CHAPTER 11

INSANITY

Mental Impairment in criminal law

11.1 An accused must be mentally fit to stand trial before there can be any inquiry into criminal responsibility. The test is whether the accused person is capable of making a defence: this will include being able to understand the nature of the charge, the evidence and the proceedings. The Criminal Procedure Codes SI/Ki/Tu s 144(1) authorises a court to inquire into whether an accused person is 'of unsound mind so that he is incapable of making a proper defence'. In the event of such a finding, s 144(5) authorises an order for confinement in a mental hospital or other custodial institution. A postponed trial may be resumed if the person's mental health is recovered: s 147.

11.2 The focus of this Chapter will be on cases where an accused is fit to stand trial but denies criminally responsibility for the conduct because of mental impairment, raising a defence traditionally called 'insanity'. At issue is the accused's mental state at the time of the conduct rather than at the time of the trial. The concern will be with mental impairment of a continuing kind, where there is an 'abnormal mind'. Temporary impairments caused by factors such as provocation or intoxication, under which 'normal' minds function in abnormal ways, are dealt with in separate chapters: see **Chapter 5** on provocation and **Chapter 12** on intoxication. There is, however, one form of temporary mental impairment examined in this chapter: sane automatism. Automatism is an act performed by a person without awareness or will. Sane automatism can be caused by factors such as a physical or psychological blow. It is examined here because of the difficulties that courts have sometimes experienced distinguishing between automatism due to insanity and automatism due to other causes. The legal definition of insanity has been developed in part through cases on the relationship between the defence of insanity and the defence of sane automatism: see below at **11.19**–**11.27**.

11.3 Both the Penal Codes and the Criminal Procedure Codes contain provisions relating to defendants who suffered from mental impairment at the time of the relevant conduct. These provisions are not wholly congruent.

- The Penal Codes SI/Ki/Tu s 12 provides that a person suffering 'shall not be criminally responsible for an act or omission' if the person suffered at the time from a '*disease affecting his mind*' and certain conditions are met: see below at **11.9**-**11.16**. The provision is titled '*insanity*' and the finding of not criminally responsible is commonly called the '*insanity defence'*.
- The Penal Codes SI s 203; Ki/Tu s 196 provides for *diminished responsibility* due to *abnormality of mind* to be a defence to murder, reducing the offence to

manslaughter. The limited role of this partial defence is discussed at **5.35**–**5.38, 11.17**-**11.18**.

- The Criminal Procedure Codes SI/Ki/Tu s 146(1)(a) provides for 'a special finding to the effect that the accused was guilty of the act or omission charged but was *insane* when he did the act or made the omission'. Section 146 is titled, '*Defence of unsoundness of mind* on trial'. The conditions for the special verdict are similar to those for a finding of 'not criminally responsible' under the Penal Codes SI/Ki/Tu s 12: see below at **11.6**.

11.4 The terms 'insanity', 'disease of the mind', 'abnormality of mind' and 'unsoundness of mind' have often been used interchangeably in criminal law when describing mental impairment. 'Abnormality of mind' is distinguishable because of the unique role of the defence of diminished responsibility. However, the Penal Codes SI/Ki/Tu s 12 and the Criminal Procedure Codes SI/Ki/Tu s 146(1) both deal with the problem of 'insanity'. They need to be read together in mapping the significance of mental impairment for criminal responsibility.

11.5 The provisions of the Penal Codes and the Criminal Procedure Codes are not wholly congruent. The Penal Codes SI/Ki/Tu s 12 denies any criminal responsibility. In contrast, although the Criminal Procedure Codes SI/Ki/Tu s 146(1) is titled 'Defence', the body of the provision specifies a verdict of 'guilty of the act or omission charged'. The provisions can, however, be reconciled. The Criminal Procedure Codes SI/Ki/Tu s 146(1) speak of guilt of the act or omission rather than guilt of the offence. Guilt of an offence requires not only the conduct elements of an offence but also criminal responsibility for that conduct. The phraseology of the special verdict is cumbersome but the implication is that insanity negates responsibility, as is confirmed by the Penal Codes SI/Ki/Tu s 12. The end result is expressed more simply and clearly in some other jurisdictions which have adopted a special verdict in the form, 'Not guilty by reason of insanity.'

11.6 The particular significance of the Criminal Procedure Codes s 146 lies in the part dealing with consequences of the special verdict. The Criminal Procedure Codes SI/Ki/Tu s 146(1)(b)-(c) allows for indefinite detention in a mental hospital, prison or other custodial institution, initially under order of the court and later under Executive authority. Thus, the defendant is not subject to criminal sanction but, as a dangerous person, is still liable to be subjected to custodial measures that have affinities with criminal sanctions.

11.7 Although insanity is usually called a 'defence', the special verdict may be more attractive to the prosecution than the defendant. Suppose the defendant has argued for a straightforward acquittal on the ground that some fault element of the offence such as intention was absent. The prosecution may wish to respond by contending that insanity was the reason for its absence, so that the special verdict must be imposed

with its consequence of detention. This is permitted as long as the defendant has first put their state of mind in issue.

11.8 The Penal Codes SI/Ki/Tu s 11 incorporates the common law 'presumption of sanity'.

> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question until the contrary is proved.

This reversal of the burden of proof has a long history in the common law: see **2.19**. The standard of the balance of probabilities applies whichever side has raised the issue of insanity.

Elements of the defence of insanity

11.9 The Penal Codes SI/Ki/Tu s 12 prescribes the conditions for a defence of insanity for a person who was suffering from a mental impairment at the time of the criminal conduct:

> Subject to the express provisions of this Code and of any other law in force a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission:
>
> Provided that a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind the effects above mentioned in reference to that act or omission.

Thus, the mental impairment must have had either of two effects:

1. incapacity to understand what was being done;
2. incapacity to know that it ought not to be done.

These are commonly known as the 'arms' or 'limbs' of the defence. Other forms of mental impairment do not qualify. Moreover, lesser mental impairment, such that the person had some limited capacity to understand what they were doing but due to their impairment made a mistake, also does not qualify, though some other defence such as lack of intention may be available. See, for example *Hawkins v R* (1994) 179 CLR 500, [1994] HCA 28.

11.10 The formulation of the insanity defence in the Criminal Procedure Codes SI/Ki/Tu

s 146(1)(a) is similar albeit not identical to that in the Penal Codes. The defendant must have been:

> …by reason of a disease of mind labouring under a defect of reason as to be incapable of knowing the nature and quality of the act, or if he did know it that he did not know it was contrary to law.

This formulation retains the requirement for a cognitive incapacity and also the two arms of the defence. A material difference, however, is that the second arm is expressed more precisely, in terms of incapacity to know the law. On the significance of this shift, see below at **11.14**-**11.16**.

11.11 The restricted scope of the defence has roots in the common law on insanity, as formulated by the House of Lords in *M'Naghten's Case* (1843) 8 ER 718, 722. The M'Naghten Rules have been the subject of much criticism, especially by medical professionals, but still provide the framework for the modern law of insanity in many jurisdictions. The jurisprudence from elsewhere is relevant to the interpretation of the defence in Solomon Islands, Kiribati and Tuvalu.

11.12 The first arm of the defence refers to a person being incapable of knowing what they are doing or the nature and quality of the conduct. This means knowledge of the physical character of conduct. For example, a mentally disordered person may not be able to appreciate that the ferocity of some assault will kill or seriously injure the victim. In extreme cases, the person may not be conscious of acting at all, so that the defence will deny that the conduct was voluntary. In some other cases, this form of the defence will deny a fault element of an offence such as intention. However, the insanity defence is also available for offences such as manslaughter which have negligence as their fault element. In effect, the objective standard of the reasonable person is discarded for persons whose cognitive capacity has been damaged by mental impairment, if the effect the damage is that they could not know what they were doing. They will be acquitted by special verdict, even though the harm would have been foreseeable to and avoided by a reasonable person.

11.13 The first arm of the defence should also cover cases where deficient understanding relates, not to some element of the offence, but to an exculpatory circumstance such as self-defence. The defence should be available to a person who, for example, meant to kill (and, therefore, had the fault element for murder) but was under a delusion that the victim was trying to kill him or her. If there is any doubt in this respect, there will still be no criminal responsibility under the second arm of the defence.

11.14 The second arm of the defence applies to cases where there is a deficiency of

normative understanding:

- Under the Penal Codes SI/Ki/Tu s 12, the person must be incapable of 'knowing that he ought not to do the act or make the omission'.
- Under the Criminal Procedure Codes SI/Ki/Tu s 146(1)(a), the person must have been incapable of knowing that the conduct was 'contrary to law'.

This arm operates as a true exculpatory defence, relieving the person of criminal responsibility despite the presence of the conduct and fault elements of the offence. However, the scope of the defence depends on which version is adopted: the Penal Codes version is potentially broader than the Criminal Procedure Codes version.

11.15 Formulations like that in the Penal Codes are generally interpreted to allow the defence for a person who could not appreciate that others would view the conduct as wrong: for example, because the defendant believed they were acting under a command from God. The issue is whether the person had the capacity to understand the moral judgments of the community. It is immaterial that person was a psychopath who did not internalise those judgments. However, the defence is not excluded simply because the person knew that the conduct was a crime. The issue is moral knowledge rather than legal knowledge. The defence could therefore be available to someone who, although knowing that murder was a crime, believed that he or she was acting under divine command to kill a devil or a sinner. In contrast, the Criminal Procedure Codes version excludes the defence whenever the person had the capacity to know the law. This interpretation of the second arm could exclude most of the cases where belief in a divine command is raised.

11.16 A court in Solomon Islands, Kiribati or Tuvalu will have to choose between these competing interpretations of the second arm. There are judgments from other jurisdictions favouring each of them. Nevertheless, the preponderance of modern opinion favours the view that the insanity defence should encompass incapacity to appreciate that the conduct would be viewed as wrong by other people and that it should not be excluded merely because there was knowledge of the law. See, for example, *Stapleton v The Queen* (1952) 86 CLR 258 in Australia; *R v Chaulk* 1989 CanLII 124 (SCC), [1989] 1 SCR 369 in Canada. See also Crimes Act 2009 (Fiji) s 28. For authority from Solomon Islands endorsing adoption of the Australia approach, see *R v Ephrem Suraihou* (Unrep. Criminal Case No. 33 of 1992).

Diminished responsibility

11.17 As was noted at **5.35**–**5.38**, there is a special defence of diminished responsibility which reduces the offence of murder to manslaughter. The Penal Codes SI s 203(1); KI/TU s 196(1) states:

> Where a person 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.

The loose formula of a substantial impairment of 'mental responsibility' confers a wide discretion on a court to grant the defence wherever mental abnormality appears to have clouded the judgment or self-control of a person. In contrast, the defence of insanity is subject to tight conditions.

11.18 For diminished responsibility, the mental abnormality must be such that it 'substantially impaired' the person's mental responsibility. A critical difference between the conditions for the defence of insanity and the defence of diminished responsibility is that the former requires an 'incapacity' to perform certain mental functions while the latter only requires a substantial impairment of mental responsibility. A state of diminished responsibility is a lesser abnormality than that required for a finding of insanity.

Automatism and criminal responsibility

11.19 'Automatism' is the term used to describe involuntary behaviour caused by the mental processes of the person rather than by external force: see **4.5**-**4.10**. It is a condition in which bodily movements occur without direction from the conscious mind. The person may be unconscious or, according to some psychiatrists, have impaired consciousness: *R v Stone* [1999] 2 SCR 290 at [155]–[156]. Another term used to describe the phenomenon is 'dissociation', which signifies that the body is acting separately from the conscious mind.

11.20 Indications of automatism include glassy-eyedness or flickering eyes: see *R v Leonboyer* [2001] VSCA 149 at [55]. Some psychiatrists take the view that automatistic behaviour is characteristically disorganised and purposeless so that apparently organised and goal-directed behaviour is unlikely to be truly automatistic. Other experts disagree: see the views expressed by different expert witnesses in *Leonboyer* at [40], [50], [59], [68]. The narrower view of automatism found favour with the majority of the Supreme Court of Canada in *Stone* [1999] 2 SCR 290, where Bastarache J said at [191]:

> I agree that the plausibility of a claim of automatism will be reduced if the

accused had a motive to commit the crime in question or if the 'trigger' of the alleged automatism is also the victim.

11.21 Depending on the cause of the automatism, different sets of rules may apply:

- Automatism caused by a physical blow or by any factor other than mental impairment is governed by ordinary principles of criminal responsibility, which provide that there is no criminal responsibility for involuntary conduct. The Penal Codes SI/Ki/Tu s 9 provides that there a person is not criminally responsible for conduct that occurs 'independently of the exercise of his will': see **4.5**-**4.15**.
- Automatism caused by mental impairment is governed by the rules on insanity, so that the burden of proof lies on the party raising the issue and the special verdict applies in event that the defence is successful.

11.22 The distinction between insane automatism and sane automatism has received most scrutiny in cases where the accused has sought a complete acquittal but the prosecution has responded by arguing that the alleged state of mind would in law amount to insanity. The issue in these cases is usually not the medical cause of the automatism. Rather, the issue is the legal characterisation of the medical cause.

11.23 There are two reasons why a defence of simple involuntariness may be met with an argument that the evidence raises the issue of insanity:

- The prosecution may seek to argue that a successful claim for automatism must lead to the special verdict rather than a complete acquittal; or
- The prosecution may seek to use the special rules governing the burden of proof for insanity to deny that there was any automatism at all and thereby to obtain a conviction. Insane automatism, like any form of mental impairment must be proved by the side asserting it: see the discussion above at **11.8**. In contrast, sane automatism is not governed by any special rules affecting the burden of proof. There must be some evidence putting the mental state of the accused in issue but, once this evidential burden is discharged by the accused, the absence of automatism must be proved beyond reasonable doubt by the prosecution. Thus, if an alleged state of mind is characterised as 'sane automatism', the prosecution must disprove the automatism beyond reasonable doubt, whereas, if it is characterised as 'insane automatism', the accused must prove the automatism on a balance of probabilities.

11.24 There has been much debate concerning the appropriate test to distinguish between sane and insane automatism. Modern authorities at common law have tended to focus on the distinction between external and internal causes for the mental dysfunction: *R v Hennessy* [1989] 2 All ER 9; *R v Falconer* [1990] HCA 49; (1990) 170 CLR 30. Applying this test, the automatism is characterised as 'sane automatism' when

caused by an external factor such as a blow to the head. An example is the Australian case of *Cooper v McKenna* [1960] Qd R 406, where an accused who had suffered concussion was acquitted on a charge of dangerous driving. In this situation, there is a normal mind functioning abnormally in response to a specific external stimulus. In contrast, automatism is characterised as 'insane automatism' when it is caused by some internal functioning of the mind that can be regarded as truly abnormal.

11.25 An objection often raised to the external/internal test is that it is insufficiently connected with medical theories about mental illness and, in particular, psychiatric diagnoses of continuing dangerousness and/or responsiveness to treatment. For example, in cases where the automatism is alleged to have been caused by emotional stress resulting from a 'psychological blow', the issue becomes whether or not a normal person could have become dissociated as a result of such a blow: *R v Rabey* [1980] 2 SCR 513; *R v Falconer* [1990] HCA 49; (1990) 170 CLR 30. If it is decided that the idea of a normal person becoming dissociated in those circumstances is implausible, then the automatism must be characterised as insane, even though psychiatrists may be unable to diagnose any specific mental illness and even though the psychiatric evidence may be that there is no likelihood of repetition and no condition to be medically treated.

11.26 There are two areas of major difficulty in addition to psychological blows. One is the problem of behaviour occurring during episodes of parasomnia in which complex motor behaviours such as sleepwalking occur. This has traditionally been viewed as sane rather than insane automatism. This view was upheld by the Supreme Court of Canada in *R v Parks* [1992] 2 SCR 871, but only by ignoring the external/internal test in favour of relying on psychiatric definitions of mental illness. In contrast, in *R v Burgess* [1991] 2 QB 92; [1992] 2 All ER 769, the English Court of Appeal held that an attack performed during an episode of sleepwalking was the product of insanity. In *R v Luedecke* 2008 ONCA 716, the Ontario Court of Appeal was concerned with a case of alleged 'sexsomnia' involving automatistic sexual behaviour. The accused had a well-established history of this kind of conduct. The Court held that parasomnia may or may not be a disease of the mind depending on the evidence. It was held that insanity was the appropriate classification on the evidence in the particular case.

11.27 The other area of major difficulty concerns those abnormal mental conditions that can be experienced by diabetics. In *Hennessy* [1989] 2 All ER 9, it was held that:

- the defence of sane automatism is available for dissociation caused by *hypoglycaemia* (occurring when insulin is taken to counteract diabetes but the blood sugar level falls too low); while
- only the insanity defence is available for *hyperglycaemia* (occurring when high blood sugar results directly from diabetes).

This seems to involve a strained distinction, especially when hyperglycaemia is so easily

preventable by injections of insulin. A mind which needs additional insulin to operate normally is usually regarded as still being a normal mind.