insane defendants. I submit this is unfair discrimination of mentally ill defendants.

CHAPTER FOUR

4.1 Introduction

In this chapter the position of the South African law will be discussed with reference to decided cases and the provisions of the Criminal Procedure Act with reference to onus of proof will be discussed.

The application of the notion of diminished responsibility will be looked at and the shortcomings will be identified and proposals for reforms will also be discussed.

In South Africa prior to 1977 the defence of insanity, as it was then called, was largely based upon the M’Naghten rules which were derived from English law.¹⁷¹

Since 1977 the defence of mental illness has been governed by statute namely the provisions of sec 77 – 79 of the Criminal Procedure Act.¹⁷²

These sections were the direct result of the recommendations contained in the Rumpff report and this report clarified the law relating to the effect of mental abnormality on criminal liability.¹⁷³

4.2 Defining Mental Illness

In the case of **S v Stellmacher**,¹⁷⁴ the court held that the term mental illness and defect in Section 78 indicates a pathological disturbance of the accused’s mental capacity.

According to Snyman, the term “mental illness or defect” refers to a pathological disturbance of the mental faculties, not to a temporary clouding of the mental faculties, which cannot be ascribed to a mental disease but merely to an external stimuli such as alcohol or drugs or even provocation.¹⁷⁵

The term mental illness has no scientific meaning but is rather a legal term used to describe certain mental states that excuse persons from criminal liability.¹⁷⁶

It has been held that to constitute a mental illness or defect, it must at least consist in a pathological disturbance of the accused’s mental capacity and not a mere temporary

¹⁷¹ Snyman, supra (n 2) 167.

¹⁷² Snyman, supra (n 2) 167.

¹⁷³ Snyman, supra (n 2) 167.

¹⁷⁴ 1983 (2) SA 181 SWA at 87.

¹⁷⁵ Snyman, supra (n 2) 169.

¹⁷⁶ Burchell, supra (n 1) 373.

mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.¹⁷⁷

According to the Mental Health Act no. 17 of 2002, mental illness is defined as a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnosis.

4.2.1 Pathological means that only those mental disorders which are the product of a disease will qualify as a mental illness for the purposes of sec 78, this simply means that the condition from which the accused suffers must be a result of some known or identifiable disease of the mind.¹⁷⁸

Hence, mental abnormalities that are not the result of disease but brought about by the temporary effect of external stimuli are not regarded as mental illnesses.¹⁷⁹

A person suffering from a pathological mental illness cannot be blamed for being ill and therefore is not criminally responsible for his actions under the influence of the illness.¹⁸⁰

4.2.2 Endogenous

According to Burchell, if it is established that a person suffers from a disease of the mind, the next point to be determined is whether the disease originated spontaneously within the mind of the victim.¹⁸¹

If a person suffered from a disease of the mind, it qualifies as a form of insanity.

4.2.3 Mental defect

The mental defect is usually evident at an early age and prevents the child from developing or acquiring elementary social or behavioural patterns, the condition is usually permanent and the intellect is so abnormally low as to deprive the individual of normal cognitive or conative functions.¹⁸²

¹⁷⁷ Burchell, supra (n 1)375.

¹⁷⁸ Burchell, supra (n 1)375.

¹⁷⁹ Burchell, supra (n 1)375.

¹⁸⁰ Burchell, supra(n 1)375.

¹⁸¹ Burchell, supra (n 1)377.

¹⁸² Burchell, supra (n 1)377.

4.3 Fitness to stand trial

The starting point is that, it is a principle of criminal law and procedure that only persons who are capable of understanding the nature of the trial proceedings or conducting a proper defence can be tried.

This principle is embodied in sec 77 of the Criminal Procedure Act 51 of 1977 (as amended), in terms of which an enquiry is made into the capacity of an accused to understand the proceedings so as to be able to conduct a proper defence.

An accused who suffers from mental illness or defect may as a result be not fit to stand trial.¹⁸³

The procedure to be followed if it is alleged that because of mental illness X lacks the capacity to understand the proceedings and can therefore not be tried is set out in sec 77, read with sec 79.¹⁸⁴

4.4 Capacity of accused to understand the proceedings

Section 77 provides as follows:

1. "If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of sec 79.

This issue is usually raised by the defence before the trial commences, but it is not always the case.

1A. At proceedings in terms of section 77(1) and 78 (2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3 of the Legal Aid Amendment Act 20 of 1996. These are some of the implications of the legislative amendments. If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before the sentence is passed, the court shall set the conviction aside, and if

2. If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not

¹⁸³ A. Kruger, Mental Health Law in South Africa (1980) 162-164.

¹⁸⁴ Snyman, *supra* (n 2) 175.

disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence. Before the court can find that the accused is not fit to stand trial, it has to receive a report under section 79 and before a report under section 79 can be made, the accused must be sent for observation as contemplated in section 79.

3. If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence and the prosecutor and accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

4. Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who has enquired into the mental condition of the accused under section 79.

5. If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall continue in the ordinary way.

6A. If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of accused's incapacity contemplated in subsection (1) and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, in order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused;

- (i) In the case of a charge of murder or culpable homicide or rape or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29(1) (a) of the Mental Health Act 18 of 1973; or
- (ii) Where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence-
 - (aa) be admitted to, detained and treated in an institution stated in the order in terms of chapter 3 of the Mental Health Act 18 of 1973; or
 - (bb) be treated as an outpatient in terms of section 7 of the Act, pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act or an order that he or she

shall no longer be treated as an outpatient, and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under the accused has pleaded it shall be deemed that he has pleaded not guilty.

(cc) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before the sentence is passed, the court shall set the conviction aside, and if the accused has pleaded it shall be deemed that he has pleaded not guilty.

(7) Where a direction is issued in terms of subsection (6) or (9), the accused may at anytime thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

(8)(A) An accused against whom a finding is made-

- (i) under subsection (5) and who is convicted;
- (ii) under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1) may appeal against such finding.

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and direct that the person concerned be detained in accordance with the provisions of subsection (6).

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the direction issued under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary way".¹⁸⁵

The state must show beyond reasonable doubt that the accused is able to understand the proceedings so as to be capable of making a proper defence.¹⁸⁶

In **S v April**,¹⁸⁷ the court found that the accused was not fit to stand trial after conviction but before sentence in the magistrate court. The Supreme Court reviewed the case by virtue of its inherent review powers as a result the conviction was set aside.

¹⁸⁵ Du Toit et al, Commentary on the Criminal Procedure Act (1993) 13-1.

¹⁸⁶ Du Toit et al, *supra* (n 185)13-1.

¹⁸⁷ 1985 (1) SA 639 (NC).

In **S v Van As**,¹⁸⁸ Stegmann J (as he was then) followed the same procedure, setting aside the entire proceedings, when it became known after conviction that the accused could not sufficiently follow the court proceedings so as to defend him properly.

In **S v Van Graan**,¹⁸⁹ the accused was arraigned in the Stellenbosch Magistrate Court on a charge of theft. He pleaded not guilty and exercised his right to silence. He was represented by a legal representative. After the state case was presented, the defence closed its case without leading evidence. On the 10th of July 2000, the accused was convicted and the matter was then postponed for the purpose of sentence.

In the meantime, the accused appeared in another court of the same district on a charge of housebreaking and theft. In that case the accused was referred for observation in terms of sec 77 and 78 of the criminal Procedure Act.

Pursuant to section 79 (4) of the Act, the accused was declared unfit to stand trial and found not to appreciate the wrongfulness of his act and to act in accordance with such appreciation. He was accordingly committed to a psychiatric institution.

In **S v Sindane**,¹⁹⁰ the accused stood trial in the Magistrate Court in Cullinan on one count of common assault and of assault with intent to cause grievous bodily harm. He conducted his own defence and despite his plea of not guilty, the accused was convicted on both counts.

He was sentenced to 12 months imprisonment, as the two counts were considered together for the purpose of sentence. The matter came before Bosielo J on automatic review in terms of section 302 (1) (a) (i) of Act of 1977. After he read the manuscript, he had serious doubts as to whether the entire proceedings were in accordance with the law.

He then sent a query to the Magistrate in the light of averments that the accused was suffering from some form of mental illness for which he was even admitted at Weskoppies Hospital.

¹⁸⁸ 1989 (3) 881 (W).

¹⁸⁹ 2002 JDR 0815 (C).

¹⁹⁰ 2002 JDR 0584 (T).

The Director of Public Prosecutions was of the view that there was a real possibility that the accused might be suffering from a mental illness and the magistrate was obliged to order an investigation in terms of section 78 (20) and 79 of the act.

Before the accused closed his case, he disclosed that he was mentally disturbed and he was undergoing treatment at Weskoppies Hospital. It was said that whenever there is a reasonable possibility that the accused suffers from mental illness or disorder there must be an investigation in terms of section 78 (2) or 79 of the Act.

4.5 Mental illness or Defect and Criminal Responsibility

Section 78 provides as follows:

(1) “A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission suffers from mental illness or defect which makes him or her incapable-

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act or omission, shall not be criminally responsible for such act or omission.

(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the

(4) Finding is not disputed by the prosecutor or the accused; the court may determine the matter on such report without hearing further evidence.

(5) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor and the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(6) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

(7) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act -

(a) the court shall find the accused not guilty; or

(b) If the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or mental defect, as the case may be, and direct -

(i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be -

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act 18 of 1973;

(bb) admitted to, detained and treated in an institution stated in the order in terms of chapter 3 of the Mental Health Act, pending discharge by a hospital board in terms of the Mental Health Act 18 of 1973;

(cc) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such ;

(dd) released subject to such conditions as the court considers it appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused -

(aa) be admitted to, and treated in an institution stated in the order in terms of chapter 3 of the Mental Health Act 18 of 1973, pending discharge by a hospital board in terms of section 29(4A) (a) of that act;

- (bb) be treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;
 - (cc) be released subject to the conditions as the court considers appropriate; or
 - (dd) be released unconditionally.
- (8) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of diminished responsibility into account when sentencing the accused.
- (9) (a) An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).
- (b) Such appeal shall be made in the manner subject to the same conditions as an appeal against conviction by the court for an offence.
- (10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course”.¹⁹¹

4.5.1 Psychiatric Investigation

The manner of determining whether an accused is insane is laid down in the Criminal Procedure Act.¹⁹²

According to Sec 78 (2), when it is alleged that an accused is not responsible by reason of insanity, the court is obliged to order that an inquiry be held into the accused's mental state.¹⁹³

The accused is committed to a mental hospital for 30 days for psychiatric examination. after examination, the psychiatrists must make a report that includes a diagnosis of the mental condition of the accused and a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of his conduct or to act in accordance with

¹⁹¹ Du Toit et al , supra (n 185)13-5.

¹⁹² As amended which its provisions are stated above.

¹⁹³ Burchell, supra (n 1)389.

such appreciation was affected by mental illness or mental defect, relying upon this evidence the court must decide whether or not the accused is insane.¹⁹⁴

4.5.2 Burden of proof

South African law has adopted the rule of English law that every person is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. This common-law rule, which has been applied by the courts for a considerable time in South Africa, has now been underscored by legislation.¹⁹⁵

The burden of proving that he was mentally ill at the time of the commission of the crime and therefore cannot be convicted of the crime charged, rests on the accused, he discharges it by proving on a preponderance of probabilities that he was mentally ill.¹⁹⁶ Moreover, this is a departure from normal principles, according to which the onus rests on the state to prove all the requirements for liability.¹⁹⁷

Sec 78 of the Criminal Procedure Act was amended by the Criminal Matters Amendment Act 68 of 1998 by the insertion of section 78(1A), which provides that every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1) until contrary is proved on a balance of probabilities.

Section 78 (1B) was also inserted into the Act and it provides that whenever the criminal responsibility (by which is meant criminal capacity) of an accused is in issue, the burden of proof with reference to the criminal responsibility (read criminal capacity) shall be on the party who raises the defence of mental illness, the burden of proof rests upon him, and if the prosecution alleges that X lacked criminal capacity due to mental illness, the burden of proving this lies on the prosecution.¹⁹⁸

These are the implications of the new legislative amendments.

¹⁹⁴ Burchell, *supra* (n 1)390.

¹⁹⁵ In terms of sec 5 of the Criminal Matters Amendment Act 68 of 1998 (amending sec 78 of the Criminal Procedure Act).

¹⁹⁶ Snyman, *supra* (n 2)172.

¹⁹⁷ Snyman, *supra* (n 2)172.

¹⁹⁸ Snyman, *supra* (n 2)173.

The constitutional recognition of the common-law exception has been contested on the following persuasive grounds, the proof of insanity is more difficult than disproving the defence of non-pathological incapacity, yet in non-pathological the onus rests firmly on the prosecution to rebut it beyond reasonable doubt, the accused suffering from mental illness are because of their disability, burdened with a higher burden of proof than those who claim non-pathological incapacity and this is unfair discrimination.¹⁹⁹

Finally, I concur with Burchell that, the presumption of innocence (protected in sec 35(3) (h) of our constitution of 1996) the right of equality before the law and the equal protection of the law (protected in sec 9 (1) of the constitution) would be infringed by the rule of law that places the onus in insanity cases on the accused.²⁰⁰

In **S v Mahlinza**,²⁰¹ a devoted mother burnt a baby to death whilst other children escaping being burnt. She was diagnosed to be in a state of hysterical dissociation. She was charged with murder but found to be insane and thus not guilty. The court held that she was not criminally responsible for her actions because of a temporary defect of reason or mind and therefore she was entitled to a verdict of not guilty.

In **S v Kavin**,²⁰² the accused was charged with 3 counts of murder, the deceased was his wife and 2 children. He pleaded insanity and an inquiry in terms of section 78 of the Act was held. The court held that he was incapable of acting in accordance with an appreciation of the wrongfulness of his act at the time of the commission of the offence because of mental illness. He was detained in a mental hospital pending the signification of the decision of the State President. The court stated that, “on the analysis of the evidence, the circumstances and arguments addressed to us, we have come to the unanimous conclusion that the state has not advanced any or any good and sufficient reasons why we should not accept the unanimous finding of the 3 psychiatrists”.

In **S v Tsafendas**,²⁰³ the accused stabbed and killed the then Prime Minister H.F Verwoerd in parliament. He was diagnosed as suffering from Schizophrenia with paranoid features. He had a delusion of a huge tapeworm dwelling in his bowels, which

¹⁹⁹ Steytler, Constitutional Criminal Procedure (1998)327.

²⁰⁰ Burchell, *supra* (n1)392.

²⁰¹ 1967 (1)SA 408 (A).

²⁰² 1978 (2) SA 731 (W).

²⁰³ (unreported) see: Strauss, *supra* (n 20) 291.

influenced his behaviour. Beyers J.P (as he was then) and his two assessors found that he was mentally disordered as envisaged by section 28 of the Mental Disorders Act. He judge said that, “I am unable to try a man who does not have a rational mind, as I am to try a dog or a motionless instrument”.²⁰⁴

In **S v Mc Bride**,²⁰⁵ the accused killed his wife while suffering from endogenous depression. The expert medical evidence was that the accused was capable of appreciating the wrongfulness of his act. Subsequent to the murder of his wife and after treatment, the accused had recovered from his mental illness. The court ordered that the accused be detained in a mental hospital pending the signification of the decision by the State President.

An extract from the judgment reads:

“Mc Ewan, J (as he was then) said... “According to Dr Schultz and Dr Levinson endogenous depression is commonly accepted as a state of psychosis. Attacks normally last for six to nine months if the patient is not treated. They are more likely to occur in a person of advanced age. If the report and findings of the psychiatrist are accepted the court will have no option but to order the detention of the accused in a mental hospital or prison pending the signification of the State President’s decision. The verdict of the court was guilty by reason of mental illness. The order will be that the accused be detained in a mental hospital or prison pending the signification of the State President’s decision” unquote.²⁰⁶

In **S v Gouws**,²⁰⁷ this matter was referred to the High Court in terms of section 52(3) of the Criminal Law Amendment Act 105 of 1997.

The High Court held that the present case was not merely a case of a senseless and motiveless murder. The accused expressed desire for blood and his conduct thereafter was bizarre, strange and abnormal.

In terms of the provisions of section 78 (2) of the Criminal Procedure Act, if it appeared to the court that the accused might by reason of mental defect not be responsible for his actions the court was obliged to direct that the matter be inquired into. In the circumstances of the present case the court should have conducted such enquiry. The

²⁰⁴ Strauss , supra (n 20)292.

²⁰⁵ 1979 (2) SA 313 (W).

²⁰⁶ supra (n 205)314.

²⁰⁷ 2001 (1)SACR 192.

court accordingly granted an order in terms of section 78 (2) for the accused to be referred for observation.

In **S v Malcom**,²⁰⁸ the appellant appeared in the magistrate court, in Port Elizabeth on charges of statutory intimidation arising out of threats made in letters written by the appellant to various officers of the High Court , including a judge.

Before the charges were put to the appellant, a Dr Harvey testified and recommended that the appellant be sent for mental observation at the Elizabeth Donkin Hospital and the appellant opposed that recommendation.

The magistrate concluded that the appellant was by reason of mental illness or defect not capable of understanding the proceedings so as to make a proper defence and the appellant might by reason of mental illness or defect not be criminally responsible for the acts of which she was charged.

He directed that the matter be enquired into and reported on in accordance with the provisions of sec 78 of Act 51 of 1977. The three specialist psychiatrists were unanimous in their conclusions that: the appellant does have a personality problem and a delusional disorder.

The magistrate established that the appellant did not have capacity to appreciate the wrongfulness of her action at the time of the alleged offence and that her ability to act accordingly was impaired by mental illness.

On appeal, it was held that the court a quo erred in not allowing the accused to testify on relevant issues, and there were no criminal proceedings were pending as a result of state having withdrawn the matter.

The appeal was allowed and the magistrate decision was set aside.

In **S v Sithole**,²⁰⁹ the accused was indicted on 2 counts of murder and one of attempted murder, all allegedly committed on 18 December 1999.

The accused arrived at his mother in law's house in his motor vehicle, when his wife approached him, he chased and fatally shot her with his licensed firearm, and he shot and killed his mother in law and wounded a 2 year old child.

²⁰⁸ 1998 JDR 0148 (E).

²⁰⁹ 2005 (1) SACR 311 (W).

The judge directed that the accused be examined by the medical superintendent, Sterkfontein hospital and Drs. Plomp and Fine in terms of sec 79 of the Act.

The diagnosis in terms of sec 79(4) (b) of the Act is post-traumatic psychosis and dementia.

The court held that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers.

The accused was found to be suffering from a mental disorder/ mental defect as contemplated in sec 77(1) and 78 (2) of the Act.

The three psychiatrists further with reference to the provisions of sec 79 (4) (c) found that the accused was unable to follow the court proceedings and unable to assist in his own defence and with reference to sec 79 (4) (d) that at the time of the alleged offence he was unable to appreciate the wrongfulness of his actions and unable to act in accordance with such an appreciation of their wrongfulness and their report was unanimous.

In **S v Volkman**,²¹⁰ whereby the application to have the accused committed in terms of section 78 (2) of the Act for his mental capacity to be enquired into (as at the time of the commission of the offence) was turned down because sec 78(2) gives the court a discretion to refer the accused who raise a defence of non-pathological incapacity for observation.

In this case it is stated that the conditions are appalling at the Valkenberg Hospital because of the following reasons:

Problems of over-crowding, patients are locked in dormitories at about 22h00 at night and let out at 07h00 in the morning,

They have no access to toilet facilities but are each given a bedpan for the night, the ventilation in the dormitories is poor and the lighting is dull,

The nursing staff observes the patients at night through a peephole in the doors of the dormitories,

The conditions are undignified and violate the basic human rights of the patients.

²¹⁰ 2005 (2) SACR 402.

This case illustrates some of the practical difficulties associated with the mental illness defence.

4.6 Diminished Responsibility

In the first place, this is usually the finding in cases of mental deficiency that do not amount to legal insanity and in deciding whether a finding of diminished responsibility is justified the court will be guided by the specialist medical evidence, but will also take all the other evidence into account.²¹¹

The concept of diminished responsibility appears not to be frequently invoked in practice in South Africa and at most operates in mitigation of the sentence.²¹²

Section 78(7) confirms that the borderline between criminal responsibility and criminal non-responsibility is not an absolute one, but a question of degree.

A person may suffer from a mental illness yet be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation.²¹³

The person normally gets a less severe sentence due to the fact that he has diminished responsibility and I submit these provisions are sound.

In **S v Martin**,²¹⁴ the court held that when imposing the sentence one must be mindful of the fact that the accused acted without self-control in the sense that he had diminished ability to act.

The court held further, that the trial judge had been correct in deciding that the appellant had acted under circumstances of diminished responsibility. It was therefore not necessary that the appellant be not removed from society nor that he be punished for more than 3 years. Correctional supervision was accordingly the appropriate sentence.

In **S v Mphela**,²¹⁵ the appellant was convicted in a provincial division of murder and was sentenced to death. On appeal the court remarked that it appeared from the appellant's answers and general demeanour, from the fact that his advocate during

²¹¹ Burchell, supra (n 1)401.

²¹² Burchell, supra (n 1)401.

²¹³ Snyman, supra (n 2)174.

²¹⁴ 1996 (2) SACR 378 (W).

²¹⁵ 1994 (1) SACR 488 (A).

cross-examination had difficulty getting through to him, the appellant possibly lacked criminal capacity or suffered from diminished responsibility. In the circumstances the court ought to have acted in terms of section 78 (2) and referred the appellant for observation.

The court accordingly set aside the conviction and remitted the matter to the trial court so that the appellant could make an application in terms of sec 77 and 78 of the Act. The test for determining whether the court should act in terms of section 78(2) of the Act is whether there is a reasonable possibility in the light of an objective consideration of all the evidence before the court that the accused lacks criminal capacity or suffers from diminished responsibility.

In **S v Kok**,²¹⁶ the judge accepted that at the time of the commission of the offences the appellant's capacity to appreciate the wrongfulness of his conduct and to act accordingly was diminished by reason of mental illness or mental defect' within the meaning of sec 78(7) of the Act.

4.7 Panel for Purposes of Enquiry and Report under section 77 and 78

Section 79 provides as follows:

- (1) "Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on-
 - (a) Where the accused is charged with an offence other than one referred to in paragraph(b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or
 - (b) Where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-
 - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

²¹⁶ 2001 (2) SACR 106.

- (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the state;
- (iii) by a psychiatrist appointed for the accused by the court; and
- (iv) By a clinical psychologist where the court so directs.

(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1) , have to conduct the enquiry and report on the accused's mental capacity with a report in which the following are stated, namely-

- (a) whether the referral is taking place
- (b) At whose request or on whose initiative the referral is taking place;
- (c) The nature of the charges against the accused;
- (d) The stage of the proceedings at which the referral took place;
- (e) The purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
- (f) The purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;
- (g) In so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her relatives; and
- (h) Any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

(2)(a) The court may for the purpose of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative request otherwise.

(c) The court may make the following orders after the enquiry referred to in Subsection (1) has been conducted-

- (v) postpone the case for such periods referred to in paragraph (a), as the court from time to time determine;

- (vi) refer the accused at the request of the prosecutor to the court referred to in section 77(6) which has jurisdiction to try the case;
 - (vii) Make any other order it deems fit regarding the custody,
 - (viii) Any other order.
- (3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.
- (4) The report shall-
- (a) include a description of the nature of the enquiry; and
 - (b) include a diagnosis of the mental condition of the accused; and
 - (c) If the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence.
 - (d) If the enquiry is in terms of section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of the act was, at the time of the commission thereof, affected by mental illness or mental defect.
- (5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraphs (c) or (d) of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question”.²¹⁷

In **S v Matjhesa**,²¹⁸ it was stated that before the court can find the accused is not fit to stand trial it has to receive a report under section 79.

In **S v De Beer**,²¹⁹ it was stated that Section 79 (7) of the Criminal Procedure Act, which provides that statements by an accused person whilst he is under observation are admissible to the extent that they are relevant for the determination of his mental condition, has to be interpreted restrictively, so that the exception operates only where the statements are relevant to the mental condition for which accused was referred for observation.

²¹⁷ Du Toit et al , supra(n 185) 13-5.

²¹⁸ 1981 (3) SA 854 (0).

²¹⁹ 1995 (1) SACR (SE).

In **S v Sindane and Another**,²²⁰ the appellants were convicted of murder and robbery in a local division. The court found no extenuating circumstances and each appellant was sentenced to death on the murder charge. Applications for leave to appeal against the convictions were refused by the court a quo and the Appellate Division. The panel which reviewed the death sentence in terms of section 19(8) of the Criminal Law Amendment Act 107 of 1990 was of the view that the same sentence would probably have been imposed had section 277 of the Criminal Procedure Act been in its present form at the time of sentencing.

Whilst an appeal against the death sentence in terms of section 19(12) of act 107 of 1990 was pending, the first appellant, who conducted his own defence throughout the trial, after refusing pro deo representation, brought an application for the setting aside of the sentences imposed on him and the remittal of his case to the trial for decision after his referral for observation in terms of section 79 of act 51 of 1977 and the hearing of the report of the observation panel.

In support of the first appellant's application, an affidavit from a state psychiatrist stated that the appellant had been treated at a mental hospital for schizophrenia during 1979 and there was a reasonable possibility that a referral of first appellant for observation in terms of section 79 of the Act would reveal that at the time of the commission of his crimes he was incapable of appreciating the wrongfulness of his acts or of acting in accordance with such an appreciation.

The application was opposed by the state, who relied on an affidavit by another state psychiatrist stating that he had conducted several examinations of the appellant in prison and that on the information available to him there was nothing to indicate that the first appellant was suffering from any mental disorder which could have resulted in him not being criminally responsible for his acts. The court remarked that an investigation in terms of section 79 of the Act was far more comprehensive than the examination undertaken by the latter psychiatrist and that they could not adequately serve as a

²²⁰ 1992 (2) SACR 223 (A).

substitute for an enquiry. The test for the referral of an accused for observation in terms of section 79 was a lawful one, a reasonable possibility that the accused lacked the capacity to stand trial due to a mental defect or lacked criminal responsibility sufficed to oblige the court to direct the enquiry. The court held that since the first appellant was not seeking an order pursuant to sections 77 and 78 but merely one for remittal to enable the trial court to consider an application for such an order, with the possibility that further evidence in this regard might be adduced, that no more than a reasonable possibility of such an order being ultimately granted needed to be shown in the instant application. The court was of the opinion that such a possibility existed in the instant case and granted an order remitting the matter to the trial court.

4.8 Conclusion

Finally it is clear that the law applicable in South Africa in respect of the defence of mental illness is contained in the provisions of the Criminal Procedure Act, which replaced the criteria as set out in the M’Naghten rules and the irresistible impulse. It is evident after studying decided cases that most people who rely on insanity defence claim that they were suffering from schizophrenia.

Diminished responsibility is not often used in South Africa and at most is used as a mitigation strategy.

The test as set out in sec 78(1) of the Criminal Procedure Act to determine whether the accused lacked criminal capacity or responsibility embodies a so-called mixed test, in the sense that both his pathological condition and psychological factors are taken into account.²²¹

Although the terms require definitions it seems as if South Africa legislation does provide a workable solution.

Due to the legislative amendments any party who raises mental illness as a defence is supposed to prove on a balance of probabilities that the accused was mentally ill, and this is the departure from the normal rules of evidence. This is unfair discrimination on the mentally ill accused to be burdened with a higher burden of proof.

²²¹ Snyman , supra (n 2) 168.

It is evident that 99% of instances it will be the accused who will raise insanity as a defence and he will be convicted and sent to prison because he will be unable to convince the court that he was insane when he committed the offences.

Insanity defence is a controversial subject but the law in South Africa has been clear for some time and the debate continues.

There is no need for the major reform of mental illness legislation in South Africa and the provisions are sound and constitutional vis-à-vis other African countries like Tanzania whereby their insanity law has many deficiencies.

CHAPTER FIVE

5.1 INTRODUCTION

In this chapter I conclude my comparative analysis of mental illness as a defence in criminal law. Throughout the treatise I have discussed the insanity defence law in English Law system, United States of America and the South African law position.

The reason why I decided to do a comparative analysis amongst the three legal systems is because English law is the important source of law and United States of America is another system and South Africa my country, the position in a developing country in Africa.

5.2 FINDINGS AND COMPARISON AND SIMILARITIES

Prior to the commencement of the 1977 Criminal Procedure Act, the insanity defence in South Africa was governed by the first and second of the now infamous M’Naghten rules, which were received into the South African law roughly a century before, and the so-called irresistible impulse rule that appeared on the criminal law scene some twenty years later, in response to the limitations of the original test.²²²

Following the recommendation of the Rumpff Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, these rules were, however, replaced by the provisions of sec 78 (1) of the Criminal Procedure Act.²²³

It is evident in the insanity defence law of South Africa that the position is similar to English Law system because our law emanated from English Law.

The M’Naghten rules were incorporated by legislation in all the Anglo-American jurisdictions, as well as South Africa.

The burden of proof has always been on the defence to prove its case on a balance of probabilities in all three systems, but in South Africa the law has been changed in terms of section 78(1) (A) and (B) such that he who alleges insanity must prove.

²²² Van Oosten “ The Insanity Defence : Its Place and Role in the Criminal Law” South African Journal of Criminal Justice (1990) Vol 1,1.

²²³ Act 51 of 1977 (as amended and is discussed in Chapter 4).

I submit that it is unfair to expect an insane person to prove his case on a balance of probabilities that he was insane when he committed the offence.

I do not think that this is in keeping with the constitution of the Republic of South Africa (protected in section 35(3) (h)-presumption of innocence) and section 9 (1)- right to equality before the law and it will be better to burden the state with that responsibility.

Given the implications of this burden of proof especially on the undefended accused. However, the common-law rule that an accused is burdened with the onus of proving the defence of insanity has passed constitutional muster in the United States of America.²²⁴

In South Africa, the constitutional recognition of the common-law exception could be contested on two persuasive grounds;

Firstly, the proof of insanity is more difficult than disproving the defence of non-pathological incapacity, yet in non-pathological the onus rests firmly on the prosecution to rebut it beyond reasonable doubt.

Secondly, the accused suffering from mental illness are because of their disability, having a higher burden of proof than those who claim non-pathological incapacity and this is unfair discrimination.²²⁵

According to Steytler, the one solution has been offered by placing a duty on the accused to lay a foundation for the defence of insanity.²²⁶

In the English law system and the United States of America they refer to insanity whereas South Africa refers to mental illness but this is synonymous.

The law in South Africa is contained in the provisions of sec 77 – 79 of the Criminal Procedure Act 51 of 1977 (as amended) whereas in English law in the Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991, and in the United states of America in the Insanity Defence Reform Act of 1984.

²²⁴ supra (n 170) 798.

²²⁵ Steytler , supra (n 199)328.

²²⁶ Steytler , supra (n 199)328.

In all the three systems diminished responsibility is taken into account as a mitigation of sentence.

In all the three systems the accused is detained in a prison pending the signification of a decision of a judge in chambers.

In all the three systems schizophrenia is used in support of the insanity defence.

The United States of America allows the forcible medication of insane defendants so that they can be fit to stand trial.

I submit that this procedure is not compatible with modern times and it is barbaric and inhumane because surely some of the medication will have side effects to the health of the defendant.

Some clever defendants could easily prolong the trial process by claiming unfitness to plead and some safeguards needs to be created to curb this system from abuse.

All the three systems that were compared allow for the observation by three specialist psychiatrist to determine whether the accused is really unfit to stand trial and cannot be held responsible for his actions.

The debate about insanity defence is an ongoing issue in all the three legal systems and the debates continue.

There were attempts to revise insanity law in England and the United States of America especially after the Hinckley not guilty finding.

In some American jurisdictions, the insanity defence has been abolished altogether by legislation, which means that the accused cannot be acquitted on the ground that he was suffering from mental illness. If proven guilty of the criminal act charged, he is convicted and is then treated as a mental patient.²²⁷

In the United States of America because of their different states there is no uniformity with regard to their laws but it's clear that some of their provisions are bad like the forcible medication of mentally ill so that they can be fit to stand trial.

²²⁷ Strauss , supra (n 20) 293.

According to Wilson J (as he was then) in the United States the evidentiary burden has not resulted in a flood of accused person being found not guilty by reason of insanity, nor have the Americans witnessed a great rush of insanity pleas.²²⁸

In the English law system I submit that their provisions are sound maybe this is the reason why the South African insanity law emanated from English law.

The conditions of the psychiatric hospitals is sometimes very bad and the Department of Health needs to address this issue like in the case of *S v Volkman*,²²⁹ whereby the court turned down the request for observation at Valkenberg Hospital because of the problems of overcrowding etc.

The test as set out in sec 78(1) of the Criminal Procedure Act to determine whether the accused lacked criminal capacity or responsibility embodies a so-called mixed test, in the sense that both his pathological condition and psychological factors are taken into account.²³⁰

Although the terms require definitions it seems as if South Africa legislation does provide a workable solution and I did not see any deficiency and our insanity law is compatible with the modern times.

Finally, this is an important research topic on comparative analysis of mental illness as a defence in criminal law and this is a controversial subject but it has been clear for so a long time. There were reforms in the insanity law but sometimes you will notice that the changes do work.

²²⁸ Burchell, *supra* (n 1) 394.

²²⁹ *supra* (n 210).

²³⁰ Snyman, *supra* (n 2) 168.

Bibliography

English Law

Books:

- A. Ashworth, Principles of Criminal Law (1991) Oxford, Clarendon Press.
D. Bloy and P. Parry, Criminal Law (1996) London, Cavendish Publishing.
R. Card, Introduction to Criminal Law (1988) London, Butterworths .
R. Card, Cases and Statutes on Criminal Law (1977) London, Butterworths.
P. Murphy, Blackstone's Criminal Practice (2000) London, Blackstone Press Limited .
A.P. Simester and G.R. Sullivan, Criminal Law Theory and Doctrine (2004) Oxford, Hart Publishing.
J. Herring, Criminal Law Text, Cases & Materials (2004) New York, Oxford.
J.C. Smith, Smith and Hogan Criminal Law (1999) London, Butterworths.
D. Ormerod, Smith and Hogan Criminal Law (2005) London, Oxford.
B. Hogget, Mental Health Law (1996) London, Sweet and Maxwell.

Journal:

- L.H. Leigh, J.E. Hall "Insanity" International Encyclopedia of Laws, vol 5 (1993) 70-75.
R.D. Mackay, B.J. Mitchell, L. Howe, "Yet more facts about the insanity defence" Criminal Law Review (2006) 399- 411.

United States of America

Books:

- G.P. Fletcher, Rethinking Criminal Law (1978) Boston, Little, Brown and Company.
R. Cross, P.A. Jones and R. Card, Criminal Law (1998) London, Butterworths.
M.J. Gorr and S. Harwood, Controversies in Criminal Law (1992) London, Westview Press.
P.H. Robinson, Criminal Law (1996) New York, Aspen Law and Business.
J. Monahan and H.J. Steadman, Mentally Disordered Offenders (1983) New York, Plenum Press.
M. Moscovitz, Cases and Problems in Criminal Law (2003) San Francisco, Lexis-Nexis.
C.W. Fricke and A.L. Alarcon, California Criminal Law (1977) Los Angeles, Legal Book Corporation.
R.M. Perkins, R.N. Boyce and D.A. Dripps, Criminal Law and Procedure Case and Materials (2004) New York, Foundation Press Inc.

R. Mackay, Mental Condition Defences in Criminal Law (1995) Oxford, Clarendon Press.

Journal:

C.Slobogin, "The Integrationist Alternative to the Insanity defence" American Journal of Criminal Law (2003) Vol 30,1-20.

R.A. Wright, "Insanity and Diminished Responsibility as a Defence to Criminal Liability" Encyclopedia of Criminology (1998) Vol 2,734-738.

S.J. Morse "Is diminished capacity really dead" Journal of Psychiatry and law (1992) Vol 20, 1-4.

J.R. Hayes, "Enough to forcibly medicate a criminal defendant" Supreme Court Review, Vol 94, 2004,657-686.

A. Haroon "US Supreme Court limits forced drugging of mentally ill before trial" Lancet , Vol 361 (2003) 2131-2134.

South Africa

Books:

C.R. Snyman, Criminal Law (2002) Pretoria, Butterworths.

E. Du Toit, F.J. De Jager, A. Paizes , S. Van Der Merwe, A. Skeen, Commentary on the Criminal Procedure Act (1993) Cape Town, Juta.

N. Steytler, Constitutional Criminal Procedure (1998) Durban, Butterworths.

P.J. Visser and J.P. Vorster, General Principles of Criminal Law through the Cases (1982) Durban, Butterworths.

E.M. Burchell and P.M.A. Hunt, General Principles of Criminal Law, Vol 1 (1970) Cape Town, Juta.

J. Burchell and J. Milton, Cases and Materials on Criminal law (1992) Cape Town, Juta.

J. Burchell and J. Milton, Principles of Criminal Law (1997) Cape Town , Juta.

J. Burchell, Principles of Criminal Law (2005) Cape Town, Juta.

A. Kruger, Mental Health law in South Africa (1980) Durban, Butterwoths.

Journal :

F.F.W. van Oosten, "Insanity defence: its place and role in the criminal law" South African Journal of Criminal Justice (1990) Vol 1,1-9.

S.A. Strauss, "The persons with schizophrenia and criminal justice: some aspects"

Comparative and International Law Journal of Southern Africa, (1996-1997) Vol 29-30, 282-294.

J.Milton, "Law Commission Project 89: Declaration and detention of state patients" South African Journal of Criminal Justice (1998) Vol 11,228-233. 65.

