CHAPTER 11

MENTAL IMPAIRMENT

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 thrust of the evidence and the proceedings. The Criminal Procedure Code s 91(1) authorises a court to inquire into whether an accused person is 'of unsound mind and consequently unfit to plead or incapable of making his defence'. In the event of such a finding, s 91(2) authorises postponement of further proceedings in the case. Section 91(3) provides that the provisions of the Penal Code shall thereafter apply to the case, which means that the trial may be resumed if the person's mental health is recovered and, In the meantime, the court may make a guardianship order under the Penal Code s 13.

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 when it occurred, 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 is 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 10 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 **11.22 – 11.25**.

11.3 The Penal Code contains two provisions relating to defendants who suffered from mental impairment at the time of the relevant conduct.

- The Penal Code s 20(2) specifies the conditions for a defence of insanity:

> It shall be a defence to a criminal charge that the accused was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable

effects of his conduct.

The consequences of this defence being successful are that the accused is acquitted but the court may make an order for confinement: s 20(3). The provision is titled '*insanity*' and the defence is commonly called the '*insanity defence'*.

- The Code s 25 provides that, in the event that the accused suffered from a mental impairment but did not meet the conditions for a defence of insanity, the court may make a finding of diminished responsibility due to 'abnormality of mind'. This will not affect liability: the accused is still found guilty. However, instead of the reduction of sentence that is mandated when responsibility id diminished for other reasons (see **10.4**), the court may make an order for custody and treatment under s 25(2):

> If an accused is found guilty but with such diminished responsibility, the court may make such order with respect to his custody and treatment as is necessary for the safety of others and his own well-being.

Thus, either verdict provides for a custody order. The detention may be in a prison or in any other form of secure institution.

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 that can negative criminal responsibility. However, 'abnormality of mind' is distinguishable in the Vanuatu Penal Code because of the unique role of the defence of diminished responsibility.

11.5 The Criminal Procedure Code s 82 provides in more detail for the consequences of a successful insanity defence, including the special verdict of 'not guilty by reason of insanity':

> Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane within the meaning of the Penal Code, then if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane at the time when he did or made the same, the court shall make a special finding to the effect that the accused is not guilty of the offence charged by reason that he was insane when he did the act or made the omission. When such special finding is made the court may order that the accused be kept in custody in such place and in such manner as the court shall direct and the provisions of the Penal Code shall thereafter apply.

Some other jurisdictions provide for a special verdict of 'guilty but insane' rather than

'not guilty by reason of insanity'. However, nothing turns on the form of the special verdict. Its critical feature is that is makes the defendant liable to a detention order.

11.6 Although insanity is usually called a 'defence', the special verdict may be more attractive to the prosecution than the accused. Suppose the accused 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.

11.7 The Penal Code s 20(1) incorporates the common law 'presumption of sanity':

> Every person accused of a criminal offence shall be presumed sane until the contrary is proved; the burden of proof shall lie upon the accused on a balance of probabilities.

This reversal of the burden of proof has a long history in the common law: see **2.22**. The standard of the balance of probabilities applies whichever side has raised the issue of insanity.

Elements of the defence of insanity

11.8 The Penal Code s 12(2) prescribes detailed conditions for a defence of insanity for a person who was suffering from a mental impairment at the time of the criminal conduct.

> It shall be a defence to a criminal charge that the accused was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct. Such disease may consist of a mental disorder or deficiency which leads in relation to the criminal act to a complete deprivation of the reasoning power of the accused beyond a momentary confusion, absence of self-control or irresistible impulse. Any mental disorder which has manifested itself in violence and is prone to recur is sufficient. The disease need not be permanent or prolonged; a temporary loss of mental awareness shall constitute a sufficient defence.

11.9 The bulk of the s 20(2) definition is concerned with the term 'disease of the mind'. This is broadly equated with 'a mental disorder or deficiency' of a serious kind. The condition may be either acquired or congenital and either permanent or temporary. It is said to be *sufficient* that a mental disorder manifests in violence and is prone to recur; however, it is *not* said to be *necessary* that the condition is prone to recur.

Perhaps most importantly, the condition must lead to 'a *complete deprivation* of the reasoning power of the accused' and render the accused '*incapable* of appreciating the probable effects of the conduct'. Mental disorder to a lesser degree does not qualify. For example, suppose a person had some limited capacity to understand what they were doing but due to their impairment made a mistake. The defence of insanity would not be available, though there might be a finding of diminished responsibility under s 25. Some other defence such as lack of intention is perhaps also possible: see, for example, *Hawkins v R* (1994) 179 CLR 500, [1994] HCA 28.

11.10 Section 20(4) provides that involuntary intoxication is deemed to be a mental disease. This provision is discussed in Chapter 12, in the context of a wider review of the significance of intoxication for criminal responsibility.

11.11 A critical limitation on the scope of the defence arises from the requirement that the accused be incapable of 'appreciating the probable effects of his conduct'. Other forms of mental disorder are excluded, no matter how severe or delusional the condition. In most cases, such 'probable effects' will be part of the definitional elements of the offence, as is causing the death of a person in any of the homicide offences under the Penal Code ss 106, 107(d) or 108(c). Therefore, despite the use of the term 'defence', the provisions of the Code on insanity do not establish a full defence in the sense that they enable an accused to escape the consequences of a criminal charge. Instead, they establish a special kind of custodial response: acquittal but indefinite detention rather than a guilty finding and a term of imprisonment.

11.12 In effect, there must be a defect of reasoning such that the person was incapable of appreciating what they were doing. This means appreciation 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 of the damage is that they could not know what they were doing. They will be acquitted by special verdict, even though the consequences would have been foreseeable to and avoided by a reasonable person.

11.13 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 paranoid 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. Such a person would not

appreciate that the effects of homicide would be to end the life of a non-threatening person.

11.14 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. The central propositions in the *M'Naghten* rules were expressed by Lord Tindal CJ at 722:

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

The conception of insanity in the *M'Naghten* Rules has been the subject of much criticism, especially by medical professionals, but still provides the framework for the modern law in many jurisdictions.

11.15 There is a major difference between the insanity provisions of, on the one hand, the Vanuatu Penal Code and, on the other, the *M'Naughten* Rules and most statutes based on those Rules. Unlike the Code, *M'Naughten* recognised two forms of insanity, commonly known as the 'arms' or 'limbs' of the defence.

- Under the first arm, the defect of reason relates to the 'nature and quality of the act'. This is generally understood to refer to the physical or material character of conduct. This arm is functionally equivalent to the form of insanity adopted in the Vanuatu Code: incapacity to appreciate the probable effects of conduct.
- Under the second arm, the defect of reason relates to the moral character of the conduct: not knowing he was doing 'what was wrong'. The issue is whether the accused 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: 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. 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 sinner.

The second arm is included in the criminal statutes of most jurisdictions. Curiously, however, it is absent from the Vanuatu Code.

11.16 Where an accused suffers from the wrong kind of mental impairment for an insanity defence, it may still be possible to claim diminished responsibility due to 'abnormality of mind' under s 25. Section 25 simply provides:

> The court may decide that the accused, although not insane within the meaning of section 20, was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury, as diminished his responsibility for his acts.

The broad terms of this provision could extend to defects of moral appreciation in addition to other forms of mental disorder.

Automatism and criminal responsibility

11.17 'Automatism' is a term used to describe involuntary behaviour caused by the mental processes of the person rather than by external force: see **3.28-3.31**. 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.

11.18 Indications of automatism include glassy 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* [2001] VSCA 149 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.

11.19 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 or intoxication is governed by ordinary principles of criminal

responsibility, which provide that there is no criminal responsibility for involuntary conduct. See **3.25-3.27**. This is sometimes called 'sane automatism'.

- Automatism due to voluntary intoxication is governed by the special rules relating to intoxication under the Penal Code s 21. See **Chapter 12**.
- Automatism caused by mental impairment, including involuntary intoxication, 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. See the discussion in *R v Falconer* [1990] HCA 49; (1990) 171 CLR 30.

11.20 The distinction between sane automatism and insane 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.

11.21 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, **11.7**. 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.

11.22 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) 171 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, the automatism is characterised as 'insane automatism' when it is caused by some internal functioning of the mind that can be regarded as truly abnormal.

11.23 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) 171 CLR 30. If it is decided that the idea of a normal person becoming dissociated in the 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.

11.24 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; 15 CR (4th) 289, 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.

11.25 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.