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a person suffering from insane delusions...

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LLB (HONS) RESEARCH PAPER

SHOULD A PERSON SUFFERING FROM  
INSANE DELUSIONS BE ABLE TO USE (THE  
DEFENCE OF) SELF-DEFENCE AGAINST  
IMAGINARY THREATS?

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## II INTRODUCTION

This essay will consider whether a defendant who kills someone whilst suffering from insane delusions should be able to use (the defence of) self-defence against imaginary threats. This issue has been highlighted by the decision in the case of *R v Green*.<sup>1</sup>

In this case the armed offenders' squad had been called to Green's residence because he had been behaving strangely with a sawn-off shotgun. One of the constables forced open the door, and was shot by Green. The evidence suggested that Green thought that he was acting in necessary self-defence because of a belief that the officers were KGB infiltrators seeking to kill him. However, he was deluded and no fewer than four psychiatrists agreed that he was legally insane at the time of the killing. On this basis, it was accepted that he would have a good defence of self-defence (which if successful would result in an unqualified acquittal), but not insanity.<sup>2</sup>

Arguably this result is undesirable (given that he was essentially insane) and the more appropriate result for Green and from a public policy perspective would have been for him to become a special patient (the likely result of an insanity verdict).<sup>3</sup> In order to explore this idea this essay will, first canvass the background to this decision—the law relating to insanity and self-defence, including who raises it, plus comparison of disposition options. It will then analyse the decision of *Green*<sup>4</sup> in more detail before considering whether the decision was right both in terms of the law (with respect to the wording of the provisions of the 1961 New Zealand Crimes Act) and policy. This will, in turn, enable the determination of whether anything should be done to prevent such a result from occurring in the future.

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<sup>1</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>2</sup> *R v Green*, above, 524-525.

<sup>3</sup> Criminal Justice Act 1985, s115 (1).

<sup>4</sup> *R v Green*, above.



### III THE BACKGROUND TO GREEN: SELF-DEFENCE AND INSANITY UNDER NEW ZEALAND LAW

In order to fully understand the processes which have resulted in the outcome illustrated by *Green*,<sup>5</sup> it is important to look closely at the defences of self-defence and insanity under New Zealand law. This is because (a) Green thought he was defending himself and (b) was probably insane.

#### *A History and Operation of Insanity Defence (includes Procedure and Disposition)*

The insanity defence in New Zealand has been developed from *M'Naghten's Case*.<sup>6</sup> From this case, a number of rules were developed; the essential elements of which were first incorporated into New Zealand's criminal law in section 23 of the Criminal Code Act 1893<sup>7</sup> and subsequently section 43 of the 1908 Crimes Act.

One of the questions posed by the judges in *M'Naughten's Case* concerned the liability of a person who commits an offence as a consequence of an insane delusion about existing facts.<sup>8</sup> The answer to this question was incorporated into both the 1893 and 1908 Acts.<sup>9</sup>

<sup>5</sup> *R v Green*, above.

<sup>6</sup> *M'Naghten's Case* (1843) 8 ER 718 (HL).

<sup>7</sup> The Criminal Code Act was itself based upon the Draft Code of the English Criminal Code Bill Commission, published in 1879 (This Code was drafted by Sir James Fitzjames Stevens) and indeed s23 of the 1893 Act enacted in almost identical terms the text of section 22 of the Draft Code, although the arrangement of the text differed in some respects: Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998) 267.

<sup>8</sup> Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998) 288.

<sup>9</sup> Crimes Act 1908, s 43(3).



A person laboring under specific delusions, but in other respects sane shall not be acquitted on the ground of insanity under the provisions hereinafter contained unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

This limb (the "specific delusions" limb) of the insanity defence was removed in 1961, when the Crimes Act was revised and section 23 became the new insanity provision. The material parts of section 23 are as follows:

(2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable: (a) Of understanding the nature and quality of the act or omission; or (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

The "specific delusions" provision was excluded from the 1961 Crimes Act because of a perception that it was redundant. This idea undoubtedly flowed from decisions such as *Murdoch v British Israel World Federation (NZ) Inc*,<sup>10</sup> which noted that a Green-like situation came within the "wrong" limb of the insanity defence.<sup>11</sup>

The issue of whether the conduct of a defendant comes within the ambit of section 23 tends to be raised by the defence. The prosecution can't raise this issue.<sup>12</sup> However, a judge utilising their powers under section 113 (3) of the Criminal Justice Act 1985 can, under certain circumstances, raise the issue of insanity.<sup>13</sup> This section stipulates that:

Nothing in this section shall limit or affect the power of a judge to leave to the jury the question of whether the defendant was insane within the meaning of section 23 Crimes Act 1961, notwithstanding that the defendant has not pleaded insanity nor put the question of his or her sanity in issue, where it appears in evidence that the defendant may have been insane at the time of the commission of the offence.

<sup>10</sup> *Murdoch v British Israel World Federation (NZ) Inc* [1942] NZLR 600 (CA).

<sup>11</sup> *Murdoch v British Israel World Federation (NZ) Inc*, above, 649 Smith J.

<sup>12</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>13</sup> The provision is a statutory clarification of *R v Cottle* [1958] NZLR 999 (CA) where, although sane automatism only had been pleaded, the jury acquitted on the ground of insanity: Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998) 294.



If it is decided that a defendant comes within the ambit of section 23, the court has three disposition options (set out in section 115 Criminal Justice Act 1985): committal as a special patient; committal as a patient subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992; and immediate relief. However, it usually commits the person as a special patient, especially when the charges are serious.<sup>14</sup>

### **B History of Self-defence**

The original test for self-defence in New Zealand required a reasonable belief. However, this changed when section 48 was introduced into the Crimes Act in 1981. It provides: "Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

The relevance (to the case at bar) of this historic change was that a person like Green would now come within the ambit of this defence. This is because he honestly (albeit whilst suffering from insane delusions) believed he was under attack. Under the old self-defence law, however, such a plea would fail-since an insane belief is, by definition, deemed unreasonable.

### **C Post-Trial issues**

#### *1 If insanity verdict*

As mentioned in Part III (a) a person who is held to be insane at the time that he kills a victim invariably become a special patient under section 115 of the Criminal



Justice Act. Special Patients may only be released, or transferred to patient status, on the direction of the Minister of Health. This political dimension is supposed to reflect the particular need to ensure the protection of the public in such cases.

## 2 If acquitted of self-defence but still insane

The procedure is quite different if the defendant were to receive an unqualified acquittal on the grounds of self-defence; notwithstanding that they were essentially insane (arguably the situation in *R v Green*.<sup>15</sup>) Such a defendant would, in all likelihood, be committed independently of the trial process.

The procedure for such a committal would begin with an application [that complies with the formalities in section 8 of the Mental Health (Compulsory Assessment and Treatment) Act 1992] for a compulsory treatment order being made under section 14(4) of that Act.

Such an application would then be probably heard by a Family Court judge (section 17) who would also examine the patient (section 18). If the Court considers that such an order is necessary (section 27(c)) it would then have to decide between which of the two options of inpatient or community treatment order would be best suited to the needs of the particular patient (section 28(2)).

In a case with facts similar to those in *Green*, an inpatient order is most likely due, inter alia, to the severity of the act they committed and the consequential risk to society that they would otherwise create. An inpatient order requires continued detention in a specified hospital. A person so committed would generally be in a far better position to re-enter society than a "special patient." This is because such "ordinary" patients are under the control of the particular psychiatric institution, and can be released at the discretion of the superintendent. A defendant like *Green* would therefore have an incentive to plead self-defence and hope for an unqualified

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<sup>14</sup> In cases involving homicide it has been held to be an "invariable" practice for judges to make a special patient order and that it is inappropriate to take any other course: See *R v GH* [1977] 1 NZLR 50.



acquittal, to avoid becoming a special patient (and therefore possibly have an easier route back into society).

However, if the judge making such an inpatient order considers that the patient poses a danger to others (like Green clearly does), they can refer the case to the Director of Mental Health (under section 54.) If the Director agreed with the judge's perspective, they could, apply to the Court for a restriction order (section 55(3)). Such a patient would then become subject to the same sections with regard to leave as special patients, including patients in respect of whom an order has been made under section 115 of the Criminal Justice Act 1985.<sup>16</sup>

On the face of it, this seems to suggest that a person like Green may still effectively end up in the same position (regarding release) as someone who is held to be insane notwithstanding his or her unqualified acquittal. Therefore, the result in *Green*<sup>17</sup> may be appropriate. However, as will be explained in greater detail in Part V of this essay, various negative policy outcomes would still flow, even if such a defendant were to become a restricted patient.

Now that the background to the *Green*<sup>18</sup> decision has been canvassed, it is important to explore the decision in light of both the law and the policy outcomes, which the law is trying to achieve.

#### **IV THE REASONING IN GREEN**

##### ***A Why the Court of Appeal Concluded that the Case was Covered by Self-defence not Insanity***

The case of *Green*<sup>19</sup> was first tried in the High Court, where the defendant pleaded not guilty. At a pre-trial conference, defence counsel indicated he would not be putting forward the defence of insanity and would not call psychiatric evidence. A

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<sup>15</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>16</sup> Sylvia.A.Bell (ed) *Mental Health Law in New Zealand* (Brooker's, Wellington, 1998) 65.

<sup>17</sup> *R v Green*, above.

<sup>18</sup> *R v Green*, above.

<sup>19</sup> *R v Green*, above



preliminary psychiatric report obtained by defence counsel indicated that the accused was fit to plead, but suffered from paranoid schizophrenia. This was notwithstanding the fact that four psychiatrists had certified that Green was legally insane at the time of the alleged offences. The Crown, in response, indicated its intention to call psychiatric evidence to show that the proper verdict would be not guilty by reason of insanity. The judge allowed the Crown to adduce such evidence. On the basis of this evidence, the jury returned verdicts of not guilty by reason of insanity. This decision was reversed in the Court of Appeal. The Court held that the trial judge's decision to permit the Crown to adduce evidence of the insanity defence was erroneous in point of law.<sup>20</sup> The judge went further by saying that Green was not insane within section 23 of the Crimes Act 1961.<sup>21</sup>

The Court of Appeal's conclusion essentially involved self-defence trumping insanity. This decision was based largely on two facts. First, all four [psychiatrists] said that Green had an honest and genuine belief that he was acting in necessary self-defence.<sup>22</sup> Secondly, this belief had a rational foundation in that it would have clearly been a good defence if it had been true. Consequently, this did not suggest any lack of moral understanding that to shoot someone is wrong, unless necessary for one's own defence. There was also no evidence that Green was incapable of understanding the nature and quality of his act. Therefore, he did not come within the ambit of the insanity defence.<sup>23</sup>

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<sup>20</sup> *R v Green*, above, 513-514 McKay J.

<sup>21</sup> *R v Green*, above, 524-525 McKay J.

<sup>22</sup> Therefore by virtue of this honest belief he came within the ambit of the defence of self-defence: *R v Green*, above, 524-525 McKay J.

<sup>23</sup> *R v Green*, above, 524-525 McKay J.



Implicit in this decision is the idea that not all cases in which a defendant commits a crime whilst suffering from specific delusions will come within the ambit of this limb of the insanity defence. Whether it does or not will depend on whether their act would have been morally justifiable if the facts as they believed them to be had been true.<sup>24</sup> If such a justification existed, they were capable of knowing that the act was morally wrong.

This approach suggests that the *Green*<sup>25</sup> case is a product of the fact that the morally wrong limb doesn't cover certain specific delusions such as those suffered by the defendant in that particular case.<sup>26</sup> Therefore, the cause of the problematic Green result was the law itself.<sup>27</sup> (Not merely an unjustified interpretation of the law.)<sup>28</sup> However, in order to support this argument, it is useful to look at case law.

### B Comparison with Similar Cases in other Jurisdictions

*Green*<sup>29</sup> isn't the only case where the issue has arisen as to whether a person who kills someone based on a deluded belief (caused by a disease of the mind) comes within the ambit of the insanity defence. Three other such cases are *R v Chaulk*,<sup>30</sup> *Walsh v The Queen*,<sup>31</sup> and *R v Oommen*.<sup>32</sup> It is useful to compare the facts of these cases to Green. Unlike Green, these cases all held that such a defendant came within the ambit of the "morally wrong" limb of the insanity defence. On the face of it, this suggests that the reasoning of Green may not be correct (unjustified/unduly narrow interpretation of New Zealand's insanity laws) given

<sup>24</sup> It is important to note, however, that if such an accused is acting as an automaton then he will come within the ambit of the morally wrong limb notwithstanding that his act would be morally justifiable if the facts as he believed them to be had been true: See *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A 68/1993, 42 Crawford J.

<sup>25</sup> *R v Green*, above, 513.

<sup>26</sup> This idea is supported by case law such as *R v Moke* [1917] 3 W.W.R. 575 (Alta. S.C.) and *R v Budic* (No. 3) (1978) 43 CCC (2d) 419, which held that the "specific delusions" provision and the other limbs of the insanity defence provide alternative defences.

<sup>27</sup> This suggests that the specific delusions provision should be reinstated because it would have application independent of the other two limbs of insanity.

<sup>28</sup> This analysis will be limited to the defence of insanity where judicial decision has diverged especially with respect to the ambit of the "morally wrong" limb. This can be compared with the self-defence law, which clearly covers a Green like situation.

<sup>29</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>30</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC)

<sup>31</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>32</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).



New Zealand legislation. However, although the outcomes in these cases are different, I will argue that they are each correct on their own facts/ given their legislative context.

The case of *Walsh*<sup>33</sup> involved a defendant who killed the deceased whilst suffering from a dissociative flashback episode which made him believe he was back in the Korean War (he was a war veteran), and the deceased was an opposing soldier who was about to take his life. The verdict was not guilty by reason of insanity.

Although this case involves similarities with the case of *Green*,<sup>34</sup> in that they both involved a defendant (who had a disease of the mind) doing an act that would have been morally justifiable if the facts as they believed them to be had been correct, there was also a key difference which caused the different results. This difference was that the defendant in *Walsh*<sup>35</sup> was acting as an automaton<sup>36</sup> (his action was without conscious volition<sup>37</sup>) when he killed the deceased. In such a situation, a person who commits a crime clearly would not understand the nature and quality of their act<sup>38</sup> nor that their act was wrong. (This can be compared with the defendant in the case of *Green*<sup>39</sup> who clearly was in a conscious state of mind when he committed the act of murder). Therefore, the result in *Walsh*<sup>40</sup> (found insane under the "morally wrong" limb) is consistent with the result in the case of *Green*.<sup>41</sup>

The result in *Green*<sup>42</sup> can also be distinguished from that in *Chaulk*<sup>43</sup> on the facts. The verdict in the latter case was one of insanity. The *Chaulk*<sup>44</sup> case involved two teenagers who suffered from a paranoid psychosis. They believed that they could rule the world, and killing was a necessary means to that end. They knew that the laws of Canada existed, but believed that they were above the law and thus had the

<sup>33</sup> *Walsh v The Queen*, above.

<sup>34</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>35</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A 68/1993.

<sup>36</sup> The defendant in *Walsh* was acting as an automaton. This is illustrated by the fact that the psychiatrist in that case said that he suffered from post traumatic stress disorder, which triggered him into a dissociative state. In this state the defendant would have acted as he did on an impulse which he would have been powerless to resist: *Walsh v The Queen*, above, 16 Crawford J.

<sup>37</sup> *Murdoch v British Israel Federation* [1942] NZLR 600, 605 (CA).

<sup>38</sup> See *R v Cottle* [1958] NZLR 999 (CA).

<sup>39</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>40</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>41</sup> *R v Green*, above.

<sup>42</sup> *R v Green*, above.

<sup>43</sup> *R v Chaulk* (1990) 62 CCC (3d) 193.



right to kill the victim because he was a "loser".<sup>45</sup> Therefore, they did not know that it was morally wrong to kill someone unless for example acting in self-defence (and therefore came within the "morally wrong" limb of the insanity defence). They actually thought it was right to kill "a loser".<sup>46</sup> This can be compared with the defendant in the case of *Green*,<sup>47</sup> who knew that it was wrong to commit murder in the applicable circumstances but was merely deluded about the actual circumstances.

Arguably, however, the case of *Green*<sup>48</sup> cannot be distinguished from the case of *Oommen*<sup>49</sup> on its facts. The verdict in the latter case was one of insanity (under the "morally wrong" limb of the insanity defence). It involved a defendant who suffered from a paranoid delusion that the deceased had been commissioned (as part of a conspiracy) to kill him. This delusion convinced the defendant that he was obliged to kill her.

Both cases involved a voluntary act (compare with *Walsh*<sup>50</sup>) by a defendant who acted under a deluded belief (caused by a disease of the mind) in a set of facts, which, if true, would have made the act morally justifiable. The conclusion to be drawn from this (because both countries have the same "morally wrong" limb to the insanity defence<sup>51</sup>) is that these two cases involved different interpretations of the ambit of the "morally wrong" limb of the insanity defence.

The reasoning in *Oommen*<sup>52</sup> was that the accused, unbeknownst to him, was killing in a circumstance in which it was morally wrong to do so. Consequently, he didn't

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<sup>44</sup> *R v Chaulk*, above.

<sup>45</sup> *R v Chaulk*, above, 200.

<sup>46</sup> There are comparisons here with the case of *R v Budic* (No. 3) (1978), 43 CCC (2d) 419. In this case Budic, under the insane delusion that his doctor was part of a conspiracy to withhold medical treatment from him, killed him. A refusal to provide medical attention does not justify murder. It was held specifically that the "specific delusions" limb of the insanity defence did not cover such a fact pattern whereas the "morally wrong" limb did.

<sup>47</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>48</sup> *R v Green*, above.

<sup>49</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).

<sup>50</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>51</sup> Although in the Canadian legislation they refer to "wrong", as opposed to "morally wrong" the Court in the case of *R v Chaulk* (1990) 62 CCC (3d) 193, 236 said that "wrong" meant "morally wrong" and not simply "legally wrong." (Therefore this difference in the wording in the insanity provisions of the respective jurisdictions had no bearing on the difference in the outcome of the two cases.)

<sup>52</sup> *R v Oommen*, above.



know that he was in the wrong. In fact, the delusion caused him to believe that it was right to commit murder in his case.<sup>53</sup> On the basis of this reasoning, the judge concluded that delusions as to factual matters, which if true would make an act morally justifiable, could demonstrate that a person was incapable of knowing that an act was morally wrong.<sup>54</sup> The Court in *Green*<sup>55</sup> disagreed. They seemed to base their decision on the idea that it was difficult to argue that Green didn't know right from wrong, since, if the deceased had been from the KGB, Green's action would have been justifiable.

However, this does not necessarily discount the possibility that the decisions in both cases may be correct, because of the different legislative contexts in which they were decided. For instance, arguably the "morally wrong" limb of the insanity defence may mean something different in a jurisdiction where unreasonable mistake can still found self-defence than it would where there is a reasonable belief test<sup>56</sup> for self-defence. This idea is supported by the fact that the 1942 New Zealand case of *Murdoch v British Israel Federation inc*,<sup>57</sup> which decided that a Green-like fact pattern would come within the ambit of the "morally wrong" limb of the insanity defence was decided when the self-defence test in New Zealand required a reasonable belief. It is possible, therefore, that the ambit of the "morally wrong" limb of the insanity defence is contingent on other aspects of the law. Thus, just because under the reasoning of *Oommen*<sup>58</sup> a "specific delusions" provision would not be relevant in Canada<sup>59</sup> (due to the fact that the "morally wrong" limb would cover such situations), it does not follow that such a provision would also be redundant in New Zealand (because the ambit of the "morally wrong" limb does not cover such situations).

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<sup>53</sup> The conclusion of the Court involved a comparatively wider interpretation of the ambit of the "morally wrong" limb. It was held that despite the fact that the accused knew that it was morally wrong to kill in circumstance (A) and morally right to kill in circumstance (B) he could still come within the ambit of the "morally wrong" limb.

<sup>54</sup> *R v Oommen*, above, 20. See also *R v Chaulk*, above, 236 and *Murdoch v British Israel Federation inc* [1942] NZLR 600, 649 (CA) per Smith J.

<sup>55</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>56</sup> Canada has a reasonable belief test as part of their self-defence law. The case of *R v Oommen* (1994) 91 CCC (3d) 8 (SCC) was decided in Canada and therefore this theory could explain that decision.

<sup>57</sup> *Murdoch v British Israel Federation inc* [1942] NZLR 600, 649 (CA) per Smith J.

<sup>58</sup> *R v Oommen*, above, 20.

<sup>59</sup> Dennis R. Klinck "Specific Delusions in the Insanity Defence" (1982-83) 25 Crim. L.R. 458, 477.



From the above-mentioned case analysis, it can be concluded that the decisions of *Chaulk*,<sup>60</sup> *Walsh*,<sup>61</sup> and *Oommen*<sup>62</sup> can all be distinguished from *Green*<sup>63</sup> either on the basis of their facts or legislative context. This suggests that the cause of the problem is the law itself.<sup>64</sup>

However, I will now explore whether the reasoning, which went into the decision in *Green*,<sup>65</sup> was appropriate (for instance whether its interpretation of the ambit of the insanity limbs had a rational foundation). If it was not appropriate, a change in the law may not be necessary.

### *C Given New Zealand Legislation, whether Reasoning in the Case of R v Green<sup>66</sup> was Correct*

#### 1 *Morally wrong limb issue*

In order to begin the process of analysing whether the Court in *Green*<sup>67</sup> was correct in their narrow interpretation of the ambit of the "morally wrong" limb of the insanity defence, it is useful to become familiar with how such a provision has been judicially interpreted.

One such case is that of *R v Porter*<sup>68</sup> in which it was noted that an accused would come under this limb if he:<sup>69</sup>

[C]ould not think rationally of the reasons which to ordinary people make that act right or wrong. If through the disordered condition he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong.

<sup>60</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC).

<sup>61</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>62</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).

<sup>63</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>64</sup> The reason why this suggests that the problem is the law itself is because it seems that the ambit of the insanity law in New Zealand simply doesn't cover a Green-like fact pattern.

<sup>65</sup> *R v Green*, above.

<sup>66</sup> *R v Green*, above.

<sup>67</sup> *R v Green*, above, 525 McKay J.

<sup>68</sup> *R v Porter* (1933) 55 CLR 182.

<sup>69</sup> *R v Porter*, above, 189-190 Dixon J.



Another case that dealt with this issue was *Lord Ferrers' trial*,<sup>70</sup> in which Charles York as Solicitor General stated that:<sup>71</sup>

[I]f there be.... a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offence proved, judgement of the law must take place.

In order to sufficiently assess whether it was correctly held that Green didn't come within this limb of the insanity defence, these historical considerations will be supplemented by a framework that recognises when an act of killing is right or wrong.

An act of killing is objectively morally right if the defendants were acting in necessary self-defence (or some other legal justification), and morally wrong if they were not.<sup>72</sup> For the purposes of this analysis, the former situation will be referred to as killing in circumstance (B) and the latter as killing in circumstance (A).

By applying this framework to the facts of *Green*<sup>73</sup> and also to other situations, which more clearly fit within the "morally wrong" limb, we can become more familiar with the boundaries of this limb, and, consequently, consider whether it covers fact patterns like those in that case.

Each of the above-mentioned cases (see Part IV (B)) involved a defendant who killed in circumstance (A). However the distinction between the defendants in the *Chaulk*<sup>74</sup> case and the *Oommen*<sup>75</sup>/*Green*<sup>76</sup> line of cases lies in their subjective perception of the facts / and their general perception of what is right and wrong.

<sup>70</sup> *Lord Ferrers' trial* (1760) 19 State Trials 885 (HL).

<sup>71</sup> *Lord Ferrers' trial*, above, 947-948.

<sup>72</sup> An example of killing someone for an objectively morally wrong reason would be i.e if you murdered the victim because you didn't like him or her. This idea is supported by the fact that "morally wrong" is understood in New Zealand and Australia to mean 'contrary to the ordinary principles of reasonable people' [Campbell, I. *Mental Disorder and the Criminal Law in Australia and New Zealand* (Butterworths, Wellington, 1988) 123.] Thus surely killing someone because you didn't like them would surely be 'contrary to the ordinary principles of reasonable people; and therefore morally wrong.

<sup>73</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>74</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC).

<sup>75</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).



In *Green*,<sup>77</sup> the defendant believed mistakenly (due to his insane delusions) that he was killing in circumstance (B) rather than circumstance (A). He also knew that it was morally wrong to kill in circumstance (A) and acceptable to kill in circumstance (B).

This can be compared with the case of *Chaulk*,<sup>78</sup> where the defendants knew they were killing in circumstance (A) and thought that they were right in killing in such a situation.<sup>79</sup>

The significance of this is that Green's act would have been morally justifiable if the facts were true. This implies the accused is able to think rationally of the considerations/ reasons which to ordinary people make that act right or wrong and that they consequently have the faculty<sup>80</sup> to discern the difference between moral good and evil. Therefore, Green would not come under the "morally wrong" limb (he was capable of knowing that the act was morally wrong) of the insanity defence but would be likely to come within a "specific delusions" provision if one existed. (This conclusion is still arguably consistent with *Oommen*<sup>81</sup> coming within the "morally wrong" limb due to the different legislative context of the two cases.)

This can be compared with the defendant in *Chaulk*,<sup>82</sup> who, it was rightly decided, would come within the ambit of the "morally wrong" limb. This is because he thought it was right to kill a "loser."<sup>83</sup> Therefore, he had neither the faculty nor the ability to think rationally about the considerations/ reasons, which to ordinary people make that act wrong. (For example an ordinary person wouldn't think that it was right to kill someone because he was a "loser").

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<sup>76</sup> *R v Green*, above.

<sup>77</sup> *R v Green*, above, 525.

<sup>78</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC).

<sup>79</sup> They didn't know that it was only morally right to kill someone under the narrow circumstances of circumstances (B): *R v Chaulk*, above, 200.

<sup>80</sup> The defendant in the case of *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993 17 wouldn't have such a faculty as he was in an automatic state at the time in which he committed the offence. Therefore he was incapable of knowing that the act was morally wrong.

<sup>81</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).

<sup>82</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC).

<sup>83</sup> *R v Chaulk*, above 200.



It is the knowledge that it is morally wrong to kill someone when not acting for instance in self-defence that distinguishes cases, which fit within the "specific delusions" provision (like *Green*<sup>84</sup>) from those that fit within the "morally wrong" provision of the insanity defence (like *Chaulk*<sup>85</sup>).

This conclusion is in keeping with both the historical interpretations of the "morally wrong" limb and the legislative wording of this limb. This suggests two things. First, that the *Green*<sup>86</sup> decision (regarding this limb) was correct in light of the law, and, secondly, that perhaps the "specific delusions" provision should be reinstated to close this gap in the insanity law.

The idea that a "specific delusions" provision may be needed to close the current gap in the insanity law runs counter to the suggestion by a number of legal commentators that such a provision involves faulty reasoning. Their argument seems to be based, inter alia, upon the idea that to say that it is possible for a defendant to be able to know that his act is wrong and simultaneously be so deluded that he does not know that it is wrong is a logical absurdity. By this reasoning, a "specific delusions" provision would be irrelevant.<sup>87</sup>

However, this argument is incorrect. For example, Green knew that the actual act of killing not in self-defence (the circumstance in which he acted) was wrong. However simultaneously he (because of his deluded perception of the facts) incorrectly thought his act of killing was right (therefore he didn't know it was wrong.) Consequently the reasoning underpinning a "specific delusions" provision is not a logical absurdity, and, thus, it should perhaps be reinstated.

However, before the possibility of such legislative action is explored it is important to investigate whether a Green-like situation could in fact fit within the nature and quality limb of the New Zealand insanity defence. (If it could then such a provision would still be redundant).

<sup>84</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>85</sup> *R v Chaulk*, above, 193.

<sup>86</sup> *R v Green*, above.



## 2 Nature and quality limb issue

The judge in *Green* decided that psychiatric evidence establishing that, as a result of insane delusions, Green honestly believed that he was acting in self-defence was not evidence that he did not understand the nature and quality of his act.<sup>88</sup>

Certain authorities have argued that this approach is questionable/ may be doubted.<sup>89</sup> It has been said that Section 23(2)(a) of the Crimes Act<sup>90</sup> is usually considered to comprise two types of lack of understanding. First, it was held in *R v Cottle*<sup>91</sup> that it covered a person who did not act consciously. Secondly, a person may make a mistake due to an insane delusion which, if it were true, would mean that his or her conduct would not be an offence. An example often given is where a man cuts the throat of a woman thinking that he is cutting the throat of a pig.<sup>92</sup> Authority for this proposition can be found in *M'Naghten's Case*.<sup>93</sup>

It is arguable that the last point does not apply to all delusional mistakes of fact. This idea is supported by comments made in an article written by Dennis R. Klinck.<sup>94</sup> He agreed that a situation like the above-mentioned pig hypothetical (although he used the example of a person killing someone under the mistaken belief that they are hitting a potter's vessel<sup>95</sup>) came within the ambit of this limb of the insanity defence. However, he (like the judge in *Green*<sup>96</sup>) drew a distinction between this scenario and a situation in which the defendant (who believed he was acting in self-defence) knew that he was hitting a person and that this might cause

<sup>87</sup> Dennis R. Klinck "Specific Delusions in the insanity defence" (1982-83) 25 Crim. L.R. 458, 477.

<sup>88</sup> *R v Green*, above, 524 McKay J.

<sup>89</sup> Robertson *Adams on Criminal Law* (2 ed, Brooker's, Wellington, 1998) 71-72; Timothy Stephens *Criminal Law* (2 ed, Butterworths, Wellington, 1998) 122.

<sup>90</sup> Section 23(2)(a) of the Crimes Act is the subsection, which considers whether the defendant was capable of understanding the nature and quality of his act.

<sup>91</sup> *R v Cottle* [1958] NZLR 999 (CA).

<sup>92</sup> Timothy Stephens *Criminal Law* (2 ed, Butterworths, Wellington, 1998) 122.

<sup>93</sup> *M'Naghten's Case* (1843) 8 ER 718.

<sup>94</sup> Dennis R. Klinck "Specific Delusions in the Insanity Defence" (1982-83) 25 Crim.L.R. 458.

<sup>95</sup> Klinck above 469.

<sup>96</sup> *R v Green* [1993] 2 NZLR 513, 524 (CA) per McKay J.



injury.<sup>97</sup> A person with such knowledge would not come within the “nature and quality” limb of the insanity defence, notwithstanding a mistake of fact, which would have justified her conduct if true. Because Green did have such knowledge, he understood the nature and quality of his act when he shot the police officer.

Therefore, the reasoning of the judge in *Green*<sup>98</sup> as to why the case did not come within the ambit of the insanity defence was appropriate on the law.

#### **V WHETHER GREEN IS A GOOD DECISION FROM A POLICY POINT OF VIEW**

Although legally correct, the *Green*<sup>99</sup> decision is problematic from a policy point of view. Consequently, steps should be taken to prevent such a result occurring in the future.

This proposition is supported by the fact that it was arguably never the intention of the legislature (but was instead a legislative accident) to exclude a person like Green from the ambit of the insanity defence. This suggestion is supported by the fact that, when the insanity law was altered in 1961 (by removing the “specific delusions” provision), the prevailing authority in New Zealand concerning a murder based upon a deluded (caused by disease of the mind) mistake of fact was *Murdoch v British Israel Federation Inc.*<sup>100</sup> In this case, the judge decided that delusions as to factual matters, which if true, would make an act morally justifiable, could suffice to show that a person was incapable of knowing that an act is morally wrong.<sup>101</sup> As a consequence of this wide interpretation of the “morally wrong” limb, the “specific delusions” provision was no doubt excluded from the insanity defence as redundant (as opposed to a legislative change that was designed to narrow the ambit of the insanity defence to exclude a Green-like situation). This is because, under this wide interpretation, any person that would come under the

<sup>97</sup> Klinck above 469.

<sup>98</sup> *R v Green*, above, 524 McKay J.

<sup>99</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>100</sup> *Murdoch v British Israel Federation Inc* [1942] NZLR 600 (CA).

<sup>101</sup> *Murdoch v British Israel Federation Inc*, above, 649 Smith J.



“specific delusions” provision (for example like Green) would also come under the “morally wrong” limb.

Despite this intention of the legislature, Green-like cases have now been unexpectedly pushed out of the ambit of the insanity defence.<sup>102</sup> This has been a result of the three-fold interaction of the above-mentioned legislative change, the subsequent change (in 1981) to New Zealand’s self-defence laws, and, the fact that the judiciary has narrowed their interpretation of the “morally wrong” limb.

This legislative accident has resulted in a number of negative policy outcomes which further strengthen the idea that some sort of action should be taken to rectify it.

First, a defendant like Green would be able to avoid becoming a special patient by pleading self-defence and receiving an unqualified acquittal. Arguably this is not appropriate, since they may thereby have an easier pathway back into the community<sup>103</sup> despite being no less insane than many special patients are. One possible solution (which is mentioned in greater detail in Part VI) would be to allow the prosecution to adduce evidence of insanity when the accused disclaims it as a defence.<sup>104</sup> In the case of *Green*,<sup>105</sup> it was held that they couldn’t, even when the defendant was otherwise putting their state of mind at issue. The judges rationale for this standpoint was that if this resulted in the unqualified acquittal (for example on the basis of self-defence) of insane and dangerous people, the provisions of Part II of the Mental Health (Compulsory Assessment and Treatment) Act 1992 could be used to secure their treatment.<sup>106</sup> By saying this he was implying that there wouldn’t be any negative policy outcomes flowing from the possibility of an unqualified acquittal of a person like Green.

<sup>102</sup> *R v Green*, above.

<sup>103</sup> See Part III (C)(2).

<sup>104</sup> The Judge under section 113(3) of the Criminal Justice Act 1985 can also raise insanity against the wishes of the defence. However, until the insanity law is changed (i.e. to include a “specific delusions” provision) on the reasoning of *R v Green* [1993] 2 NZLR 513 (CA) a judge in the future would be unlikely to use these powers in a Green-like situation. Thus section 113(3) would not on its own offer a solution to this problem.

<sup>105</sup> *R v Green*, above.

<sup>106</sup> Stanley Yeo *Insanity and Automatism* (Victoria University of Wellington, 2000) 5.



However, for this procedure to be effective in resulting in the same outcome as an insanity verdict, it would depend upon such a defendant being committed as a restricted patient. If this didn't occur then they would have an easier route back into society<sup>107</sup> putting both society and the individual (as it makes it less likely that a person like Green will get the extent of the help/ rehabilitation that they require) at risk. Even if they were to become a restricted patient by being committed subsequent to the trial, there would still be a number of negative policy outcomes.

For example, first, there may be an additional risk to society because of the lay period (a few weeks) between the unqualified acquittal (of a defendant like Green) and their possible subsequent committal in which such a defendant arguably wouldn't be sufficiently secured. This would occur for two main reasons. First, the application formalities (section 8 of the Mental Health (Compulsory Assessment and Treatment) Act 1992) with respect to committal would have to be completed. Secondly the judge would have to examine the patient and there is a possibility that there will be a two-week gap between the date of this examination and the receipt of the application.

Second, there would still be a labelling issue because a defendant like Green is receiving an unqualified acquittal when they are instead genuinely insane.<sup>108</sup> Such a decision goes against the notion that the correct label is appropriate so that the criminal law maintains its accuracy.<sup>109</sup> This contravention is very significant in light of the fact that the principle of fair labelling is concerned to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law. Arguably this principle extends to defences as well.<sup>110</sup> This is because the underlying reasoning behind the principle applies equally to defences.

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<sup>107</sup> This would also create an incentive for a defendant who committed a crime whilst suffering from insane delusions to plead self-defence. This incentive will further exacerbate the problems created by the state of the law in this area.

<sup>108</sup> He has received an unqualified acquittal in circumstances where arguably an acquittal on the grounds of insanity would be more appropriate. (This is because, as has already been mentioned, such a defendant is no less insane than a lot of people who would come within the ambit of the insanity test.)

<sup>109</sup> The ex ante guidance the law is meant to provide requires it to be clearly stated: Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998) 30.

<sup>110</sup> Simester and Brookbanks, above, 30.



The underlying reasoning for the fair labelling principle is two-fold. This is illustrated by the fact that it has been argued that it is not satisfactory for the law simply to label all convicted offenders unspecifically as "criminals", for that would equate the convictions of rapists with pickpockets. This suggests that two main ideas underpin the principle. The first is that the fair labelling principle ensures that the Criminal law distinguishes between actions that have a disparity in culpability between one another. The second is that the labels that the Criminal law gives to its elements should reflect the public stigma attached to them.<sup>111</sup>

There is much more public stigma attached to someone acquitted on the grounds of insanity than, for example, someone who may have killed whilst acting in self-defence. Thus one of the underlying reasons for the fair labelling principle applies to the distinction between the two defences of self-defence and insanity. Therefore, because Green received the wrong label (unqualified acquittal on the grounds of self-defence), this contravenes the notion that the correct label should be given to elements of the criminal law so that it maintains its accuracy. Another reason why correct labelling is important in this context is because the right of appeal that an accused like Green would have if they were facing committal independent of the Criminal Justice Act<sup>112</sup> is something that they wouldn't have under section 23 of the Crimes Act. The result in Green (the label attached to the defendant) is therefore inappropriate from a policy perspective in this respect.

Also if a defendant like Green was acquitted on the grounds of self-defence instead of insanity this would (if an application for the defendant to be committed occurred independent of the trial) place a heavy onus on the Judge.<sup>113</sup> In such a case arguably it should be for the jury (subsequent to the issue of insanity being raised) to determine whether Green's mental health was sufficiently impaired.

<sup>111</sup> Simester and Brookbanks, above, 30.

<sup>112</sup> During the first period of assessment and treatment the proposed patient may apply to have his condition reviewed by the Family Court judge under section 16 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. This can further delay (thus putting the community at more risk) the time period in which the proposed patient is secure in a Hospital: Sylvia.A.Bell (ed) *Mental Health Law in New Zealand* (Brooker's, Wellington, 1998) 99.

<sup>113</sup> This heavy onus would flow from the fact that as a result of such an unqualified acquittal it would be a judge (in the Family Court) who would have to decide whether i.e. Green's mental health was impaired.



Therefore, disposition of mentally disordered persons such as Green independent of the Criminal Justice Act is arguably undesirable. This idea is supported by the fact that the judge in *M'Naghten's Case*<sup>114</sup> (the case upon which the insanity law in New Zealand is based (see Part III (A)) noted that a facts pattern like that in *Green*<sup>115</sup> would have come within the ambit of such a "specific delusions" provision.<sup>116</sup> (Therefore insanity was considered the appropriate result in a case like *Green*).<sup>117</sup>

Therefore, the result in *Green*<sup>118</sup> is undesirable from a policy perspective. In order to analyse the extent of the steps that may be necessary to rectify this problem, it is important to investigate whether this situation is limited only to the relationship between the insanity and self-defence defences.

An accused suffering from insane delusions cannot escape the net of insanity by pleading any defence of involuntariness, since, they would be putting their state of mind and thus their sanity at issue.<sup>119</sup> The accused would be similarly unsuccessful at escaping this net through pleading any other defence (for example provocation,<sup>120</sup> compulsion [because there is no real/genuine threat],<sup>121</sup> or necessity<sup>122</sup>) other than self-defence, since a delusion is, by definition, an unreasonable belief.

<sup>114</sup> *M'Naghten's Case* (1843) 8 ER 718 (HL).

<sup>115</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>116</sup> "[I]f under the influence of his delusion he 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": *M'Naghten's Case*, above, 723 Tindal LCJ.

<sup>117</sup> *R v Green*, above.

<sup>118</sup> *R v Green*, above.

<sup>119</sup> *R v Falconer* (1990) ALJR 20, 34.

<sup>120</sup> *R v McGregor* [1962] NZLR 1069, at 1075 it is noted that the provocation must be "grave and weighty." Thus an accused who commits a crime (due to an imaginary threat) whilst suffering from insane delusions wouldn't be able to rely on this defence because he is merely imagining the provocation/ threat.

<sup>121</sup> The terms of the section seem to require an actual threat (*R v Teichelman* [1981] 2 NZLR 64, 66-67 (CA)). This was accepted in *R v Raroa* [1987] 2 NZLR 486, 492-493 where the Court of Appeal suggested that there can be no defence [of compulsion] if there were not in fact a threat of the kind required by section 24(1) of the Crimes Act even if the accused believed that there was: Robertson *Adams on Criminal Law* (2 ed, Brooker's, Wellington, 1998) 98-99.

<sup>122</sup> In the case of *Kapi v MOT* [1992] 1 NZLR 227, 377 (CA) Judge Jeffries held that the defendant's perception of the threat must be either correct or reasonably based.



This suggests that a person suffering from insane delusions can only hope to escape the net of insanity, and thereby become a special patient, if they plead self-defence. In light of this finding that the result in *Green*<sup>123</sup> is undesirable and limited to the relationship between insanity and self-defence, this essay will now explore the options/ solutions that could be chosen to reform this relationship between those two defences.

## VI REFORMING THE INSANITY/SELF-DEFENCE RELATIONSHIP

A number of approaches could be taken to reform this relationship between the two defences. I will first explore the three least-intervention approaches (procedural rather than substantive change), and then move on to possible substantive changes to this relationship.

### *A Statutory Interpretation*

One possible solution is for the courts to partake in statutory interpretation to help close the unintended loophole represented by the decision in *Green*.<sup>124</sup> Judges could essentially narrow the interpretation of the self-defence law, or widen the interpretation of what comes under the insanity law (for instance following the *Chaulk*,<sup>125</sup> *Oommen*,<sup>126</sup> and *Murdoch*<sup>127</sup> approach with respect to the ambit of the "morally wrong" limb). It is important to note that the issue of whether the court can rectify a legislative mistake in this way depends substantially on what sort of mistake it is. If both the nature of the mistake and the correction needed to remedy it are obvious, the courts will generally remedy this type of mistake.<sup>128</sup>

<sup>123</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>124</sup> *R v Green*, above.

<sup>125</sup> *R v Chaulk* (1990) 62 CCC (3d) 193.

<sup>126</sup> *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).

<sup>127</sup> *Murdoch v British Israel Federation* [1942] NZLR 600 (CA).

<sup>128</sup> Jim Evans *Statutory Interpretation: Problems of Communication* (Oxford University Press, Auckland, 1988) 133.



An argument in favor of using such an interpretation to widen the ambit of the “morally wrong” limb is that this would result in a person like Green coming within the ambit of the insanity defence, consistent with the legislative intention.<sup>129</sup> Such interpretation would merely be correcting a legislative accident. It would not, in effect, be writing a law which Parliament did not intend.

This approach to statutory interpretation is widely known as the purposive approach. The distinguishing feature of strong purposivism is that, when a specific statutory text produces “an unreasonable [result] plainly at variance with the policy of the legislation as a whole,” judges may (and must) alter even the clearest statutory text to serve the statute’s “purpose.”<sup>130</sup>

Another option for the judiciary is to construe the self-defence provision of the Crimes Act narrowly. There are two conflicting issues. The first is that self-defence is defined in that way, and, unless the law is altered, there may not be any way to do this. The second involves the Courts deriving an outcome through statutory interpretation, which is best from the perspective of public safety (for example that a person like Green is detained as a Special Patient). However, addressing the second issue in this way introduces problems with respect to the integrity of the Criminal law, because it is important that the courts don’t unduly stretch (by widening their interpretation of what comes under the insanity law)/ or narrow (self-defence) the meaning of bits of the Crimes Act to provide the best result.

Arguably, therefore, this legislative mistake is too big an error to be dealt with through statutory interpretation. This idea is supported by the fact that the failure to think through the consequences of the combination of the legislative changes to the two defences has meant that the rule enacted is simply an inept instrument to achieve the legislative purpose. Therefore, there is little that the Courts can do about it.<sup>131</sup>

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<sup>129</sup> See Part V.

<sup>130</sup> John F. Manning “Textualism and the Equity of the Statute” (2001) 101 Colum. L. Rev. 1, 10-11.



### **B Evidence issue: Should the Prosecution/ Crown be able to raise Insanity**

Another possible procedural solution to the Green problem is to allow the Crown to raise the insanity defence (in a case such as Green), notwithstanding that the defence didn't raise it.

If the prosecution/ Crown were able to do this upon the accused pleading self-defence, there is a good chance that the jury would act on gut instinct and find the accused insane. This happened in the *Green* decision in the High Court, where the jury (no doubt heavily influenced by the Crown's evidence concerning insanity) found him not guilty by reason of insanity. This would mean that the law might not need to be changed and statutory interpretation will not need to be employed.

The argument that the Crown should be able to raise insanity in these circumstances flows from the suggestion in certain case law<sup>132</sup> that, whenever an accused seeks acquittal because of his or her state of mind, there is a true exception to the rule that the prosecution may not seek to prove insanity. In such an instance the prosecution will be permitted to call evidence that the true nature of an accused's state of mind was insanity.<sup>133</sup> This practice is illustrated by the English case of *R v Kemp*,<sup>134</sup> in which it was held that medical evidence of insanity could be called by the prosecution in rebuttal of the defence's claim that the accused was acting in a state of non-insane automatism at the time of the alleged crime.<sup>135</sup>

However, looking at the decision in *Green*,<sup>136</sup> it now appears that in New Zealand the prosecution is not permitted to adduce evidence of insanity even if the accused

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<sup>131</sup> Jim Evans *Statutory Interpretation: Problems of Communication* (Oxford University Press, Auckland, 1988) 233.

<sup>132</sup> *Bratty v. A-G. for Northern Ireland* [1963] AC 386, 411-412; *R v Simpson* (1977) 77 DLR (3d) 507, 528 (Ont CA); *R v Bastian* [1958] 1 WLR 413; *R v Russell* [1964] 2 QB 596.

<sup>133</sup> Robertson *Adams on Criminal Law* (2 ed, Brooker's, Wellington, 1998) 79.

<sup>134</sup> *R v Kemp* [1957] 1 QB 399.

<sup>135</sup> Marc E. Schiffer *Mental Disorder and the Criminal Trial Process* (Butterworths & Co, Toronto, 1978) 141.

<sup>136</sup> *R v Green* [1993] 2 NZLR 513.



has sought acquittal because of some state of mind not amounting to insanity (for example self-defence based on a mistaken belief caused by a disease of the mind).<sup>137</sup>

This decision was arguably incorrect with respect to this state of mind issue. The rationale behind such an exception to the general rule is that it is not in the public interest to allow a mental condition to support an unqualified acquittal when in truth that mental condition amounted to insanity.<sup>138</sup> Arguably, this same justification would occur when an accused raised self-defence (which can result in an unqualified acquittal) based on a mistaken belief caused by, for example, paranoid schizophrenia (a mental condition).<sup>139</sup>

Thus, provided that there are sufficient grounds to have a rule that the Crown can adduce evidence of insanity when the accused puts their state of mind at issue this may be an appropriate vehicle to use to improve the chances of an insanity verdict resulting in a Green-like case.

The issue of whether such an exception could be justified on policy grounds was explored in the English case of *R v Dickie*<sup>140</sup> and the Canadian case of *R v Simpson*.<sup>141</sup>

In the decision in *Dickie*<sup>142</sup> (which was followed by the court in *Green*,<sup>143</sup>) it was held that it could never be proper for the Crown to lead evidence of insanity. That matter should be left to the defence, or, in exceptional circumstances, to the judge. This perspective was based on two interrelated ideas. The first was that allowing the Crown to raise this issue would, inter alia, countenance too great an interference with the fundamental right of an accused to advance whichever defences they

<sup>137</sup> Robertson *Adams on Criminal Law* (2 ed, Brooker's, Wellington, 1998) 79.

<sup>138</sup> *R v Cottle* [1958] NZLR 999, 1013 (CA).

<sup>139</sup> Robertson, above, 79. However, it is important to note that perhaps not all self-defence claims will involve an accused putting their state of mind at issue but arguably this one did.

<sup>140</sup> *R v Dickie* [1984] 3 All ER 173 (CA).

<sup>141</sup> *R v Simpson* (1977) 77 DLR (3d) 507 (Ont CA).

<sup>142</sup> *R v Dickie*, above.

<sup>143</sup> *R v Green* [1993] 2 NZLR 513 (CA).



consider to be in their best interests. The second was that such an allowance could completely distort the trial process.<sup>144</sup>

These two ideas reflect, inter alia, the concern that the prosecution clearly ought not to be entitled to bolster a weak case that the accused committed the act by weak evidence that the accused was insane when the admission of such evidence might deprive the accused of a fair trial by leaving the jury to conclude that he was the type of person likely to have committed the act charged.<sup>145</sup>

The Court in *R v Simpson*<sup>146</sup> took an alternative judicial position. They believed that the Crown should be able to raise the issue of insanity in certain circumstances. Their reasoning was that an insane defendant lacked the capacity to commit the offence. Therefore, a rule, which permitted strong evidence of insanity to be withheld from the court at the option of the accused, and led to the conviction of a person who lacked capacity to commit the offence, would be very problematic. Such a result does not accord with the requirements of justice. It is also fundamentally wrong and in conflict with the basic principles of a criminal law which, in general, predicates liability upon fault.<sup>147</sup> However, a point to note is that we allow people to plead guilty (is this any different?) when they might have a defence and not use it, or, the Crown might not have been able to prove the case.

An effective balance between the policy considerations enunciated in these two cases might be to only allow the prosecution to raise the issue of insanity in a closely regulated set of circumstances. For example, there would have to be a fairly open and shut case that the accused committed the actus reus of the offence (and therefore the bolstering of a weak case argument would carry little weight).

### *C The Judge raising the Issue of Insanity*

Perhaps a more appropriate option in a Green-like situation is for the judge to put the issue of insanity to the jury by utilising their powers under Section 113(3) of the

<sup>144</sup> *R v Dickie*, above, 178 Walkins L.J.

<sup>145</sup> *R v Dickie*, above, 178 Walkins L.J.

<sup>146</sup> *R v Simpson* (1977) 77 DLR (3d) 507 (Ont CA).



Criminal Justice Act. However, the likelihood of a judge doing this (in light of the judicial interpretation of the ambit of the two limbs of the insanity defence in *Green*<sup>148</sup>) may rest on the reinstatement of a specific delusions provision<sup>149</sup> into the insanity laws of New Zealand. This is because the Court will not introduce the issue of insanity unless there is "sufficient evidence" of all the requirements of the defence.<sup>150</sup>

### **D Walsh<sup>151</sup> Approach**

Another possible solution to addressing the problems caused by a person like Green being able to successfully argue self-defence, as opposed to insanity, is the approach of the court in the case of *Walsh*.<sup>152</sup>

This approach was that, after the jury had decided whether the accused is guilty of murder or manslaughter, they then had to decide whether they were satisfied on the balance of probabilities that the accused was not responsible by reason of insanity. Only if the jury were not satisfied that the accused was insane could they consider the self-defence issue. Therefore, this approach uses a procedural device to stop a result like Green. However there are two arguments against this approach. First, arguably it is not consistent with the burden of proof in New Zealand and, second, because it goes against the idea that in New Zealand we are moving to make it easier to get self-defence to the jury, not harder.<sup>153</sup>

This approach does however have an advantage over that in *Green*,<sup>154</sup> since the insanity issue will come into the picture (because it is explored before the self-defence issue). In addition, it will exclude facts from the self-defence analysis that

<sup>147</sup> *R v Simpson*, above, 509.

<sup>148</sup> *R v Green* [1993] 2 NZLR 513, 524-525 per McKay J.

<sup>149</sup> In a Green-like situation the judge would have evidence sufficient to come within a specific delusions provision [see: *M'Naghten's Case* (1843) 8 ER 718, 723 (HL) Tindal LCJ] if such a provision was reinstated and thus arguably they would use their powers under section 113(3) of the Criminal Justice Act.

<sup>150</sup> Robertson *Adams on Criminal Law* (2 ed, Brooker's, Wellington, 1998) 78.

<sup>151</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>152</sup> *Walsh v The Queen*, above.

<sup>153</sup> Criminal Law Reform Committee, *Report on Self-defence* (1979) 8-10.

<sup>154</sup> *R v Green* [1993] 2 NZLR 513 (CA).



would be included in New Zealand. Prima facie, this approach could go a long way to solving the problem with respect to the way the law deals with people in a Green-like situation because it makes an insanity verdict much more likely.

However by itself such an approach may not necessarily result in such a verdict. This is because there is an issue as to whether, if a defendant like Green tried to get off on self-defence and therefore had to firstly escape the net of the insanity defence, the jury would be likely to act on gut instinct and hold him insane or follow the narrow interpretation of the insanity defence that the judge in *Green*<sup>155</sup> took (and thus give him an unqualified acquittal).

If the latter is likely to be the case, the "specific delusions" provision may also have to be brought back to completely solve the problem illustrated by *Green*<sup>156</sup> using the *Walsh*<sup>157</sup> approach.<sup>158</sup>

Another alternative with similarities to the *Walsh*<sup>159</sup> approach is that of the Criminal Code Bill Section 7.3 (7) in Australia that provides that:

[I]f the tribunal of fact is satisfied that a person acted as a result of a delusion caused by mental impairment [like the Green case], the delusion cannot otherwise be relied upon as a defence [emphasis added.]

Although the meaning of this provision is obscure, legal commentators have noted that the expression "cannot otherwise be relied on as a defense", would bar the situation in a Walsh-like case of delusions being treated as relevant to self-defence.<sup>160</sup> This alternative would, therefore, have the advantage of leaving the self-defence law otherwise intact.

<sup>155</sup> *R v Green*, above, 524-525 McKay J.

<sup>156</sup> *R v Green*, above.

<sup>157</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>158</sup> This is because an accused wishing to plead self-defence would have to get through the insanity net (which would now be wide enough to include the Green situation by virtue of reinstating the specific delusions provision: see *M'Naghten's Case* (1843) 8 ER 718, 723 (HL) LCJ) first.

<sup>159</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>160</sup> P.A. Fairall "The Exculpatory Force of Delusions-A Note on the Insanity Defence" (1994) 6 Bond LR 57, 62-63.



### *E Changing the Self-defence Law*

Another possible solution is altering the self-defence law to require a reasonable belief. This would prevent a person like Green successfully pleading self-defence, because a delusional belief is, by definition, an unreasonable belief.<sup>161</sup> Such a law would also pay a certain deference to the cardinal principle of criminal responsibility that moral obligation is dependent not merely upon the actual facts but also upon the actor's perception of them (a mistaken belief if it is reasonable would come within the ambit of the test).

In support of this law change is the fact that the subjective nature of the first limb of the defence of self-defence has caused some concern. This has been illustrated by the cases of *R v Terewi*,<sup>162</sup> *R v Green*,<sup>163</sup> *R v Thomas*.<sup>164</sup> Thus arguably not every circumstance of mistaken but honest belief should be encompassed within the ambit of self-defence. If so, a law change in this area of the criminal law may be a good idea.<sup>165</sup>

However, in order to fully analyse the merits of changing the law in this way, it is important to consider the practical implications of such legislative action by applying the reasonable belief test to a range of different hypothetical fact situations. This idea was explored by Robert F. Schopp,<sup>166</sup> who looked at the issue of whether a reasonable belief test would protect people who had a mistaken but reasonable belief, punishing people who made stupid mistakes and not punishing them if something were wrong with them (i.e. "reasonable retarded person"/ or they may come under the insanity test).

<sup>161</sup> *R v Oommen* (1994) 91 CCC (3d) 8, 18 (SCC).

<sup>162</sup> *R v Terewi* (1985) 1 CRNZ 623 (CA).

<sup>163</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>164</sup> *R v Thomas* (Sharon) [1995] Crim LR 314.

<sup>165</sup> Stanley Yeo *Insanity and Automatism* (Victoria University of Wellington, 2000) 5.

<sup>166</sup> Robert F. Schopp (ed) "Battered Women Syndrome, Expert Testimony, and the Distinction between Justification and Excuse" (1994) U. I 11. L. Rev. 45.



First, defendants may form unreasonable beliefs because they fail to exercise appropriate care. A racist defendant, for example, who sees an individual of another race approaching with a cricket bat, might honestly but mistakenly believe that he is in danger. If this defendant shot and wounded the approaching person without exercising the care necessary to notice that he was close to a sports field and that many people on the street were carrying bats, one might reasonably conclude that he ought to be held liable. It is arguably a negative aspect of the honest belief test that it covers such a situation. In cases of this type, a standard requiring reasonable belief for self-defence might seem appropriate to many observers.<sup>167</sup>

Second, defendants may form a belief regarding necessity when information is limited or distorted. Suppose, for example that a plumber walking home from work is confronted in the dark by an apparent armed robber. When the person says, "your money or your life," the plumber strikes the apparent robber with a wrench. It later emerges that the apparent robber was a retarded person playing a game with a toy gun. This is a case of mistaken but reasonable belief.<sup>168</sup>

Third, a defendant might form an unreasonable belief about the necessity for defensive force due to impaired capacity (i.e. they are retarded) or disease of mind. In contrast to the racist defendant in the first case, this defendant fails to derive a reasonable belief due to lack of competence rather than inadequate care. Some readers may conclude that this retarded defendant ought to be held to the standard of an ordinary person. These readers would endorse conviction of the defendant. They would find satisfactory self-defence provisions requiring reasonable beliefs. Those who find this conclusion intuitively unjust might consider several strategies.

First, there is the approach of the Crimes Act, which requires only an honest belief rather than a reasonable belief. This approach, however, also exculpates the racist defendant in the first case. Many readers may think that different treatment would be justified.<sup>169</sup>

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<sup>167</sup> Schopp (ed), above, 97-100.

<sup>168</sup> Schopp (ed), above, 99-101.

<sup>169</sup> Schopp (ed), above, 100.



Second, some might argue that the defendant's limited intelligence should be relevant to the reasonableness of his belief (they may still fall within the ambit of a reasonable person test, even if acting under an unreasonable belief). Jurors would then decide whether the belief was reasonable for a person of such limited intellectual endowment, applying the standard of the reasonable retarded person. This notion is difficult to explicate because limited mental capacity directly undermines the capacity to reason with ordinary speed and accuracy, apparently generating the notion of the "reasonable person with impaired reasoning." Such an interpretation renders the reasonable person standard incoherent under both the ordinary and the legal meaning of "reasonable" as grounded in good reasons and good reasoning. Although the suggestion that one might formulate standards for the "reasonable retarded person" seems implausible, courts and commentators have seriously advocated standards for the "reasonable battered woman."<sup>170</sup>

The example of the retarded defendant seems to raise serious concerns about the reasonable belief standard. It inculpates such a person despite the fact that he formed unreasonable beliefs due to impaired capacities (thus his belief is understandable and non-culpable [compare with the bigot]). A possible strategy for exculpating such defendants might be an insanity defence. Such a defence could be pleaded on the grounds that the defendant did the act whilst laboring under natural imbecility<sup>171</sup> which rendered them incapable to the extent of coming within section 23 of the Crimes Act. In other words, due to functional impairment of psychological processes, they did not know that their conduct was wrong. Thus, one could plausibly argue for inclusion of such a defendant under the provisions of the insanity law.<sup>172</sup>

By reinstating a reasonable belief test, the plumber would be able to rely on self-defence but the bigot would not. The retarded defendant would be exculpated (under either the insanity laws or by applying a reasonable retarded person standard.) Therefore, within the framework of these three examples, *prima facie*,

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<sup>170</sup> Schopp (ed), above, 100.

<sup>171</sup> Natural imbecility refers to cases in which insanity arises from congenital mental subnormality or intellectual handicap.

<sup>172</sup> Schopp (ed), above, 102.



such a test would still result in the correct outcome regarding exculpation/ inculpation.

However, this approach may create new problems because of the narrow interpretation of the existing insanity laws in New Zealand (as illustrated by the Court in *Green*.<sup>173</sup>) This interpretation may mean that Green would not come within the ambit of either of the self-defence or insanity provisions. Therefore, an essentially insane accused like Green may be found guilty and sent to jail. This is undesirable for two reasons. First, it would be more beneficial for such an accused to receive psychiatric care in a mental institution (which would provide him better with the type of help he needs). However, there is still a chance that such a defendant would be committed under section 45 of the Mental Health (Compulsory Assessment) Act and thus still receive at least the type (if perhaps not the extent<sup>174</sup>) of help he requires for his rehabilitation. However, notwithstanding this possibility, a guilty verdict would still be problematic in that it would run counter to the idea that a person like Green should not be held morally responsible for their actions. (It would instead be much fairer for them to be able to avoid the stigma of conviction.)<sup>175</sup> However, it is important to note that this negative outcome may not eventuate because an accused in Green's situation might plead insanity if self-defence were not an option. In any event, the judge would still have the power to leave the issue of insanity to the jury.<sup>176</sup>

#### ***F Including a "Specific Delusions" Provision in Section 23***

Thus, a number of issues (both positive and negative) would be created by altering only the self-defence legislation. This essay will now investigate the alternative (or

<sup>173</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>174</sup> Such a defendant may not receive the extent of the help that they require for their rehabilitation if they don't become a restricted patient/ or a "special patient."

<sup>175</sup> Roderick Mulgan *Psychiatry, Law, and the Insanity Defence* (Victoria University of Wellington, 1999).

<sup>176</sup> The judge might do this by using their powers under section 113(3) of the Criminal Justice Act 1985.



perhaps even complementary) solution of reinstating the "specific delusions" provision.

1 *As an alternative (changing insanity/ not changing self-defence)*

As mentioned in Part IV, a situation like that in *Green*,<sup>177</sup> while not covered by the "morally wrong" limb of the insanity defence, would be covered by a "specific delusions" provision if one existed.<sup>178</sup> Thus, if section 23 were revised to include such a provision, an opportunity would be created for a situation like the Green fact pattern to satisfy both defences. If the defence in such a situation didn't raise insanity, then, arguably, the judge would do so by their powers under s113 (3) of the Criminal Justice Act. This would both resolve the "evidence issue" and mean that the jury would have to decide which of the two defences was more appropriate. (It is important to note that the judge cannot force the jury to accept insanity [jury could still decide insanity is not satisfied and self-defence is]). This raises a possible need to change both defences.

2 *As a complement (changing both defences)*

By changing both the self-defence (to a reasonable belief test) and insanity laws (to include a "specific delusions" provision) the jury would not have to make a decision between the two defences, the "evidence issue" would be resolved, and the negative outcomes that would flow from changing only the self-defence laws (see Part VI (E)) would be eliminated.

<sup>177</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>178</sup> This idea is supported by comments made by Lord Chief Justice Tindal in *M'Naghten's Case* (1843) 8 ER 718, 723 (HL) who said: "[I]f under the influence of his delusion he 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."



### 3 The merits of a "specific delusions" provision

This suggests that reinstating the specific delusions provision may be a good idea in theory. It would, at the very least, increase the likelihood of a verdict of insanity in a Green-like situation. However, a number of issues would need to be explored before such a legislative reform could be encouraged: first, the idea that specific delusions can't exist and, secondly, that even if they can exist, such a provision would nonetheless be redundant [this second issue was covered in depth in Part IV (C)].

Numerous legal commentators have explored this issue of whether a "specific delusions" provision should form part of the insanity defence. To many of them it is simply incorrect to say that a person afflicted with specific delusions is "in other respects sane."<sup>179</sup> Such a delusion, they believe, is merely the superficial indication of a deep-seated and widespread disorder.<sup>180</sup>

A counter argument is that the law is less concerned with psychological accuracy than with fixing principles of criminal liability. Moreover, there is a recognised psychiatric condition- "monosymptomatic psychosis"- manifesting precisely the syndrome alluded to in "specific delusions" provisions (the patient's delusional system is circumscribed and he is able to function normally apart from the delusions.)<sup>181</sup>

Another criticism is that the strict application of a "specific delusions" provision yields inconsistent results when the delusions are not qualitatively different.<sup>182</sup>

Schiffer illustrated this point in the context of three situations, involving defendants who suffered from grandiose delusions of similar proportion.<sup>183</sup> These hypothetical examples were, if (A) supposes (delusionally): that Parliament has given him an

<sup>179</sup> The idea that a person may be sane in every respect except for a specific delusion has been described as faculty psychology at its worst: Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998) 289.

<sup>180</sup> Charles Mercier *Criminal Responsibility* (New York, 1926) 149; This idea was also recognised in the case of *R v Monkhouse* [1923] GLR 13.

<sup>181</sup> Dennis R. Klinck "Specific Delusions in the Insanity Defence" (1982-83) 25 *Crim.L.R.* 458, 463.



unqualified licence to kill; or that God had ordered him to kill; or that he was the Angel of Death he would again have a defence.

In the first and third (because the criminal law of Canada binds men, not angels) hypothetical examples, the defendant would have a defence under a "specific delusions" provision, but not under the second hypothetical. On this basis, Schiffer concluded that such a provision was flawed because not all of them would come under the "specific delusion" provision. However, this neglects to take into account that the hypothetical example that he gave would not come under this provision. Rather it would still come under the "morally wrong" limb of the insanity defence (see Part IV). Therefore, the result in all three cases is appropriate since each comes within the ambit of the insanity defence.

Another criticism of the "specific delusions" provision was identified by Glanville Williams. He suggested that such a test would lead to trials in which the "facts" would consist entirely of the contents of the delusion. These could be elicited only by probing the mind of the insane person, an exercise that would doubtless be tinged with unreality ("Only an exceptionally clear-headed lunatic would be able to furnish all [the] details of his delusion.")<sup>184</sup>

Another criticism was enunciated in a leading text on forensic medicine, which referred to the, "frank absurdity of evaluating insane delusions as if they were true."<sup>185</sup>

Arguably, however, the most important criticism of the "specific delusions" provision is that it covers situations already comprehended by the other two limbs of the insanity defence. This was the perspective of the Court in the case of *Chaulk*,<sup>186</sup> which argued that such a provision was redundant. However, as I have already concluded (see Parts IV and V), the narrow interpretation in New Zealand

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<sup>182</sup> Marc E. Schiffer *Mental Disorder and the Criminal Trial Process* (Butterworths & Co, Toronto, 1978) 137-138.

<sup>183</sup> Schiffer, above, 137-138.

<sup>184</sup> Glanville Williams *Criminal Law: The General Part* (2 ed, Stevens, London, 1961) 501-502.

<sup>185</sup> Brent Fisse *Howard's Criminal Law* (The Law Book Company Limited, Sydney, 1990) 462.



of the ambit of the morally wrong limb (as illustrated by *Green*<sup>187</sup>) has meant that such a provision would have an application independent of the other two limbs of the insanity defence.

## VII CONCLUSION

At the moment the legal position in New Zealand (as illustrated by *Green*<sup>188</sup>) is that a person suffering from insane delusions can use (the defence of) self-defence against imaginary threats and obtain an unqualified acquittal.

Arguably, it would be more appropriate for such a defendant to become a special patient pursuant to section 115(1) of the Criminal Justice Act 1985 for the best interests of both society and the individual to be protected.

Although a defendant in a case like *Green*<sup>189</sup> would likely be committed independent of the trial and may become a restricted patient<sup>190</sup> this process is by no means certain<sup>191</sup> (relies on a number of discretionary decisions). And, even if it were certain, there would still be the problems flowing from the labelling issue, putting too much emphasis on the judge instead of the jury, the time period between an unqualified acquittal and committal in a Green-like case, and the issue with respect to rights of appeal.

This essay has explored a number of possible solutions to these problems. One such solution is that (because Green has put his state of mind at issue) the prosecution could be permitted to call evidence of insanity if a fact pattern such as that in

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<sup>186</sup> *R v Chaulk* (1990) 62 CCC (3d) 193 (SCC).

<sup>187</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>188</sup> *R v Green*, above.

<sup>189</sup> *R v Green*, above.

<sup>190</sup> A restricted patient goes through the same procedure as a "special patient" would have to go through in order to be released: Sylvia A. Bell (ed) *Mental Health Law in New Zealand* (Brooker's, Wellington, 1998) 65.

<sup>191</sup> This poses a problem because a person like Green should become either a special patient or a restricted patient to properly protect society and the individual concerned from the potential for recurrences of such action.



*Green*<sup>192</sup> was being tried, on the basis that it is not in the public interest to allow an unqualified acquittal in such circumstances.<sup>193</sup> This solution would also have the added advantage (over alternative solutions like changing the self-defence test) of not requiring legislative change.

An alternative solution would be to reinstate the specific delusions provision. This would mean, inter alia, that even if the defence of insanity were not raised by the accused, the judge would be likely to use their powers under section 113(3) of the Criminal Justice Act to raise the question of insanity. However, this would not necessarily on its own prevent a person like Green from escaping the net of insanity. This is because this would enable such an accused to satisfy both defences (self-defence and insanity) and possibly plead self-defence successfully. Therefore, the *Walsh*<sup>194</sup> method (or the idea embodied in section 7.3 (7) of the Criminal Code Bill in Australia) might, in conjunction with changing the insanity laws, be the correct approach.

By altering the procedural and substantive parts of the law with respect to the defences of insanity and self-defence in this way a person like Green would be acquitted on the grounds of insanity. This would be a far more appropriate outcome from a policy perspective than the result in *Green*.<sup>195</sup>

<sup>192</sup> *R v Green* [1993] 2 NZLR 513 (CA).

<sup>193</sup> *R v Cottle* [1958] NZLR 999, 1013 (CA).

<sup>194</sup> *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A68/1993.

<sup>195</sup> *R v Green*, above.



## VIII BIBLIOGRAPHY

### A Cases

- *R v Green* [1993] 2 NZLR 513 (CA).
- *M'Naghten's Case* (1843) 8 ER 718 (HL).
- *Murdoch v British Israel World Federation (NZ) Inc* [1942] NZLR 600 (CA).
- *R v GH* [1977] 1 NZLR 50.
- *Walsh v The Queen* (19 August 1993) Supreme Court Tasmania-Court Criminal Appeal A 68/1993.
- *R v Moke* [1917] 3 W.W.R. 575 (Alta. S.C.)
- *R v Budic (No. 3)*(1978) 43 C.C.C. (2d) 419.
- *R v Oommen* (1994) 91 CCC (3d) 8 (SCC).
- *R v Cottle* [1958] NZLR 999 (CA).
- *R v Chaulk* (1990) 62 CCC (3d) 193.
- *R v Porter* (1993) 55 CLR 182.
- *Lord Ferrers' trial* (1760) 19 State Trials 885 (HL).
- *R v Falconer* (1990) ALJR 20.
- *R v McGregor* [1962] NZLR 1069.
- *R v Teichelman* [1981] 2 NZLR 64.
- *R v Raroa* [1987] 2 NZLR 486.
- *Kapi v MOT* [1992] 1 NZLR 227.
- *R v Kemp* [1957] 1 QB 399.
- *Bratty v. A-G. for Northern Ireland* [1963] AC 386.
- *R v Simpson* (1977) 77 DLR (3d) 507 (Ont CA).
- *R v Bastian* [1958] 1 WLR 413.
- *R v Russell* [1964] 2 QB 596.
- *R v Dickie* [1984] 3 All ER 173 (CA).
- *R v Terewi* (1985) 1 CRNZ 623 (CA).
- *R v Thomas (Sharon)* [1995] Crim LR 314.
- *R v Monkhouse* [1923] GLR 13.

### B Statutes

- Criminal Code Act 1893.
- Crimes Act 1908.
- Crimes Act 1961.
- Criminal Justice Act 1985.
- Mental Health (Compulsory Assessment and Treatment) Act 1992.



### C Texts

- Simester and Brookbanks *Principles of Criminal Law* (Brooker's, Wellington, 1998).
- Campbell, I. *Mental Disorder and the Criminal Law in Australia and New Zealand* (Butterworths, Wellington, 1988).
- Robertson *Adams on Criminal Law* (2ed, Brooker's, Wellington, 1998).
- Timothy Stephens *Criminal Law* (2 ed, Butterworths, Wellington, 1998).
- Stanley Yeo *Insanity and Automatism* (Victoria University of Wellington, 2000).
- Jim Evans *Statutory Interpretation: Problems of Communication* (Oxford University Press, Auckland, 1988).
- Brent Fisse *Howard's Criminal Law* (The Law Book Company Limited, Sydney, 1990).
- Rollin M. Perkins *Perkins on Criminal Law* (The Foundation Press Inc, New York, 1969).
- Marc E. Schiffer *Mental Disorder and the Criminal Trial Process* (Butterworth & Co, Toronto, 1978).
- Roderick Mulgan *Psychiatry, Law, and the Insanity Defence* (Victoria University of Wellington, 1999).
- Charles Mercier *Criminal Responsibility* (New York, 1926).
- Glanville Williams *Criminal Law: The General Part* (2ed, Stevens, London, 1961).
- Sylvia A. Bell (ed) *Mental Health Law in New Zealand* (Brooker's, Wellington, 1998).

### D Journals / Reports

- Dennis R. Klinck "Specific Delusions in the Insanity Defence" (1982-83) 25 Crim. L.R 458.
- John F. Manning "Textualism and the Equity of the Statute" (2001) 101 Colum. L. Rev 1.
- Robert F. Schopp et al "Battered Women Syndrome, Expert Testimony, and the Distinction between Justification and Excuse" (1994) U. I 11. L. Rev. 45.
- P.A. Fairall "The Exculpatory Force of Delusions-A Note on the Insanity Defence" (1994) 6 Bond LR 57.
- Criminal Law Reform Committee, *Report on Self-defence* (1979) 8-10.



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