A NEW FRAMEWORK FOR DETERMINING THE DEFENCE OF INSANITY?
Police v Bannin

Legal Writing Requirement

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Kirsten Ann Frew
199002860

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I INTRODUCTION

There have been numerous writings and cases on all aspects of the insanity defence in the criminal law. A recent case is *Police* v *Bannin* [1] which is significant in that it attempts to place the insanity defence within an articulated framework of analysis which fits more securely into the wider definitional elements of a criminal charge.[2]

The appellant was a 16 year old boy suffering from "Kleine-Levin Syndrome", a neurological condition. This resulted in periodic episodes of prolonged sleep which were followed by several days of abnormal behaviour - including an impaired state of consciousness, a partial memory loss and inappropriate sexual behaviour. The behaviour would then progressively return to normal.

While suffering from such an episode, the accused entered the next door neighbour's house on several occasions. The first time he just stood silently behind the complainant. However five days later, he again entered the house, removed his t-shirt and came up behind the complainant and grasped her. The complainant struggled free, and pushed the accused away telling him to stay away. Fifteen minutes later a third incident occurred where the complainant again found the accused next to her. This time she screamed at him "Get away from me. I'm telling your father." The accused asked her not to and left.

The case was an appeal against convictions for unlawfully entering a building with intent to commit a crime (section 242 Crimes Act 1961) and assault on a female (section 194(b) Crimes Act 1961).

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[1] [1991] 2 NZLR 237.

[2] W J Brookbanks "Criminal Law" [1991] NZ Recent Law Review 388-389.

In the lower court (and later in the High Court) the issues were concerned solely with the accused's state of mind at the time of the alleged offences. The learned Judge in the District Court concluded that at the relevant times the accused was to a significant extent aware of what he was doing, and that accordingly the defences of sane and insane automatism were both excluded.

Fisher J in the High Court proposed a framework to use when determining sane and insane automatism. In order to analyse the approach, a diagrammatic outline of the approach suggested by Fisher J follows: [3]

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[3] Above n1, 243.

1. What are the mental elements of the crime?

2. Assuming no mental abnormality, would the mental elements be a reasonable inference from the conduct?

Yes / No

No → Unqualified acquittal

3. Is there independent expert evidence of mental abnormality?

Yes / No

No → Conviction

4. Is it a disease of the mind?
The test is whether it is an internal or external factor. This determines the onus of proof and ultimate disposition of the case.

Yes / No

5. Has the defence proved incapacity - is the accused incapable of having mens rea, on the balance of probabilities.
The test is the 3 principles of awareness
i) Some appreciation of the key facts.
ii) Some capacity to make a decision to act with respect to the key facts.
iii) Some capacity to form each of the residual mental elements of the mens rea.

Yes / No

6. Section 23 acquittal

No → Has the prosecution disproved the alleged incapacity beyond reasonable doubt?

Yes / No

Unqualified acquittal

Yes → Does the accused have the mens rea?
The mental abnormality can be taken into account with all the other circumstances.

Yes / No

No → Unqualified acquittal

7. If there was a disease of the mind, has the accused shown they lacked capacity to know the act/omission was morally wrong having regard to the commonly accepted standards of right and wrong?

Yes / No

8. Section 23 acquittal

Conviction

This framework was then applied to the facts of the case. The findings were as follows:

1. The mental elements for the unlawful entry charge included intent to unlawfully enter the house and once inside an intent to find and touch the complainant. And for the assault charge the mental elements included proving the sexes, and proof that the accused intentionally touched the complainant.

2. Assuming no mental abnormality the mental elements would have been a reasonable inference to draw from the accused's conduct, because on the unlawful entry aspect the accused physically entered the house and there was never any suggestion of express or implied permission. Further, due to the close time lapse between the second and third incidents (only fifteen minutes), the persistence of the accused's conduct and the absence of an alternative explanation for his presence, raised a reasonable inference that the accused was there for the purpose of touching her. There was no suggestion of belief in consent, given the surrounding circumstances.

On the assault charge the sexes were proved, and due to the resistance of the complainant when the accused grabbed her, it is an irresistible inference that an assault was established.

3. Independent expert evidence was given explaining the Kleine-Levin syndrome and the symptoms and consequences.[4] The evidence showed that the accused was suffering from altered behaviour as a result of his medical condition. The important factors were: the lack of memory, the previous beach incident when the accused had laid down next to a woman, the surrounding circumstances of daylight, the trance like state, and the persistent behaviour with no encouragement given.

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[4] For a description of the evidence of mental abnormality see above n1, 246.

4. Fisher J found there was a disease of the mind, due to the fact that it was an internal factor as opposed to an external one. This is the test accepted by the leading authorities.[5]

5. Incapability (which must be proved according to Fisher J as section 23 states that the accused must be incapable of understanding) was not established as on the three principles of awareness there was evidence of some awareness of the key facts. This awareness was establsihed by the following factors: (i) The subsequent recollection established awareness of the key facts, as it is inferred that the accused must have remembered something about going back to the complainants house (ii) Bannin made this decision to enter the house, so there was some capacity to make a decision to act (iii) The dissociation did not conclusively prove that the accused was necessarily incapable of advance contemplation of entering the house and once inside assaulting the complainant. Hence the insanity defence was not available because the disease of the mind had not produced the necessary incapacity.

6. Mens rea was established for the assault charge, but not for the unlawful entry charge. Due to the "mental abnormality" there was no intention for the encounter to be an unlawful one. Therefore, on this charge the accused received a complete acquittal.

It is submitted that before this framework can be accepted as the basis for determining sane and insane automatism issues, there are four issues which must be analysed.

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[5] These authorities are reviewed in the case see above n1, 242 including *R* v *Hennessy* [1989] 1 WLR 287; [1989] 2 All ER 9 (CA); *R* v *Quick* [1973] QB 910; [1973] 3 All ER 347 (CA); *R* v *Rabey* (1978) 79 DLR (3d) 414.

The first three issues involve aspects of His Honour's focus on capacity. Fisher J saw capacity as the focal concept in section 23 in determining whether the accused understands the nature and quality of the act or omission, or of knowing that the act or omission was morally wrong. Issue one, therefore, addresses whether this focus on capacity is correct.

Fisher J supported his approach by submitting that the real question is always the capacity to form the mental elements of the crime (the "mens rea"). Therefore all the other tests used in previous cases are equivalent to asking whether the accused is incapable of forming the mental elements. Issue two, therefore, addresses whether this mens rea approach is correct.

His Honour then proposed three tests to determine whether this capacity exists - these must be satisfied before there is incapability, and hence before section 23 can be claimed. Issue three, therefore, addresses whether these three proposed tests are appropriate.

Hence to determine if there is a defence under section 23 the question to ask of the accused is whether they are incapable of understanding the nature and quality of the act or omission (under limb a). This is proven if the accused is incapable of forming the mental elements, which is determined by satisfaction of the three awareness tests.

Once it is determined section 23 has not been satisfied there is a further question to ask, namely whether the accused did in fact have the mens rea, before a conviction is justified. Here arises the fourth issue. Is Fisher J correct in submitting that in determining this mens rea question, the evidence of mental abnormality may be taken into account with all the other circumstances? If this is correct, then it is possible to receive a complete acquittal, notwithstanding the evidence of a mental abnormality.

II CAPACITY

The discussion of Fisher J on capacity is based on three factual findings.[6] These are (i) That without the medical evidence of the mental abnormality there would have been sufficient proof to warrant an inference of mens rea (step 2). (ii) That there existed independently verified evidence of a mental abnormality which put doubt on the accused's capacity to form the required mental elements (step 3). (iii) That the medical evidence in the case amounted to a disease of the mind. Hence an insanity defence was raised and the onus of proving the incapacity rested on the accused (step 4).

His Honour concluded on the facts of the case that the accused could not establish on the balance of probabilities that he was "incapable" of understanding the nature and quality of the act (step 5). Hence there was no defence of insanity available.[7]

To determine whether this conclusion was correct it is necessary to analyse the three issues identified in relation to the focus on actual capacity.

A *The Focus On Capacity*

The original formulation of the insanity defence comes from the English House of Lords, who laid down the McNaghten rules:[8]

> Labouring under such a defect of reason, from a 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 what he was doing was wrong.

The equivalent section in New Zealand is that in section 23 Crimes Act 1961, which has modified these rules. Section 23(2) provides that:

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6 Above n1, 246-249.

7 Above n1, 255.

8 *Daniel McNaghtens Case* (1843) 10 Cl & Fin 200; 8 ER 718.

> 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 extend 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.

It can be seen that New Zealand's legislation has introduced an additional criteria, in that the disease of the mind must render the accused incapable of understanding the nature and quality of the act as opposed to not knowing the nature and quality of the act, as under the McNaghten rules.

Fisher J noted this distinction and emphasised that "incapable" is now an integral part of the section and submitted that it has become the focal concept. Is this correct? This can be resolved by considering the case law, the statutory context, policy arguments and authority from other jurisdictions.

In *R* v *MacMillan* [9] the New Zealand Court of Appeal when discussing section 23(2)(b), said the question is whether the accused did understand that the act was morally wrong and that to focus on incapability was wrong. The principle is still the same for section 23(2)(a) because incapability applies to both.

Turner J in *MacMillan* stated:[10]

> We do not think any difference in meaning was intended, and that as this court accepted in *Murdoch* v *British Israel World Federation (NZ) Inc*[11] it was not intended that by using "incapable" in section 43 of the 1908 Act[12] to alter in any way the test proposed in *McNaghten's* case, viz, that by reason of a defect of reason arising

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[9] [1966] NZLR 616 (CA).

[10] Above n9, 621.

[11] [1942] NZLR 600; [1942] GLR 390.

[12] This is now equivalent to section 23 in the 1961 Act.

> from disease of the mind the accused *did not know* that he was doing what was wrong.

In its statutory context, the word incapable is clear, it cannot just be ignored. It is submitted that *MacMillan* is incorrect in saying that Parliament did not intend to alter the test. If Parliament did not intend this why did they change the wording from the McNaghten formulation of knowing the nature and quality of the act or omission, to section 23's formulation of incapable of understanding? The approach of Fisher J is in direct conflict with *MacMillan*. However it will be shown that Fisher J is supported by policy considerations and authority from other jurisdictions and it is submitted that *R* v *MacMillan* needs to be reconsidered.

There are policy arguments to support the capability focus. It can be argued that the real inquiry is properly on capacity because the role of insanity is to deal with the lack of capacity. If the accused is capable, the inquiry should just be the normal one "Did they or didn't they form the mens rea?" The role of the insanity defence is to make special provisions to assist those who are incapable of understanding or knowing, and hence who are not responsible, to the same extent as a sane person, for their act or omission. The defence also helps protect society from these people.

Another supporting policy consideration is that it is appropriate to use expert evidence to show that the accused was incapable of understanding due to a disease of the mind, as opposed to did the accused actually understand. The expert cannot give testimony on the factual issue in question ("Did they understand?") as this is for the jury to determine.

There is supporting authority to be found in other jurisdictions. New Zealand's section 23 is similar to the equivalent Canadian provision, which is section 16 of the Criminal Code. Section16(2) provides that:

> For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that

> renders him incapable of appreciating the nature and quality of an act or omission or of knowing that act or omission is wrong.

As can be seen the wording of the Canadian provision is nearly identical to New Zealand's, except that you must be incapable of appreciating as opposed to incapable of understanding the nature and quality of the act.

In Canada, a report was issued by the Royal Commission on the Law of Insanity as a Defence in Criminal Cases. This was commonly known as the McRuer Report. In this report it was submitted that[13]

> [M]ere knowledge of the nature and quality of the act ("Did the person know what he was doing") is not the true test to be applied. The true test necessary is, was the accused person at the very time of the offence - not before or after but at the moment of the offence - by reason of disease of the mind unable fully to appreciate, not only the nature of the act but the natural consequences that would flow from it? In other words was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?

This statement has been relied on by the Supreme Court of Canada in *Cooper* v *The Queen* [14]. *Cooper* held that the literal adoption of capacity is the correct focus. The code postulates a test which goes further than the "mere knowledge" required under the English approach. What is required is a capacity to apprehend the nature of the act and its consequences.[15] The Court found, therefore, that the focus is on whether the disease of the mind renders the accused

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[13] Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956), see p 13.

[14] (1980) 51 CCC (2d) 129 (SCC).

[15] Above n14, 146. Dickson J stated that the position is well expressed in the McRuer Report at p 12:

> Under the Canadian Statute law a disease of the mind that renders the accused person incapable of an appreciation of the nature and quality of the act must necessarily involve more than mere knowledge that the act is being committed, there must be an appreciation of the factors involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct.

incapable of appreciating the nature and quality of the act or omission. The test is not that of the English courts[16] that the disease of the mind means you do not know the nature and quality. The insertion of the word "incapable" was viewed as making a material difference.

The facts of *Cooper* were that the appellant who was an out-patient of a psychiatric hospital was attending a social function at the hospital, where he met the deceased, an in-patient. They left the group and went for a walk. The appellant asked the deceased to remove her clothing, which she did, and he then attempted to have sexual intercourse with her. He then grabbed her around the throat and choked her to death. The appellant gave differing stories to his Father and to the Police and finally admitted to causing her death. The appellant had had a long history of psychiatric treatment.

The case held that the accused may have lacked the capacity to appreciate, in nature and quality, that death might result from the act although the accused may have been aware of the physical character of the action of choking her.[17] The appeal was allowed and a new trial was ordered. Several later cases have applied and followed *Cooper*.[18]

The approach taken by the Canadian court shows Fisher J is not alone in his focus on capacity to determine section 23. Other jurisdictions have also dealt with this question.

The American Model Penal Code, formulated by the American Law Institute, has been adopted by several American jurisdictions. It required the actor to lack the substantial capacity to appreciate

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[16] The English courts still use the McNaghten rule and the cases illustrate this , such as *R* v *Hennessey* [1989] 2 All ER 9.

[17] Above n14, 145-146.

[18] These include *R* v *Hem* (1989) 72 CR (3d) 233, *R* v *Chavest* (1990) 76 CR (3d) 63, *R* v *Barnier* (1980) 51 CCC (2d) 193 (SCC) (a decision handed down on the same day as *Cooper).*

the criminality of their conduct.[19] The cases have emphasised that the inquiry must be directed to the accused's capacity.[20]

There has been criticism of this definition in that substantial incapacity should not be the test. The criticism was concerned with the situation when the accused can make out substantial incapacity and therefore is entitled to the defence, even though they actually did realise what they were doing. However it is submitted this is a theoretical limitation and situations like this would be very rare. Also in New Zealand the test is not substantial incapacity but rather a total incapacity, so this situation would not arise.

The Australian codes also include the word capacity. The test is the accused's capacity to understand what he/she is doing (the Queensland and Western Australia Codes) or incapable of understanding the physical character (the Tasmanian Code).[21]

The Australian cases have interpreted these statutes as having capacity as the focal concept. Even though the English courts have taken the McNaghten rules as tantamount to a codification of the meaning of insanity, Australia and New Zealand have not.[22] *Stapleton* v *R* [23] is authority for saying it is permissible to depart from the English courts pronouncements on insanity. The Australian cases say there must be a total deprivation of one of the specified capacities. Authority for this comes from *R* v *Rolph* [24] and *R* v *O'Neill* [25].

The New Zealand statute has two such capacities - the capacity to know the nature and quality of the act, or that it was morally

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[19] Model Penal Code S 4.01.

[20] See *Freeman* v *People* 4 Denio (NY) 9, *Duthey* v *State* 131 Wis 178, 111 NW 222.

[21] See B Fisse *Howard's Criminal Law* (5ed, Law Book Co Ltd, Sydney, 1990) 455.

[22] See I C Campbell *Mental Disorder and Criminal Law in Australia and New Zealand* (Butterworths, Sydney and Wellington, 1988) 121.

[23] (1952) 86 CLR 358, 368.

[24] [1962] Qd R 262, 272.

[25] [1976] Tas S R 66, 98.

wrong (a cognitive capacity). Under the Queensland, Western Australia and Northern Territories Codes, there is the cognitive capacity plus a volitional capacity of a capacity to control your action/resist an impulse. *R* v *Falconer* [26] shows that the focus is still on the capacity. "Unless it can be shown that the actor, being of sound mind, has been deprived of the *capacity* to control his actions..." (emphasis added).

The Australian commentators would appear to support this focus on capacity. Fisse in his book *Howard's Criminal Law* submits that the importance of a disease of the mind is that it might interfere with the accused's capacity to reason, not with his capacity to control himself or with his capacity to experience emotional sensitivity. Once again the focus is on the capacity.[27]

Adams on Criminal Law [28] submits that the focus on "incapability" departs from the formula of the McNaghten rules which treat liability as depending on the existence or non existence of the relevant knowledge, not on the capacity to know. *MacMillan* is cited in support and it is argued that it is unthinkable that a jury should be told to distinguish between proved absence of knowledge, and a theoretical capacity to know. Therefore it is questionable whether section 23 (2)(a) requires true incapacity.[29]

The jury should be focusing on this "theoretical" capacity because the insanity defence is for those who are incapable and hence who need help. Absence of knowledge may be for a variety of reasons, but it is only when there is absence due to an incapacity to know/understand that the defence should be available.

It is submitted that this focus on capacity is correct and support is found in contextual arguments, policy and from other jurisdictions. But this focal word seems to have been ignored in a lot of insanity

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[26] (1990) 65 ALJR 20.

[27] Above n21, 454.

[28] Hon J B Robertson *Adams on Criminal Law* (Brooker & Friend Ltd, Wellington, 1992) Volume 1.

[29] *MacMillan* has alredady been discussed above, and it was submitted that on policy grounds the change in the New Zealand statute means the focus is now on capacity.

cases. This is shown by *Burnskey* v *Police*[30] a case heard shortly after *Bannin*. The issue involved determining the dividing line between insanity and automatism cases, but *Bannin* was not discussed. Therefore the approach is still not clear and it has been submitted that the rationale still needs to be resolved.[31]

B *THE ISSUE OF CAPACITY TO FORM THE MENS REA*

Section 23(2)(a) states that the accused must be rendered incapable of understanding the "nature and quality" of the act or omission. Here Fisher J makes a distinction between the two concepts of "nature" and "quality". His Honour understands "nature" to refer to the actual act - this refers to a situation when the accused is unconscious so there will be a total lack of capacity to understand the act or omission (this will be a rare situation). Hence "unconscious involuntary action" suffices as a test.[32]

It is accepted by both the medical and legal professions that there are many different levels of consciousness, it is "a matter of degree not kind".[33] Fisher J concluded this is why the cases are not easily reconciled. In some cases, mere impairment of conscious understanding and reasoning power have not been enough.[34] But in other cases the defence has been given notwithstanding at least a residual degree of awareness.[35] These cases reflect the view that there is no stated level of capacity to compare the accused's behaviour to. The distinction made by Fisher J between "full

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[30] Unreported, 1 May 1992, High Court Wellington Registry, AP 102/91).

[31] E Macdonald "Acquittal for the Intoxiacted Automaton" (1993) NZLJ 44.

[32] *Bratty* v *Attorney General for Northern Ireland* [1963] AC 386; [1961] 3 All ER 523 (HL).

[33] This is discussed by M 'Caldon "Automatism" (1964) 91 Can Med Ass J 911.

[34] In *Broome* v *Perkins* (1987) 85 Cr App R 321 the accused was on a charge of driving without due care and attention. He was in a hypoglycaemia state but this was not enough because he still had sufficient conscious control over his car to be able to brake violently and veer away from other vehicles. Other cases which support this are *R* v *Isitt* [1978] RTR 211 and *Haynes* v *MOT* (1988) 3 CRNZ 587.

[35] In *R* v *K* [1971] 2 OR 401 the accused had killed his wife while in shock when informed she was leaving him, he was said to have been in a state of diminished awareness. Another case which supports this is *R* v *T* [1990] Crim LR 256.

consciousness" and "partial consciousness" is helpful as it shows that different levels of awareness apply in different situations.

His Honour concluded that "quality" was best reserved for when the accused has some degree of consciousness or awareness (this will be the case in the majority of situations). Where the accused is unconscious the focus is on the "nature" of the act (the actus reus), but where there is some consciousness the focus is on the "quality", the actus reus focus is of no assistance (because partial consciousness will ensure there is voluntariness), so the proper focus is on the mens rea. If the accused lacks the capacity to form any one of the mental elements to the crime, the prosecution must fail. One way of demonstrating the absence of a mental element is to show that due to a mental abnormality, at the material time, the accused was incapable of satisfying it.

His Honour further supports this distinction by saying there is no legislative intent to distinguish between the actus reus and the mens rea. The expansive interpretation comes from the fact that lack of capacity to form the necessary mens rea could fall within section 23 on the basis that there was no capacity to understand the "quality" of the act. Otherwise the distinction would be between when the accused lacked capacity to understand the immediate physical nature and where capacity is limited to the formation of the mens rea. Both have a dangerous incapacity caused by a disease of the mind.[36]

The conclusion of Fisher J was that "capable of understanding the nature and quality of the act" is either the physical nature and quality (totally unconscious, so focus on the actus reus) or mens rea (reduced unconsciousness, therefore it is necessary to focus on the mens rea). The two questions which arise from this approach are: (i) Was His Honour correct in saying that where there is some degree of consciousness the focus should be on the capacity to form the mens rea? (ii) Is section 23 consistent with this in that lack of capacity to form the mens rea could come within the "quality" of the act.

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[36] For the discussion of Fisher J on all of this see above n1, 250-51.

(i) The traditional approach has been to ask whether there was action without conscious volition, and to focus on the absence of voluntariness. For example *Haynes* v *MOT* [37] talks of being capable of voluntary conscious action. The idea is that if voluntariness is not established no crime has been committed and the question of mens rea is irrelevant. But Fisher J has added that as well as insanity being able to negate the requirement for voluntary conduct it can also negate the mens rea.

Fisher J concluded that there is no need to distinguish between the actus reus and the mens rea, as the true foundation lies in the mental elements. Brookbanks[38] has argued that this comes close to stating that automatism is only available for cases where intent is a requirement. *MOT* v *Strong* [39] is an authority for this proposition. But there is a logical difficulty if absence of voluntariness could defeat liability on an absolute liability charge but automatism per se could not.

It is submitted that the reason Fisher J did not need to distinguish between the actus reus and the mens rea is because on the facts this was a partially conscious action, in which focusing on the actus reus would have been of no assistance - hence the reason why it was stated that the focus must be on the mental elements.

The Canadian courts seem to support Fisher J and have held in *R* v *Abbey* [40]

> The ability to appreciate the nature and quality of one's act includes the ability to perceive the physical consequences and impact of the act. It refers to the physical character of the act, and requires sufficient mental capacity to measure and foresee the consequences of conduct. A delusion which renders an accused incapable of appreciating the nature and quality of his act goes to the mens rea of

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[37] [1988] 3 CRNZ 587.

[38] See Brookbanks above n2.

[39] [1987] 2 NZLR 295.

[40] [1982] 29 CR (3d) 193, 194 (SCC).

> the offence, and results in a verdict of not guilty by reason of insanity.

The accused then, must have sufficient mental capacity to measure and foresee the consequences. The approach of Fisher J hinges on saying that when the accused has some level of unconsciousness, focusing on the actus reus is of no assistance, so it is necessary to look to the mens rea (which is also an essential element).

It is submitted that when there is "partial consciousness" there will always be some awareness of the physical act itself, for example that you are hitting someone, so it will be necessary to consider whether they <u>are</u> incapable of understanding the "intention/recklessness" or as the Canadians have stated - if they can measure and foresee the consequences, because then the accused must have the capability of having intention.[41]

Cooper [42] is authority for saying that the requirement of being able to perceive the consequences of a physical act is a restatement of the principle of mens rea. The mental elements must be proved with respect to all the circumstances and consequences that form part of the actus reus. This gives authority for the proposition put forward by Fisher J, of focusing on the mens rea, if one perceives the consequences, they must have been capable of having the intention.

(ii) It is submitted that Fisher J is also correct in stating that the focus on the mens rea comes from the reference to the "quality" of the act. Authority for this comes from *R* v *K* [43], where it was held that nature and quality refers to physical nature and consequences of the act. This is supported by Halsburys.[44]

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[41] *Abbey* stated at p 204 that "A delusion which renders an accused incapable of appreciating the nature and quality of the act goes to the mens rea", so surely if you are incapable of understanding the mens rea there is no capability.

[42] Above n14, 147.

[43] [1971] 2 OR 401.

[44] *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 11(1) para 31, p 36. This says the authority for this comes from *R* v *Codere* (1916) 12 Cr App Rep 21 CCA.

The reference to consequences shows that if you can foresee the consequences you must have had the intention, therefore the word "quality" supports the focus on the mens rea.[45] It is submitted that Fisher J is correct in focusing on the mens rea in these situations. Any impairment of the mens rea or the actus reus should activate the insanity defence.

C *Proposed Tests For Determining Capacity*

Fisher J translates this partial level of awareness where the focus is on the mens rea (as discussed above), into an inquiry of capacity determined by the three awareness tests identified. Once these are satisfied the accused is aware and hence has the capacity to understand the quality of their act. On the other hand if these are not satisfied the accused lacks capacity and therefore must rely on an insanity defence.

The first of these three tests (called the "deliberative functions of the mind") was some appreciation of each of the key facts relevant to the crime. On the facts of *Bannin* for the unlawful entry charge these key facts were being able to recognise the existence of the house next door which did not belong to him, that he was walking toward it, that it contained a woman, and that he was entering. But Fisher J does note that the mental capacity for a more complex crime would be much more difficult.[46]

The second requirement was some capacity to make a decision to act with respect to the key facts. This contemplates a capacity to exercise several decision making functions including advance appreciation of the possibility of acting in this way; a contemplation of innocent alternatives; then converting the contemplated action into a mental commitment and finally issuing the appropriate commands. On the facts of *Bannin* the accused

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[45] Also the distinction given makes sense. If there is an impairment of the mens rea or the actus reus, then a question of insanity must arise.

[46] The example cited is uttering a forged document - where there would be more complicated mental elements such as knowing you were forging a signature, recognising you were forging on a document.

would have had to have been able to stay away from the complainant if he had considered this (an innocent alternative) and must have commanded his body to enter the house (an appropriate command). This test was therefore satisfied.

The third requirement was some capacity to form each of the residual mental elements of the mens rea involved. In *Bannin* with the unlawful entry charge the accused would also need the capacity to form the ulterior intent (at the time of entry) of locating and assaulting the complainant.[47]

Although Fisher J qualified this.[48] The key question being whether before and after the event the accused was aware of the critical facts and whether, having that knowledge the accused then acted in a certain way. Once this is satisfied it would be difficult to argue the accused did not have the necessary level of capacity, barring any contrary evidence. The situation where awareness is present, but there is incapability of making a voluntary decision to act, was left open for future cases.

The limited nature of these awareness/capacity requirements was recognised by Fisher J as he stated "however clouded, confused and distant" your awareness is, you still have awareness.[49] The accused only needs capacity to exercise these three function in some degree, there is no particular standard to achieve. It is no defence if your capacity is severely impaired or it was a compulsive urge. The question is whether the capacity was there at all.

On the facts of *Bannin* the tests were satisfied. The accused was in a state of partial dissociation, but the accused remembered going to the house and grabbing the complainant, so he was aware of the key facts (test 1). The actions taken were simple ones - and

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[47] Above n1, 250-252.

[48] Fisher J at p 252 concluded that it was doubtful whether criteria two adds much to criteria one. "It is one thing to have a capacity another to exercise it." This means the accused does not have to actively consider all the innocent alternatives and deliberately reject them.

[49] Above n1, 253.

it was not shown that he lacked the necessary decision-making capacity (test 2). And the onus was not discharged to show that he did not have the capacity to simultaneously contemplate in advance the immediate act of entering and the deferred acts of finding and touching the complainant - this conclusion could not be drawn from the state of dissociation (test 3). Therefore the accused in *Bannin* had a reduced level of consciousness and awareness, but this did not negate the capacity to form the mental elements. Therefore the section 23 defence was not made out - the accused had the capacity so there was no defence.

Are these tests for capacity appropriate? *Haynes* v *MOT* [50] is an illustration of how the capcity question was decided before *Bannin*. In this case Haynes was convicted of refusing to allow a blood specimen to be taken when requested to do so by a registered medical practitioner. The accused was involved in a motor collision, which as a result he sustained injuries and was taken to hospital. During the course of events he refused to give a blood specimen which would have determined if he had consumed alcohol.

The evidence showed that there was a probability that the brain was not functioning normally, so the refusal to give a blood test was not a fully conscious voluntary action. But Gault J said full consciousness was too high a standard for the mental element, in which to compare the capacity of a person.[51] It was sufficient if the accused would have been capable of voluntary conscious action, even though the mental processes, to a degree, might have been depleted. The test is one of voluntariness.

Fisher J went much further and concluded that it was only necessary to have capacity to exercise these three functions in <u>some</u> degree - then there is automatic awareness, and therefore there is capacity.

The proposed test is very strict. If the accused has any recollection later (even partial recollection) then they must have

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[50] Above n37.

[51] Above n37, 591.

had prior awareness.[52] This is because the accused can only have later recollection of what they were previously aware of. As stated above on the actual facts of *Bannin* the accused was in a state of partial dissociation and because he remembered going to the house he had sufficient awareness. So, memory became the decisive factor.

For an accused to establish incapacity, and hence an insanity defence, the best option is criteria three - some capacity to form each of the residual mental elements, such as an intention to locate and assault the complainant once he entered the house. The residual elements are a more complex step in the line of intention and actions. However, considering the type of offences likely to be committed by a person in this state, the residual elements will not be that complicated.[53] Criteria two and three which involve some appreciation of the key facts and some capacity to make a desision to act, will usually be easily satisfied by someone who has partial consciousnes. A partially conscious person will struggle to prove they did not have capacity in some degree, and hence will not be able to establish insanity.

The policy behind the test is correct - if the accused is not aware and therefore has no capacity, then these are the people who should be pleading insanity. But it is submitted that it will only be for very complicated crimes with residual mental elements and hard to comprehend ´essential facts, in which incapacity could be established and it is not likely someone in this state of partial consciousness will commit these more complicated crimes. It is submitted that the focus is a valid one, but the tests will make it very difficult to succeed in an action of this kind.

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[52] So an obvious test is of memory - because it is difficult to see how there could be recollection later without prior awareness to the standard required. See above n1, 253.

[53] These types of offences will be the less complex ones which will have less complicated mental elements and lack of residual mental elements, plus simple and readily comprehended facts (eg) assault as opposed to uttering a forged document.

The Canadian courts have decided in *R* v *Simpson* [54] that appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feelings about the effect of the act on other people. *Kjeldsen* v *R* goes on to state that[55]

> To be capable of appreciating the nature and quality of his acts an accused person must have the capacity to know what he is doing, in the case at bar, for example, to know that he was hitting the woman on the head with the rock, with great force, and in addition he must have the capacity to estimate and to understand the physical consequences which would flow from his act, in this case that he was causing physical injury which would result in death.

The test for capacity (awareness) given in this case was capacity to know what he/she is doing. This is similar to an appreciation of the key facts (test 1) and a capacity to make a decision to act with respect to those facts (test 2). It is submitted that the Canadian test is much more general and it would be easier to prove an incapacity, compared to the *Bannin* tests which breaks down each part of the action and makes it harder to find an overall incapacity.

This can be illustrated by the *Bannin* facts. On the evidence such as the dissociation and the trance like state, it would be easier to show that there was incapacity to understand what he was doing. As shown in the decision once it is broken down into recognising the house next door, recognising the fact that he was walking toward it, and the fact that it contained a woman ..., it makes it more likely that the accused had the capacity for each indiviual action, and hence an overall capacity.

The second Canadian test is a capacity to estimate and understand the physical consequences which would flow from the act. If the accused understands the physical consequences they must have

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[54] (1977) 35 CCC (2d) 337 (Ont CA).

[55] (1981) 24 CR (3d) 289, 295 (SCC). The facts in this case were that the accused had engaged a female taxi driver, raped her at knife point, and brutally killed her by delivering several blows with a large rock to her head.

some mens rea. It is submitted that this test makes it easier to show an incapacity. In *Bannin* Fisher J concluded that the accused could not satisfy test three (the accused did not show that he did not have the capacity to simultaneously contemplate in advance the immediate act of entering and the deferred act of finding and touching the complainant). However if the facts are tested against "a capacity to estimate and understand the physical consequences" (the Canadian test) it is more likely that it would be found that no capacity exists because the accused would have had to contemplate the entry and his actions once inside, plus understand the consequences of the action.

Therefore the Canadian tests are more approariate, due to their generality, as it does not make it so impossible to prove incapacity. In *Bannin* because very specific tests were given, it was much easier to find some degree of awareness, and hence no incapacity. It is submitted that the focus of Fisher J was correct, but that the tests proposed were far too strict. This would result in the insanity defence being largely unavailable, and, if this evidence of the mental abnormality is allowed into determining the next question (step 6) the mens rea question (as discussed below), then the result would be more acquittals.

III USING THE DISEASE OF THE MIND EVIDENCE WHEN DETERMINING MENS REA

Fisher J decided that once it is decided that the accused does have capacity (and therefore there can be no reliance on the defence of insanity) the next relevant question is "Did he/she have the mens rea?" More importantly His Honour concluded that when determining this question it is permissible to take into account the mental abnormality with all the other circumstances. If the accused did have the mens rea (and does not satisfy limb section 23 (2)(b)), then it will be inferred that the accused is guilty. If mens rea is absent a complete acquittal is given, even though the lack of mens rea stems from a disease of the mind.

In *Bannin* the accused was acquitted on the unlawful entry charge because the evidence (especially the medical evidence) raised a reasonable doubt as to whether the intent had in fact been formed at the time of entry. The accused had a disease of the mind, but was capable of having the mens rea (on the tests) so insanity was not proven. However, the accused did not actually have the mens rea on the facts, so there was a complete acquittal!

Is this a valid approach? Can the mental abnormality be taken into account when determining the mens rea question? *Adams on Criminal Law* [56] states that this approach is wrong - it should not be taken into account. When evidence of insanity fails to establish the defence of insanity it seems wrong that it can then be used to support an unqualified acquittal on the grounds of lack of mens rea. Adams concludes that the mens rea issue should be decided without reference to any evidence of insanity and before that defence is considered. The authority cited for this is *R* v *S*. [57]

The facts of this case were that the accused who was a German, had been living in Australia. On the day in question two women in units next door to where he was living saw the accused in his

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[56] Above n28, CA 23.36.

[57] [1979] 2 NSWLR 1.

backyard firing a rifle, shooting at the shed and at bottles. The police were called, upon which the accused stayed inside firing the rifle, even after being asked in German to throw out his rifle and come out with his hands up. This went on for a number of hours and ended when the accused finally came out. He was charged with discharging a loaded firearm with the intent to prevent his lawful apprehension.

There was medical evidence showing he was a schizophrenic, and that he was suffering from hallucinations, delusions and a thought disorder. This case held it was wrong to give a complete acquittal by using the illness as precluding the accused from forming the intent (the mens rea). This is an effort to avoid proof of insanity by the accused and instead to impose on the Crown proof of sanity as an element in the proof of guilt.

This is further supported by Glanville Williams.[58] He states that[59]

> The rule is that where *mens rea* is denied, the jury if it accepts the denial, must consider whether there was insanity. If mens rea was absent on account of insanity, or if in any event there was insanity and the case falls within the *McNaghten* rules the proper verdict is "guilty of the act but insane". If *mens rea* was absent on account of sane ignorance or mistake, the proper verdict is an acquittal.[60]

For practical purposes if the evidence of mental instability can be adduced for proving incapacity (on the balance of probabilities) so as to have a qualified acquittal, and to prove there was no mens rea (by raising a reasonable doubt) so as to get a complete acquittal, then the accused will always adduce it for the second purpose. This is because there would be a complete acquittal, and the

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[58] Glanville Williams *Criminal Law the General Part* (2ed, Stevens & Sons Ltd, London, 1961)) 522.

[59] Above n58, 522.

[60] *R* v *Youssef* [1990] 50 A Crim R 1 says that if the evidence falls short of establishing the accused did not know what he was doing (the insanity defence), and the same evidence may create a reasonable doubt that he did know what he was doing (an acquittal) this would give a very odd result, and needs urgent reform.

accused would only have to raise a reasonable doubt as opposed to proving on the balance of probabilities.

Hence, this would render the defence of insanity useless. The concern here is with those who need help and who are a danger to society - giving them a complete acquittal will not help them or society.

It could be argued that what Fisher J was trying to do here was in relation to the standard of proof not the onus of proof - it is often the Prosecution who will want to raise it. They will have to prove beyond reasonable doubt as opposed to the balance of probabilities.

The Canadian courts are leaning towards a "compromise" as Stuart[61] puts it, where evidence (usually psychiatric) will be admitted to negative proof of mens rea, with the resulting conviction only for a reduced charge. For example a charge of manslaughter as opposed to murder. An example is *R* v *More*. [62] The facts of this case were that the accused shot his wife through the head while she was asleep. He then wrote a number of letters explaining why he had done it. He concealed this crime during the day and during the afternoon he attempted suicide by shooting himself through the head. He did not die and phoned the police to tell them what he had done. The majority held that the psychiatric evidence of an impaired mental ability stemming from depressive psychosis had a "direct bearing" on whether the killing was deliberate.

Fauteux J dissented, complaining that admitting this evidence short of establishing insanity would be "tantamount to introducing in the Canadian law a new and secondary test of legal irresponsibility."[63] It would be a concept of mental responsibility of a lesser degree for which no legal standard is given.[64]

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[61] D Stuart *Canadian Criminal Law: A Treatise* (2ed, The Carswell Co Ltd, Toronto, 1987) 337-342.

[62] (1963) SCR 522.

[63] Above n62, 529.

[64] There is no defence of diminished responsibility in Canada.

This has been applied to other capital murder cases[65] and later on to charges of murder not in the capital (first degree) murder category. However *R* v *Wright* [66] held that the evidence of mental disorder negating mens rea must be directly related to the accused's state of mind at the time in question.

In Canada therefore, there is authority for allowing evidence of mental disorder to negate mens rea. It is a reflection of taking the mens rea inquiry seriously.[67] "The crucial problem is to determine what was in the accused's mind ... need to look at his whole personality, including any mental disorder or disturbance from which he may be suffering ... apart from the defence of insanity".[68]

But there are problems with this approach. Firstly this has only been applied to murder charges. Although in *R* v *Macdonald* [69] a case involving a robbery charge, there was psychiatric evidence which was admitted to show a mental disability (short of legal insanity), that would render the accused incapable of forming the requisite specific intent. The conviction was not overturned and the admissibility of the psychiatric evidence was not questioned. However, it is submitted that there would be problems in expanding this "compromise" situation, in that not every offence has a reduced charge.

Secondly, given that the tests laid down by Fisher J make it very difficult to prove incapacity, it would mean that the evidence would constantly be used as going toward the mens rea, and hence result in a lot more reduced charges. (Although this is preferred to people getting complete acquittals). The original policy behind this reduced charge was to avoid the death sentence, and it has been

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[65] This developments is explained as reflecting the concern of the courts to avoid the death sentence or its replacement of life imprisonment, with a minimum term of 25 years in prison before eligible for parole. See Stuart above n61, 338.

[66] (1979) 48 CCC (2d) 334.

[67] G A Martin "Insanity as a Defence" (1966) 3 CLQ 240 expressed this view years ago.

[68] *R* v *Barnier* (1978) 37 CCC (2d) 508, 510 (BC CA) goes further and suggests that the real question is "should the accused be confined in a mental institution" as opposed to tests based on capacity.

[69] (1976) 29 CCC (2d) 257, 260.

said that the remarks in *More* [70] were not intended to apply to mens rea generally.

Thirdly, due to the potential overlap with the defence of insanity this "escape route" involves uncertainity and semantics, which highlights the need for comprehensive reform of the law of insanity.[71]

It is submitted that Fisher J is wrong in using evidence of mental instability to determine mens rea once you have already rejected the defence of insanity. We have no diminished responsbility defence in New Zealand, and as of yet no "compromise" situation. Therfore, it is up to the legislature to provide additional defences in this area.

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[70] Above n62, 338.

[71] Above n31.

IV CONCLUSION

The defence of insanity is very controversial and is difficult in application. There have been numerous approaches used and *Bannin* provides an articulated framework to follow through, and it is submitted that it is a worthwhile approach to adopt.

Firstly His Honour's focus on the word capacity is justified on context, policy arguments and on authority from other jurisdictions, especially Canada. It is not a new concept conjured up it is an acceptable focus, especially considering section 23's departure from the original McNaghten formulation so as to include that the accused must be incapable of understanding as opposed to the accused not knowing.

The focus on the mental elements is supported by reference to the word "quality" in section 23. As Fisher J concluded, the actus reus is appropriate for total unconsciousness, but this will seldom be the case, and a focus on the mens rea seems correct for partial consciousness (the majority of cases).

The tests proposed to determine capacity are very strict, and beg the question of who would be caught under these requirements. There is a need to weigh up and balance the competing considerations, including the necessity for strict tests, but also the need for an insanity test to be available for those who need it. However, some general guidelines are an improvement over the current situation which has resulted in various tests being applied. The Canadian tests are more general, easier to measure up to and hence afford a better approach.

Finally, it is submitted that the use of the abnormality evidence to determine the mens rea question is wrong. It is not right that the accused should receive a complete acquittal even though there is some evidence of abnormality, but just not enough to establish incapacity. This conclusion is supported by other writers, as

discussed above. Alternative defences in this area are up to the legislature to investigate.

In conclusion *Police* v *Bannin* is a very useful case as it finally attempts to lay down some guidelines to aid Judges in determining these vital questions involved with the insanity defence. This is necessary because after all we are talking about peoples lives and determining which is the best way to help them and society.

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