

# **THE CONSTITUTIONALITY OF THE ONUS OF PROOF IN CASES WHERE MENTAL ILLNESS IS AVERRED**

# **THE CONSTITUTIONALITY OF THE ONUS OF PROOF IN CASES WHERE MENTAL ILLNESS IS AVERRED**

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## SUMMARY

This dissertation deals with the constitutionality of the onus of proof in cases where mental illness is averred.

Insanity refers to the legally defined state of mind and not to a specific psychological disorder. Mental illness is one of the factors recognised by South African law which negates criminal responsibility. The law recognises that persons suffering from insanity cannot be sanctioned in the same way as sane offenders.

The law applicable in South Africa today with regards to the insanity defence is contained in the provisions of the Criminal Procedure Act 51 of 1977, which replaced the M’Naghten rules and irresistible impulse test that appeared in South African Law nearly a century before.

Section 78(1) of the Criminal Procedure Act stipulates that in order to not be responsible for an alleged crime the accused must have committed an act which constitutes an offence and must at the time of said commission have suffered from a mental illness or mental defect which rendered him incapable of (a) appreciating the wrongfulness of his actions; or (b) acting in accordance with an appreciation of the wrongfulness of his actions.

Due to legislative amendments any party who raises mental illness as a defence is supposed to prove on a balance of probabilities that the accused was mentally ill at the time of the commission of the offence. This constitutes a departure from the normal rules of evidence which requires the state to prove the accused’s guilt beyond a reasonable doubt.

The test for insanity is therefore a mixed one in which expert testimony is vital. Psychologists as well as psychiatrists play an important role in assisting the court, by way of expert testimony, to determine the mental state of offenders. Lawyers and mental health professionals often don’t see eye to eye as a result of the differences in interpretation and application of mental illness in the respective professions. The various difficulties faced by the defence, as a dependant of the professions, is explored.

A comparative study of the laws relating to the insanity defence in English Law and in the United States of America is conducted. These findings are contrasted to the current South African legal position. The selected jurisdictions share a common thread in that the insanity defence in these countries all originated from the M'Naghten rules and was subsequently modified by each.

In the English law system, a general insanity defence is non-existent today. The strict M'Naghten rules are still applied as the test for insanity and seldom evoked by accused persons.

In the United States of America the test for insanity differs from state to state but all have returned to the stricter English approach despite a number of different tests being developed and applied during the years since the defence's existence.

The presumption of innocence, which means that the burden of establishing the elements of criminal liability lies with the prosecution and is a fundamental aspect of the South African criminal justice system. In all three of the legal systems the burden of proof has always been placed on the defence to prove its case on a balance of probabilities. Following the legislative amendments in South African law, in section 78 (1) (A) and (B), this position has now changed to he who alleges must prove.

Whether it constitutes unfair discrimination on the mentally ill accused to burden him with this higher onus than in normal defences, and whether it will survive constitutional scrutiny, concludes the study.

# TITLE: THE CONSTITUTIONALITY OF THE ONUS OF PROOF IN CASES WHERE MENTAL ILLNESS IS AVERRED

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## CHAPTER 1

### INTRODUCTION

#### A. INTRODUCTION

This chapter serves as a general introduction to the insanity defence and the burden of proof with reference to its history as well as relevant definitions. It concludes with a summary of what can be expected from each chapter.

#### B. CONTEXTUAL BACKGROUND

##### 1. GENERAL

In *R v Ndhlovu*<sup>1</sup> Davis AJA, in applying *Woolmington v The Director of Public Prosecutions*<sup>2</sup>, held that:

*“In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt...The only exceptions to the above rules, as to the onus being on the Crown in all criminal cases to prove the unlawfulness of the act and the guilty intent of the accused, and of his being entitled to the benefit of any reasonable doubt thereon, in regard to intention, the defence of insanity, and, in regard to both unlawfulness and intention, offences where the onus of proof is placed on the accused by the wording of the statute.”*<sup>3</sup>

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<sup>1</sup> *R v Ndhlovu* 1945 AD 369.

<sup>2</sup> *Woolmington v The Director of Public Prosecutions* [1935] AC 462 (HL) 481.

<sup>3</sup> At 386-7.

Woolmington<sup>4</sup> has been viewed as a welcome advance in the definition of the presumption of innocence in terms of which the prosecution is required to prove all elements of the offence charged beyond a reasonable doubt, including the absence of exculpatory issues<sup>5</sup>. The only exceptions are the defence of insanity and statutory exceptions<sup>6</sup>.

## 2. HISTORICAL DEVELOPMENT OF THE INSANITY DEFENCE AND THE PRESUMPTION OF INNOCENCE

Insanity in some form or another was deemed as an excuse in most ancient law systems<sup>7</sup>.

Mohammedan law only punished “individuals who have attained majority” and “who are in full possession of their faculties.”<sup>8</sup>

Hebraic law recognised deaf-mutes, idiots and minors as not being responsible for their actions<sup>9</sup>.

Mentally ill persons were categorized together with young children as *doli incapax* and thus not liable to punishment in Roman law.<sup>10</sup>

Similarly, Roman-Dutch law held that mentally ill persons should not be punished.<sup>11</sup>

English law saw mentally ill offenders convicted but granted an automatic pardon.<sup>12</sup> Later it was held that the insane should not be held responsible but should be detained in asylums.<sup>13</sup>

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<sup>4</sup> Above at n2

<sup>5</sup> PJ Schwikkard Presumption of Innocence 5

<sup>6</sup> PJ Schwikkard Presumption of Innocence 5

<sup>7</sup> M S Moore “Legal Conceptions of Mental Illness” at 127

<sup>8</sup> M S Moore “Legal Conceptions of Mental Illness” at 127

<sup>9</sup> M S Moore “Legal Conceptions of Mental Illness” at 127

<sup>10</sup> Burchell Principles of Criminal Law (2007) 370.

<sup>11</sup> Burchell Principles of Criminal Law (2007) 370

<sup>12</sup> Burchell Principles of Criminal Law (2007) 370



Early Anglo American law developed the good and evil test, which is thought to have been taken out of Genesis, where knowledge of good and evil likens a person to God.<sup>14</sup> In 1313 it was held that a child under the age of seven years shall go free if convicted because he has no knowledge of good and evil.<sup>15</sup> It was this rationale that led to the fusion of this principle with the definition of legal insanity.<sup>16</sup>

The thirteenth century saw significant developments in European criminal law and procedure<sup>17</sup>. Trial by ordeal was abandoned, inquisitorial procedures were adopted in Continental Europe and advancement of accusatorial principles in English criminal law procedures was seen<sup>18</sup>. Both the inquisitorial and accusatorial systems required the prosecution or accuser to prove the accused's guilt clearly and convincingly<sup>19</sup>. In both systems recognition was given to the sentiment that 'it is better to acquit a guilty person than to condemn an innocent, this was the seen of the concept of the presumption of innocence<sup>20</sup>.

The modern formulation of the presumption of innocence appears to have been first stated in an English text in 1814 in Phillips's Evidence as follows: '[T]hat innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice'<sup>21</sup>.

In 1843 the *M'Naghten Rules* were developed by the House of Lords. Upon request to set out the proper test for criminal insanity, the judges replied:<sup>22</sup>

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<sup>13</sup> Burchell Principles of Criminal Law (2007) 370

<sup>14</sup> M S Moore "Legal Conceptions of Mental Illness" at 127

<sup>15</sup> M S Moore "Legal Conceptions of Mental Illness" at 127

<sup>16</sup> M S Moore "Legal Conceptions of Mental Illness" at 127

<sup>17</sup> PJ Schwikkard Presumption of Innocence 1

<sup>18</sup> PJ Schwikkard Presumption of Innocence 1

<sup>19</sup> PJ Schwikkard Presumption of Innocence 1

<sup>20</sup> PJ Schwikkard Presumption of Innocence 1

<sup>21</sup> PJ Schwikkard Presumption of Innocence 3

<sup>22</sup> M S Moore "Legal Conceptions of Mental Illness" at 128

*“To establish a defence on the grounds of insanity, it must be conclusively proved that, at the time of the committing of the act, the party accused was laboring 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.”<sup>23</sup>*

The M’Naghten rules were adopted in South Africa, but were extended beyond the capacity to distinguish between right and wrong, to include a test based upon whether a mentally ill person had acted under an irresistible impulse to commit the crime, even though he possessed the capacity to understand the nature of the act and appreciate its wrongfulness.<sup>24</sup>

Subsequently the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (the Rumpff Commission) concluded that the M’Naghten rules were not satisfactory<sup>25</sup>. The commission recommended that the law should be changed so as to provide that ‘an accused who in respect of the an alleged crime was not capable on account of mental illness or defect of appreciating the wrongfulness of his act, or of acting in accordance with such appreciation, shall be held not to be responsible’.<sup>26</sup>

Following this recommendation, a statutory formulation of the rules for determining the criminal responsibility of the mentally ill was included in the Criminal Procedure Act 1977.<sup>27</sup>

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<sup>23</sup> *Regina v. M’Naghten*, 10 Clark and F. 200, 8 Eng. Rep 718 (1843))

<sup>24</sup> Burchell Principles of Criminal Law (2007) 371

<sup>25</sup> Burchell Principles of Criminal Law (2007) 371

<sup>26</sup> Burchell Principles of Criminal Law (2007) 371

<sup>27</sup> Burchell Principles of Criminal Law (2007) 372

### 3. DEFINITIONS

**Mental Illness-** “a pathological disturbance of the accused’s mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.”<sup>28</sup>

**Mens rea-** guilt on the part of the perpetrator, the blameworthy state of mind with which the perpetrator acts<sup>29</sup>. *Mens rea* presupposes the presence of mental faculties which enable the person not to have willed his crime<sup>30</sup>. The law takes the view that a person who is not responsible owing to some morbid mental disorder or defective mental development is not punishable<sup>31</sup>.

**Criminal responsibility-** The mental illness or defect must have a certain effect on the abilities of the person to warrant a finding that he is not criminally responsible<sup>32</sup>. The person must lack the capacity to (a) appreciate the wrongfulness of his actions or (b) act in accordance with an appreciation of the wrongfulness of his act<sup>33</sup>. These two psychological criteria apply in the alternative, that is to say that even if a person is found to be able to appreciate the wrongfulness of his actions he will still escape liability if it is found that he is incapable of acting in accordance with such appreciation.<sup>34</sup>

**Burden of Proof-** Section 78(1A)<sup>35</sup> reads as follows: “Every person is presumed to not suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.”<sup>36</sup> Section 78(1B) provides: “Whenever the criminal responsibility of

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<sup>28</sup> S v Stellmacher 1983 (2) SA 181 (SWA) at 187H

<sup>29</sup> Visser & Vorster General Principles of Criminal Law Through the Cases (1982) 214

<sup>30</sup> Visser & Vorster General Principles of Criminal Law Through the Cases (1982) 214

<sup>31</sup> Visser & Vorster General Principles of Criminal Law Through the Cases (1982) 214

<sup>32</sup> Snyman Criminal Law (2008) 172

<sup>33</sup> Snyman Criminal Law (2008) 172

<sup>34</sup> Snyman Criminal Law (2008) 172

<sup>35</sup> Criminal Procedure Act 51 of 1977

<sup>36</sup> Snyman Criminal Law (2008) 174

an accused with reference to the commission of an act or omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.”<sup>37</sup>

#### **4. PRESUMPTION**

There is a legal presumption that states that “every person is presumed to be sane, and therefore the onus of proving mental illness rests on the accused”.<sup>38</sup>

#### **C. AIM OF STUDY**

To highlight the difficulties faced by mentally ill people when they have committed offences by giving an exposition of the theoretical approach and analysing the way our courts have dealt with the defence of mental illness. I will thereafter consider the constitutionality of the onus of proof placed on the mentally insane and explore some possible amendments that can be made to the current South African law.

#### **D. OVERVIEW OF CHAPTERS**

**Chapter 2:** This chapter entitled ‘analysis of the operation of the insanity defence in South African law’ will explore the South African legal position on the insanity defence with reference to the Criminal Procedure Act as well as decided cases.

**Chapter 3:** This chapter explores the current position regarding the presumption of innocence and the allocation of the burden of proof in mental illness cases and the difficulties faced by accused who invoke the defence. I also consider the role which psychological knowledge plays in assisting the court in determining

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<sup>37</sup> Snyman Criminal Law (2008) 175

<sup>38</sup> Milton “Law Commission Project 89: Declaration and detention of state patients” South African Journal of Criminal Justice (1998) 230.

criminal responsibility where the accused's mental state is in question. This provides a platform to explore some of the difficulties which arise when psychological conceptions of mental illness (or disorder) intersect with legal notions of insanity.

**Chapter 4:** In this chapter entitled 'Comparative study' I will embark on a comparative analysis of mental illness as a defence in criminal law in English Law, American Law and South African Law.

**Chapter 5:** This chapter summarises the conclusions reached in this study as contained in each chapter as well as some recommendations for the future development of the insanity defence in South African criminal law.

## CHAPTER 2

### ANALYSIS OF THE OPERATION OF THE INSANITY DEFENCE IN SOUTH AFRICAN LAW

#### A. INTRODUCTION

In this chapter I reflect on what constitutes mental illness in South African criminal law. I then consider how mental illness affects an accused's capacity to understand proceedings as well as his criminal responsibility.

#### B. DEFINING MENTAL ILLNESS

The term "mental illness" or "mental defect" refers to a pathological disturbance of the mental faculties, not to a temporary clouding of the mental faculties which cannot be ascribed to a mental disease, but merely to external stimuli such as alcohol or drugs or even provocation.<sup>39</sup>

In *S v Stellmacher*<sup>40</sup> the court held that the term mental illness and defect in Section 78 indicates a pathological disturbance of the accused's mental capacity.

The term "mental illness" has no scientific medical meaning but is rather a legal term used to describe certain mental states that excuse persons from criminal liability.<sup>41</sup>

#### 1. PATHOLOGICAL

The requirement that the illness must be pathological means that only those mental disorders which are the product of a disease will qualify as a mental

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<sup>39</sup> Snyman Criminal Law (2008) 171-172

<sup>40</sup> *S v Stellmacher* 1983 (2) SA 181 SWA at 87

<sup>41</sup> Burchell Principles of Criminal Law (2006) 373-374

illness for purposes of section 78<sup>42</sup>. The condition from which the accused suffers must therefore be a result of some known or identifiable disease of the mind<sup>43</sup>. Mental abnormalities that are not a result of disease but brought about by the temporary effect of external stimuli are not diseases<sup>44</sup>.

## **2. ENDOGENOUS**

If it is established that a person suffers from what can be regarded as a disease of the mind, the next point to be determined is whether the disease originated spontaneously within the mind of the victim, if this is the case, the illness qualifies as a form of insanity.<sup>45</sup>

## **3. MENTAL DEFECT**

Mental defects are usually evident at an early age and prevent the child from developing or acquiring elementary social and behavioral patterns and the condition is usually permanent<sup>46</sup>. This mental state is characterized by an intellect so abnormally low, it deprives the individual of normal cognitive and conative functions<sup>47</sup>.

## **4. FITNESS TO STAND TRIAL**

It stands to reason that a court cannot try a mentally ill person<sup>48</sup>. Such a person is incapable not only of giving evidence properly, but also of either defending himself or of properly instructing his legal representative<sup>49</sup>.

This principle is embodied in section 77 of the Criminal Procedure Act<sup>50</sup>, in terms of which an enquiry is made into the capacity of the accused to understand

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<sup>42</sup> Burchell Principles of Criminal Law (2006) 375

<sup>43</sup> Burchell Principles of Criminal Law (2006) 375

<sup>44</sup> Burchell Principles of Criminal Law (2006) 375

<sup>45</sup> Burchell Principles of Criminal Law (2006) 376-377

<sup>46</sup> Burchell Principles of Criminal Law (2006) 377

<sup>47</sup> Burchell Principles of Criminal Law (2006) 377

<sup>48</sup> Snyman Criminal Law (2008) 178

<sup>49</sup> Snyman Criminal Law (2008) 178

<sup>50</sup> 51 of 1977

proceedings as to be able to conduct a proper defence<sup>51</sup>. An accused who suffers from a mental illness or defect may consequently not be fit to stand trial<sup>52</sup>.

An enquiry into the capacity of the accused to understand the trial process, in the past, preceded the issue of criminal responsibility and could be prejudicial to an accused, as the court could make a decision to commit a person to an institution on the grounds that he is incapable of understanding proceedings before the prosecutions case has been assessed or the defences available to the accused were considered<sup>53</sup>. The Law Commission recommended that it should be possible to postpone this enquiry until the state's case had been concluded<sup>54</sup>.

This problem has however been addressed, and the Criminal Matters Amendment Act<sup>55</sup>, which amended section 77 of the Criminal Procedure Act now provides that the court may order that such evidence as to prove that the accused committed the alleged act be placed before it<sup>56</sup>. The enquiry can be initiated by the prosecution, defence or the court. In practice the court relies heavily on medical evidence and must be satisfied that there is a reasonable suspicion that the accused lacks the criminal capacity to appreciate the nature of the proceedings or to conduct a proper defence<sup>57</sup>.

The Australian case of *Kesavarajah v R*<sup>58</sup> sets out the standard test governing fitness to stand trial:

“ The defendant (accused) needs to understand what it is that he is charged with...He needs to understand generally the nature of the proceedings...He needs to be able to follow the course of proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand

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<sup>51</sup> Burchell Principles of Criminal Law (2006) 372

<sup>52</sup> Burchell Principles of Criminal Law (2006) 372

<sup>53</sup> Burchell Principles of Criminal Law (2006) 372

<sup>54</sup> Burchell Principles of Criminal Law (2006) 372

<sup>55</sup> Criminal Matters Amendment Act 68 of 1998, which came into force on 28 February 2002

<sup>56</sup> Burchell Principles of Criminal Law (2006) 372

<sup>57</sup> Burchell Principles of Criminal Law (2006) 372

<sup>58</sup> *Kesavarajah v R* (1994) 123 ALR 463



the meaning of various court formalities...Where he has counsel, he needs to be able to do this through his counsel by giving any necessary instruction and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is...he must have sufficient capacity to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any..."

### **C. CAPACITY OF THE ACCUSED TO UNDERSTAND THE PROCEEDINGS**

Section 77<sup>59</sup> provides as follows:

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

(1A) At proceedings in terms of sections 77 (1) and 78 (2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3B of the Legal Aid Amendment Act, 1996 (Act No. 20 of 1996).

[Sub-s. (1A) inserted by s. 3 (a) of Act No. 68 of 1998.]

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

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

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<sup>59</sup> Criminal Procedure act 51 of 1977

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

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

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

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,

(bb)...

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.

(b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he has pleaded not guilty. [Sub-s. (6) substituted by s. 10 of Act No. 33 of 1986, amended by s 9 of Act 51 of 1991, by s 42(a) of Act 129 of 1993 by s 3(b) of Act 68 of 1998 and by s 12 of Act 55 of 2002 and substituted by s 68 of Act 32 of 2007.]

(7) Where a direction is issued in terms of subsection (6) or (9), the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question. [Sub-s. (7) amended by s. 9 of Act No. 51 of 1991 and substituted by s. 42 (b) of Act No. 129 of 1993 and by s. 3 (c) of Act No. 68 of 1998.]

(8) (a) An accused against whom a finding is made—

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

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

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

[Sub-s. (9) amended by s. 9 of Act No. 51 of 1991 and substituted by s. 42 (c) of Act No. 129 of 1993 and by s. 3 (d) of Act No. 68 of 1998.]

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the direction issued under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary way<sup>60</sup>.

It is a basic premise in our law that the accused must be able to follow the proceedings against him and to instruct his legal advisers as well as make a proper defence<sup>61</sup>.

In *S v Pratt*<sup>62</sup> the accused was found to be incapable of understanding the proceedings by reason of mental illness. The accused was indicted for the attempted assassination of the then Prime Minister, Dr Verwoerd.

In *S v van As*<sup>63</sup> Stegmann J set aside proceedings when it became known after conviction that the accused could not sufficiently follow court proceedings so as to defend himself properly.

In *S v van Graan*<sup>64</sup> the accused was referred for observation in terms of section 77 and 78 of the Criminal Procedure Act. Pursuant to section 79(4) of the Act, the accused was declared unfit to stand trial and found not to appreciate the wrongfulness of his act and to act in accordance to act in accordance with such appreciation. He was accordingly committed to a psychiatric institution.

#### **D. MENTAL ILLNESS OR DEFECT AND CRIMINAL RESPONSIBILITY**

Section 78 provides as follows:

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<sup>60</sup> Du Toit et al, Commentary on the Criminal Procedure Act (1993) 13-1

<sup>61</sup> Du Toit et al, Commentary on the Criminal Procedure Act (1993) 13-3

<sup>62</sup> *S v Pratt* 1960 (4) SA 743 (T)

<sup>63</sup> *S v van As* 1989 (3) SA 881 (W)

<sup>64</sup> *S v van Graan* 2002 JDR 0815 (C)

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

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

shall not be criminally responsible for such act or omission.

[Sub-s. (1) substituted by s. 5 (a) of Act No. 68 of 1998.]

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

[Sub-s. (1A) inserted by s. 5 (b) of Act No. 68 of 1998.]

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

[Sub-s. (1B) inserted by s. 5 (b) of Act No. 68 of 1998.]

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

[Sub-s. (2) substituted by s. 5 (c) of Act No. 68 of 1998.]

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

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

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

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

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

(b) if the court so finds after the accused has been convicted of the offence charged but

before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or mental defect, as the case may be, and direct—

(i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc)...

- (dd) released subject to such conditions as the court considers appropriate; or
- (ee) released unconditionally;
- (ii) in any other case than a case contemplated in subparagraph (i), that the accused—
  - (aa) be admitted to and detained in an institution stated in the order and and treated as if he or she were an involuntary mental care health user contemplated in section 37 of the Mental Health Care Act, 2002;
  - (bb) ...
  - (cc) be released subject to such conditions as the court considers appropriate; or
  - (dd) be released unconditionally.

[Sub-s. (6) substituted by s. 11 of Act No. 33 of 1986, amended by s. 9 of Act No. 51 of 1991 and by s. 43 of Act No. 129 of 1993 and substituted by s. 5 (d) of Act No. 68 of 1998, by s 13 of Act 55 of 2002 and by s 68 of Act 32 of 2007.]

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) (a) An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

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

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

## E. CONCLUSION

In South Africa prior to 1977 the defence of insanity, as it was then called, was based upon the M'Naghten rules which were adopted from English Law.<sup>65</sup> Since 1977 the defence of mental illness has been governed by statute, namely the provisions of sections 77 to 79 of the Criminal Procedure Act 51 of 1977.<sup>66</sup> These sections are the direct result of the recommendations contained in the Rumpff report and clarified the law relating to the effect of mental illness on criminal liability.<sup>67</sup>

In the absence of other statutory provisions providing for alternative insanity defences, the two defences disclosed by section 78(1) purport to provide a comprehensive definition of the criminal law insanity defence from a legislative viewpoint<sup>68</sup>.

Whether the legislature intentionally or unconsciously omitted to cover all areas in which the insanity is applicable is a matter to be speculated over<sup>69</sup>. A reasonable assumption would be that if the legislator considered the defences encompassed in section 78(1) to be inadequate, he would have supplemented them appropriately<sup>70</sup>. On the other hand, the phrase "commits an act which constitutes an offence" is sufficiently vague to warrant an investigation into whether or not section 78(1) allows for more than its two prominent insanity defences<sup>71</sup>.

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<sup>65</sup> Snyman Criminal Law (2008) 170

<sup>66</sup> Snyman Criminal Law (2008) 170

<sup>67</sup> Snyman Criminal Law (2002) 167

<sup>68</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 2

<sup>69</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 2

<sup>70</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 2

<sup>71</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 2



## CHAPTER 3

### BURDEN OF PROOF AND PSYCHIATRIC TESTIMONY

#### A. INTRODUCTION

Almost as controversial and problematic as the legal definition of insanity, is the assignment of the burden of proof and the ultimate issue of testimony<sup>72</sup>. The allocation of the burden of proof in insanity cases is important because psychiatric evidence is usually not sufficient in proving or disproving it<sup>73</sup>.

It is conceivable that the Constitutionality of the rule that the onus of proof rest on the accused to prove his mental illness, if he is the party raising the defence, may in future be challenged on the basis that it amounts to a unjustifiable infringement on the presumption of innocence<sup>74</sup>. Since mental disease is also a medical concept, there is an inevitable overlap between legal and medical concepts of mental illness, and the importance of psychiatric evidence in such cases cannot be denied<sup>75</sup>.

#### B. PSYCHIATRIC INVESTIGATION

*“Defining mental disorder is not a simple matter, either for doctors or for lawyers. With a physical disease or disability, the doctor can presuppose a state of perfect or ‘normal’ bodily health (however unusual that may be) and point to the ways in which the patient’s condition falls short of that. A state of perfect mental health is probably unattainable and certainly cannot be defined. The doctor has instead to presuppose some average standard for normal intellectual, social, or emotional functions, and it is not enough that the patient deviates from this, for some deviations will be in the better-than-average direction; even if it is clear that the patient’s capacities are below that supposed average, the problem still arises of*

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<sup>72</sup> Slovenko Psychiatry and Criminal Culpability (1995) 133

<sup>73</sup> Slovenko Psychiatry and Criminal Culpability (1995) 133

<sup>74</sup> Snyman Criminal Law (2008) 175

<sup>75</sup> Burchell Principles of Criminal Law (2006) 383

*how far below is sufficiently abnormal, among the vast range of possible variations, to be labeled a disorder<sup>76</sup>”.*

The manner of determining whether an accused is insane is laid down in the Criminal Procedure Act<sup>77</sup>. In terms of section 78(2), a court is obliged to order that an inquiry be held into the accused’s mental state when it is alleged that he is not responsible by reason of insanity<sup>78</sup>. The accused is committed to a mental hospital for 30 days for psychiatric examination, after which the psychiatrist must compile a report that includes a diagnosis of the mental condition of the accused and a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of his conduct or to act in accordance with such appreciation was affected by mental illness or mental defect<sup>79</sup>.

Consequently, the law acknowledges that mentally ill offenders cannot be sanctioned in the same way as sane offenders<sup>80</sup>. Thus, where mental illness and criminal responsibility are concerned, the law is clear as to the legal test which has to be applied, the nature of expert testimony which has to be adduced, and the disposition of such offenders<sup>81</sup>. Psychologists (and psychiatrists) play an important role in assisting the court with expert testimony regarding the mental state of the offender<sup>82</sup>.

It is important to note that the psychologist, in providing a diagnosis, is not required or able to offer an opinion on the accused’s criminal responsibility. This is a matter to be decided by the courts. As Ogilvie Thompson J A in *R v Harris*<sup>83</sup> states:

“... it must be borne in mind that...in the ultimate analysis, the crucial issue of the appellant’s criminal responsibility for his actions at the

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<sup>76</sup> B Hoggett Mental Health Law Sweet and Maxwell London: 1976

<sup>77</sup> Du Toit et al Commentary on the Criminal Procedure Act (2008) 13-10

<sup>78</sup> Section 78(2)

<sup>79</sup> Burchell Principles of Criminal Law (2006) 390

<sup>80</sup> Adelene Africa Insanity and Diminished Capacity Before the Court 1

<sup>81</sup> Adelene Africa Insanity and Diminished Capacity Before the Court 1

<sup>82</sup> Adelene Africa Insanity and Diminished Capacity Before the Court 1

<sup>83</sup> R v Harris 1965 (2) SA 340 (A) at 365 B-C

relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'.

This dictum highlights that the issue of determining criminal responsibility is a legal question while the diagnosis of mental illness is medical of nature<sup>84</sup>.

An added difficulty in our legal system is that the courts have not ruled on the admissibility of psychiatric or psychological evidence<sup>85</sup>. In the USA the parameters of expert testimony were set out in *Daubert v Marrell Dow Pharmaceuticals Inc* by which psychiatric opinions offered during expert testimony essentially have to be held with 'reasonable medical certainty'<sup>86</sup>. South African courts should also follow this example and force experts to provide courts with evidence that the opinions which they offer are supported by scientific literature, and have been obtained using acceptable methodology<sup>87</sup>. Unfortunately, the researchers who produce the enormous amounts of information in our psychology and psychiatry journals almost never consider that these may have psycho-legal implications<sup>88</sup>.

Both psychology and law are described as social sciences with politically and morally based practices, respectively<sup>89</sup>. In insanity cases, these two practices are concerned with a similar subject matter, human nature, but the different

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<sup>84</sup> Adelene Africa Insanity and Diminished Capacity Before the Court 7

<sup>85</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>86</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>87</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>88</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>89</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 27

purpose for which it is approached needs to be separated<sup>90</sup>. Legal conclusions are drawn from a rational knowledge base whereas psychologists accumulate research data and develop general principles from this<sup>91</sup>. Lawyers look to precedent and like situations and apply general legal principles whilst psychologists dissect legal procedures and processes abstractly in the laboratory instead of applying a legal question to a real-life situation in order to provide answers<sup>92</sup>.

The diagnoses of serious psychiatric disorders (which satisfy the legal definition of mental illness) do not depend on objective findings such as brain scans, except for a few disorders such as dementias<sup>93</sup>. Therefore the courts currently, almost exclusively have to accept the expert's clinical judgment or decide between competing clinical judgments<sup>94</sup>.

The foregoing comparison indicates the contrast between the discipline of law and psychology<sup>95</sup>. What becomes evident is that the conventions of thought about a common subject matter, human behaviour, are fundamentally different in law and psychology<sup>96</sup>. The disciplines speak different languages and their understanding of each other's viewpoints is limited<sup>97</sup>. As forensic psychology is participating in the legal realm it seems sensible for both parties to develop a better general understanding of the language of the other discipline in order to find ways to overcome the challenges currently faced by this relationship<sup>98</sup>.

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<sup>90</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 28

<sup>91</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 28

<sup>92</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 29

<sup>93</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>94</sup> SZ Kaliski My brain made me do it-how neuroscience may change the insanity defence SAJP volume 15 No 1 March 2009

<sup>95</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 31

<sup>96</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 31

<sup>97</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997) 10 SAS 32

<sup>98</sup> Gillmer, Louw, Verschoor Law and psychology: An explanation of the conceptual interface SACJ (1997)

## C. BURDEN OF PROOF

Roman-Dutch law is the primary source of South African substantive law, whereas many aspects of South African procedural law have their roots in English law<sup>99</sup>. The influence of English law is particularly strong in the law of evidence<sup>100</sup>.

In *R v Ndlovu*<sup>101</sup> the Appellate Division was required to determine whether the House of Lords decision in *Woolmington v DPP*<sup>102</sup> accurately reflected South African law<sup>103</sup>. In both *Ndlovu* and *Woolmington* the crucial issue to be determined was whether on a charge of murder the state must prove in addition to the killing, unlawfulness and intention; or whether once the state has proven the killing, the onus shifted to the accused to disprove unlawfulness and intention<sup>104</sup>. Before *Woolmington*, the prevalent view was that once it has been established that the accused had been the cause of death, the onus shifted to the defence to disprove unlawfulness and intention<sup>105</sup>. In *Woolmington* the court held that the onus remained on the Crown to established unlawfulness and intention<sup>106</sup>.

In *Ndlovo*, Davis AJA comes to the conclusion that the burden of proof rests on the state to prove the guilt of the accused beyond a reasonable doubt. Referring to *Woolmington* and *Mancini v DPP*<sup>107</sup> with approval the court clearly also adopted the recognised exceptions, namely the accused may statutorily be required to bear the onus of proof and an accused who raises the defence of

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10 SAS 32

<sup>99</sup> PJ Schwikkard Presumption of Innocence (1999) 5

<sup>100</sup> PJ Schwikkard Presumption of Innocence (1999) 5

<sup>101</sup> *R v Ndlovu* 1945 AD 369

<sup>102</sup> Above at n 2

<sup>103</sup> PJ Schwikkard Presumption of Innocence (1999) 7

<sup>104</sup> PJ Schwikkard Presumption of Innocence (1999) 7

<sup>105</sup> PJ Schwikkard Presumption of Innocence (1999) 7

<sup>106</sup> PJ Schwikkard Presumption of Innocence (1999) 8

<sup>107</sup> *Woolmington and Mancini v DPP* [1942] AC 1, [1942] 3 All ER 272

insanity will similarly have to discharge the burden of proof. The court concluded that the principle in *Woolmington* accurately reflected South African Law.

The court's conclusion is summarized in the following passage:

*“In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt...The only exceptions to the above rules, as to the onus being on the Crown in all criminal cases to prove the unlawfulness of the act and the guilty intent of the accused, and of his being entitled to the benefit of any reasonable doubt thereon, in regard to intention, the defence of insanity, and, in regard to both unlawfulness and intention, offences where the onus of proof is placed on the accused by the wording of the statute”*<sup>108</sup>

The adoption of the principle of constitutional supremacy since this judgment and the recognition of the presumption of innocence as a constitutional pre-requisite for the right to a fair trial mean that the *Woolmington* exceptions are now subject to constitutional scrutiny<sup>109</sup>.

South African law has adopted the rule of English law that every person is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved<sup>110</sup>. The burden of proving that he was mentally ill at the time of the commission of the crime, and therefore cannot be convicted of the crime with which he has been charged, rests on the accused who discharges it by proving on a preponderance of probabilities that he was mentally ill<sup>111</sup>. This is a departure from normal principles, according to which the onus rests on the state to prove all requirements for liability<sup>112</sup>.

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<sup>108</sup> R V Ndlovu 1945 AD 369 at 386-7

<sup>109</sup> PJ Schwikkard Presumption of Innocence (1999) 9

<sup>110</sup> Burchell Principles of Criminal Law (2006) 390

<sup>111</sup> Snyman Criminal Law (2008) 175

<sup>112</sup> Snyman Criminal Law (2008) 175

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

Section 78(1B) was also inserted into the Act and it provides that whenever the accused's criminal responsibility is in issue the burden of proof with regard to the criminal responsibility rest upon the party who raises the defence, whether it is raised by the accused or the prosecution<sup>113</sup>.

The constitutional recognition of the common law exception has been contested on the following persuasive grounds:

- The proof of insanity is more difficult than disproving the defence of non-pathological incapacity, yet in non pathological cases the onus rests on the prosecution to rebut it beyond reasonable doubt
- The accused suffering from mental illness is burdened with a much higher onus of proof than those who claim non-pathological incapacity which amounts to unfair discrimination<sup>114</sup>.

## **D. THE PRESUMPTION OF INNOCENCE**

### **1. THE SCOPE OF THE PRESUMPTION OF INNOCENCE**

The presumption of innocence, protected in section 35(3)(h) of our Constitution, and the right to equality before the law and the equal protection of the law in terms of section 9(1) of the Constitution, would be infringed by the rule of law that places the onus in insanity cases on the accused<sup>115</sup>.

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<sup>113</sup> Snyman Criminal Law (2008) 175

<sup>114</sup> Steytler constitutional Criminal Procedure (1998) 327

<sup>115</sup> Burchell Principles of Criminal Law (2006) 392

In South African law guilt, or criminal liability, is dependant on proof that the accused has committed (I) voluntary conduct which is unlawful and that this conduct was accompanied by (II) criminal capacity and (III) fault<sup>116</sup>. Each of these requirements must be proved beyond a reasonable doubt and any factor negating one of these elements must also be proved beyond reasonable doubt<sup>117</sup>.

These requirements attempt to impose a unified structure on issues relating to the blameworthiness of the defendants conduct<sup>118</sup>. It is the accused's blameworthiness which justifies imposition of punishment by the state<sup>119</sup>.

The exception applicable to the defence of insanity cannot be reconciled with these principles<sup>120</sup>. The validity of this exception as well as exceptions created by statute will be dependent on a finding that the requirements of the limitations clause have been met<sup>121</sup>.

In the Canadian case of *R v Oakes*<sup>122</sup>, Dickson CJC in delivering the minority judgment, considered the presumption of innocence, and came to the following conclusion:

*'...[A] provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question violates the presumption of innocence in s 11d. if an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did*

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<sup>116</sup> PJ Schwikkard Presumption of Innocence (1999) 41

<sup>117</sup> PJ Schwikkard Presumption of Innocence (1999) 41

<sup>118</sup> PJ Schwikkard Presumption of Innocence (1999) 42

<sup>119</sup> PJ Schwikkard Presumption of Innocence (1999) 42

<sup>120</sup> PJ Schwikkard Presumption of Innocence (1999) 42

<sup>121</sup> PJ Schwikkard Presumption of Innocence (1999) 42

<sup>122</sup> *R v Oakes* 1986 50 CR (3d) 1 (SCC)



*not convince the jury on a balance of probabilities that the presumed fact was untrue.”<sup>123</sup>*

The *Woolmington* case was decided in the context of a legal system with no constitutionally entrenched human rights document<sup>124</sup>.

*“It is sometimes said that the exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on an issue in a criminal case is borne by the accused, he only has to satisfy the jury on a balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt...The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of objections to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.”<sup>125</sup>*

## 2. EVIDENTIARY BURDENS

In the case of *R v Schwartz*<sup>126</sup> the court considered the constitutionality of provisions imposing an evidentiary burden on an accused:

*‘I prefer to use the terms ‘persuasive burden’ to refer to the requirement of proving a case or disapproving defences and ‘evidential burden to mean the requirement of putting an issue into play by reference to evidence before the court. The party who has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. The party with an evidential burden is not required to convince the trier of*

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<sup>123</sup> *R v Oakes* 1986 50 CR (3d) 1 (SCC) at 26

<sup>124</sup> PJ Schwikkard *Presumption of Innocence* (1999) 89

<sup>125</sup> R Cross *The Golden Thread of the English Common Law: The burden of Proof* (1976) at 11-13

<sup>126</sup> *R v Schwartz* 1989 66 CR (3d) 251 (SCC)

*fact of anything, only to point out evidence which suggests that certain facts existed. The phrase “onus of proof” should be restricted to the persuasive burden, since an issue can be put into play without being proven. The phrases ‘burden of going forward’ and ‘burden of adducing evidence’ should not be used, as they imply that the party is required to produce his or her own evidence on an issue, as we have seen, in a criminal case the accused can rely on evidence produced by the Crown to argue for a reasonable doubt.”<sup>127</sup>*

The Canadian Supreme Court held that evidentiary burdens do not infringe the presumption of innocence as they do not require the accused to produce proof beyond reasonable doubt or on a balance of probabilities<sup>128</sup>.

In *S v Zuma*<sup>129</sup> the constitutionality of section 217 (1)(b)(ii) of the Criminal Procedure Act<sup>130</sup> was in issue<sup>131</sup>. This section placed the burden on the accused to prove in specific circumstances that the inadmissibility of a confession on a balance of probabilities.<sup>132</sup> Kentridge JA in applying the principles set out in the Canadian case of *R v Downey*<sup>133</sup> namely:

1. the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt; and
2. where a statutory presumption requires the accused to prove or disprove an element of an offence or excuse on a balance of probabilities, such a presumption would create the possibility of conviction despite the existence of a reasonable doubt.

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<sup>127</sup> *R v Schwartz* 1989 66 CR (3d) 251 (SCC) at 270

<sup>128</sup> PJ Schwikkard *Presumption of Innocence* (1999) 93

<sup>129</sup> *S v Zuma* 1995 (1) SACR 568 (CC)

<sup>130</sup> Criminal Procedure Act 51 of 1977

<sup>131</sup> PJ Schwikkard *Presumption of Innocence* (1999) 110

<sup>132</sup> PJ Schwikkard *Presumption of Innocence* (1999) 110

<sup>133</sup> *R v Downey* (1992) 13 CR (4<sup>th</sup>) 129 (SCC)

The section was found to place a burden on the accused to prove a fact on the balance of probabilities and consequently the section was found to breach the right to be presumed innocent as provided for by the Constitution<sup>134</sup>.

In *S v Gwadiso*<sup>135</sup>, a unanimous decision by the Constitutional Court found that a similar provision, section 21 (1) (a) (i)<sup>136</sup> of the Drugs and Drug Trafficking Act<sup>137</sup> infringed the presumption of innocence<sup>138</sup>.

In *Scagell v Attorney General of the Western Cape*<sup>139</sup> the court failed to draw a distinction between permissive and mandatory evidential burdens<sup>140</sup>. In this case the court was required to determine the constitutionality of a number of provisions contained in section 6 of the Gambling Act<sup>141</sup>. O'Regan J held that the presumption contained in section 6(4)<sup>142</sup> had the same characteristics as the reverse onus provisions in *Zuma* and *Gwadiso* and similarly infringed the presumption of innocence.

Section 78(1A)<sup>143</sup> which provides that every person is presumed not to suffer from a mental illness or defect so as to not be criminally responsible in terms of section 78(1)<sup>144</sup> until the contrary is proven on the balance of probabilities. This section bears striking similarity to the sections cited above, which were found to be unconstitutional. Here the evidential burden takes the form of a mandatory

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<sup>134</sup> PJ Schwikkard Presumption of Innocence (1999) 110

<sup>135</sup> *S v Gwadiso* 1996 (1) SA 388 (CC)

<sup>136</sup> "If in the possession of any person for an offence referred to-

(a) in section 13(f) it is proved that the accused-

(i) was found in possession of dagga exceeding 115grams;

It shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance."

<sup>137</sup> Drugs and Drug Trafficking Act 140 of 1992

<sup>138</sup> PJ Schwikkard Presumption of Innocence (1999) 110

<sup>139</sup> *Scagell v Attorney General of the Western Cape* 1996 (11) BCLR 1446 (CC)

<sup>140</sup> PJ Schwikkard Presumption of Innocence 117

<sup>141</sup> The Gambling Act 51 of 1965

<sup>142</sup> 6(4) if any policeman authorized to enter any place is willfully prevented from or obstructed or delayed in entering such place the, the person in control or in charge or such place shall on being charged with permitting the playing of any gambling game, be presumed, until the contrary is proved, to have permitted the playing of such gambling game at such place.

<sup>143</sup> Criminal Procedure Act 51 of 1977

<sup>144</sup> Criminal Procedure Act 51 of 1977

presumption and this would foul the presumption of innocence<sup>145</sup>. A mandatory presumption infringes the presumption of innocence as a conviction is possible despite the existence of a reasonable doubt<sup>146</sup>. The presumption that every person is sane does not inevitably lead to the conclusion that he criminally liable for his actions. The Supreme Court of Canada came to a similar conclusion in *R v Downey*<sup>147</sup>.

In the absence of a mandatory presumption, the prosecution would be forced to lead additional evidence of the presumed fact in order to secure a conviction or to avoid discharge<sup>148</sup>. It is clear that the application of such a presumption could lead to conviction despite the existence of a reasonable doubt<sup>149</sup>.

## **E. DIMINISHED CAPACITY**

Section 78(7) of the Criminal Procedure Act<sup>150</sup> reads as follows:

“If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.”

Diminished responsibility is usually the finding in cases where the degree of mental deficiency does not amount to legal insanity<sup>151</sup>. Specialist medical, as well as other evidence is taken into account in deciding whether such a finding is justified<sup>152</sup>.

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<sup>145</sup> PJ Schwikkard Presumption of Innocence (1999) 94

<sup>146</sup> PJ Schwikkard Presumption of Innocence (1999) 94

<sup>147</sup> *R v Downey* (1992) 13 CR (4<sup>th</sup>) 129 (SCC)

<sup>148</sup> PJ Schwikkard Presumption of Innocence (1999) 117

<sup>149</sup> PJ Schwikkard Presumption of Innocence (1999) 117

<sup>150</sup> Act 51 of 1977

<sup>151</sup> Burchell Principles of Criminal Law (2006) 401

<sup>152</sup> Burchell Principles of Criminal Law (2006) 401

This subsection confirms that the borderline between criminal capacity and criminal non-capacity is merely a question of degree and a person may be mentally ill but nevertheless be able to appreciate the wrongfulness of his actions, and act in accordance with that appreciation<sup>153</sup>. In such a case, the defence of mental illness in terms of section 78(1)<sup>154</sup> will not succeed<sup>155</sup>.

The concept of diminished responsibility seems not to be invoked often in practice in South Africa and this can be attributed to the wide scope of the concept of incapacity to include both pathological incapacity as well as non-pathological incapacity<sup>156</sup>.

Pleas of diminished responsibility in mitigation of sentence seem to be superfluous as the general defence of absence of capacity, in addition to the judicial discretion to interpret 'substantial and compelling circumstances' for departing from a prescribed minimum sentence, provide a broad framework for dealing with both pathological and non-pathological circumstances<sup>157</sup>.

In *S v Shapiro*<sup>158</sup> the following observations were made regarding diminished responsibility:

"[Counsel for the State's] main argument was that although he did not dispute [the opinion of the psychologist called by the defence], this Court should not lose sight of the unchallenged evidence of independent bystanders, that Shapiro's actions appeared to be cool, calm and calculated. Outwardly he gave no sign of emotional confusion. Moreover, the provocation he experienced was limited. He brutally executed a man who was helpless and dying. He acted without compunction, and thereafter showed a callous indifference to what he had done."

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<sup>153</sup> Snyman Criminal Law (2008) 176

<sup>154</sup> Act 51 Of 1977

<sup>155</sup> Snyman Criminal Law (2008) 176

<sup>156</sup> Burchell Principles of Criminal Law (2006) 401

<sup>157</sup> Burchell Principles of Criminal Law (2006) 401

<sup>158</sup> *S v Shapiro* 1994 (1) SACR 112 (A) at 123c-f.

The theory underlying this argument is that the conduct of a person who has been found to have diminished criminal responsibility is to be measured by the same yardstick as the conduct of a person with undiminished criminal responsibility and not as a person who suffers from mental illness<sup>159</sup>.

## **F. ENQUIRY AND REPORT UNDER SECTION 77 AND 78**

### **79. Panel for purposes of enquiry and report under sections 77 and 78.—(1)**

Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on—

(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively or if the court considers any other charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

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<sup>159</sup> S v Romer [2011] ZASCA 46 at [1]

[Sub-s. (1) amended by s. 44 of Act No. 129 of 1993 and by s. 28 (a) and (b) of Act 105 of 1997 and substituted by s. 6 (a) of Act No. 68 of 1998 and by s. 68 of Act 32 of 2007.]

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

- (a) whether the referral is taking place in terms of section 77 or 78;
- (b) at whose request or on whose initiative the referral is taking place;
- (c) the nature of the charge against the accused;
- (d) the stage of the proceedings at which the referral took place;
- (e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
- (f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;
- (g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and
- (h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

[Sub-s. (1A) inserted by s. 6 (b) of Act No. 68 of 1998.]

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

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

[Para. (b) added by s. 4 of Act No. 4 of 1992.]

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

- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;
- (ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case;
- (iii) make any other order it deems fit regarding the custody of the accused;
- or
- (iv) any other order.

[Sub-s. (2) amended by s. 44 of Act No. 129 of 1993. Para. (c) added by s. 6 (c) of Act No. 68 of 1998.]

(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.

(4) The report shall—

- (a) include a description of the nature of the enquiry; and
- (b) include a diagnosis of the mental condition of the accused; and
- (c) if the enquiry is made under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or
- (d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.

[Para. (d) substituted by s. 6 (d) of Act No. 68 of 1998.]

(5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraph (c) or (d) of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.



(6) Subject to the provisions of subsection (7), the contents of the report shall be admissible in evidence at criminal proceedings.

(7) A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(8) A psychiatrist and a clinical psychologist appointed under subsection (1), other than a psychiatrist and a clinical psychologist appointed for the accused, shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9) (a).

[Sub-s. (8) substituted by s. 8 (a) of Act No. 42 of 2001.]

(9) The Director-General: Health shall compile and keep a list of—

(a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and

(b) psychiatrists who are prepared to conduct any enquiry under section 286A (3), and shall provide the registrars of the High Courts and all clerks of magistrates' courts with a copy thereof.

[Sub-s. (9) substituted by s. 17 of Act No. 116 of 1993 and by s. 8 (b) of Act No. 42 of 2001.]

(10) Where the list compiled and kept under subsection (9) (a) does not include a sufficient number of psychiatrists and clinical psychologists who may conveniently be appointed for any enquiry under this section, a psychiatrist and clinical psychologist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.

[Sub-s. (10) substituted by s. 8 (c) of Act No. 42 of 2001.]

(11) (a) A psychiatrist or clinical psychologist designated or appointed under subsection (1) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff determined by the Minister in consultation with

the Minister of Finance.

(b) A psychiatrist appointed under subsection (1) (b) (iii) for the accused to enquire into the mental condition of the accused and who is not in the full-time service of the State, shall be compensated for his or her services from public funds in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

[Sub-s. (11) substituted by s. 8 (d) of Act No. 42 of 2001.]

(12) For the purposes of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act, 1974 (Act No.56 of 1974).

[Sub-s. (12) substituted by s. 8 (e) of Act No. 42 of 2001.]

In *S v Matjhesa*<sup>160</sup> it was stated that before the court can find the accused is not fit to stand trial it has to receive a report under section 79.

In *S v de Beer*<sup>161</sup> it was stated that Section 79(7) of the Criminal Procedure Act which provides that statements made by an accused person whilst he is under observation are admissible to the extent that they are relevant to the determination of his mental condition, have to be interpreted restrictively so that the exception only operates where statements are relevant to the mental condition for which the accused was referred for observation.

In *S v Sindane and Another*<sup>162</sup> the court found that the test of referral for observation in terms of section 79 was a lawful one, if a reasonable possibility that the accused lacked capacity to stand trial due to a mental defect or lack of criminal responsibility, a court is obliged to order the inquiry.

## G. CONCLUSION

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<sup>160</sup> *S v Matjhesa* 1981 (3) South African 851 (O)

<sup>161</sup> *S v de Beer* 1995(1) SACR (SE)

<sup>162</sup> *S v Sindane* 1992 (2) SACR 223 (A)

The test set out in section 78(1) of the Criminal Procedure Act to determine whether the accused lacked criminal capacity or responsibility embodies a so-called mixed test, in the sense that both his pathological condition and psychological factors are taken into account<sup>163</sup>. No mention is made if the accused's capacity to appreciate the nature and quality of his actions as distinct from his capacity to appreciate the wrongfulness of his actions but it is accepted that incapacity to appreciate the former will invariably also amount to incapacity to appreciate the latter<sup>164</sup>. The terms "mental illness" and "mental defect" have not been defined by the legislator and are therefore dependent on expert evidence, however, the decision ultimately rests with the court<sup>165</sup>.

Following the legislative amendments, the party who raises mental illness as a defence carries the onus of proving, on a balance of probabilities that the accused was mentally ill<sup>166</sup>. This is a departure from normal rules of evidence which usually places the onus on the prosecution<sup>167</sup>.

If taken out of context, this section could be considered to have shifted the onus of proving lack of criminal responsibility, from the prosecution, onto the accused by the Legislature<sup>168</sup>. This amended piece of legislation was designed to regulate matters relating to pathological mental conditions only<sup>169</sup>. Placing the onus on the accused to prove his insanity has been regarded as 'anomalous, incongruous and indefensible' but despite this, the Rumpff Commission did not recommend that the law be changed in view of the special nature of the problem<sup>170</sup>.

Unlike any other defence raised by an accused, in insanity cases, it is not enough for the accused who raises the defence to simply raise a doubt that he

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<sup>163</sup> Snyman Criminal Law (2008) 171

<sup>164</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 6

<sup>165</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 6

<sup>166</sup> Burchell Principles of Criminal Law (2006) 390

<sup>167</sup> Burchell Principles of Criminal Law (2006) 391

<sup>168</sup> Burchell Principles of Criminal Law (2007) 390

<sup>169</sup> Burchell Principles of Criminal Law (2007) 390

<sup>170</sup> Burchell Principles of Criminal Law (2007) 390

was insane at the relevant time<sup>171</sup>. It must be proved that the condition of insanity, more likely than not, existed at the relevant time<sup>172</sup>. The exception to the general rule that the prosecution must prove the elements of liability beyond reasonable doubt is based on a presumption that everyone is sane, thus, if someone claims not to be sane, he has to prove this on a balance of probabilities<sup>173</sup>.

The evidential burden contained in section 78 takes the form of a mandatory presumption and this would if constitutionally challenged, in view of decided case law, in all likelihood be found to infringe the presumption of innocence<sup>174</sup>.

A mandatory presumption infringes the presumption of innocence as a conviction is possible despite the existence of a reasonable doubt<sup>175</sup>. The presumption that every person is sane does not inevitably lead to the conclusion that he criminally liable for his actions. In the absence of a mandatory presumption, the prosecution must lead additional evidence of the presumed fact in order to prove an accused's liability beyond a reasonable doubt<sup>176</sup>. It is clear that the application of such a presumption could lead to conviction despite the existence of a reasonable doubt<sup>177</sup>.

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<sup>171</sup> Burchell Principles of Criminal Law (2007) 391

<sup>172</sup> Burchell Principles of Criminal Law (2007) 391

<sup>173</sup> Burchell Principles of Criminal Law (2007) 390

<sup>174</sup> PJ Schwikkard Presumption of Innocence 1999 94

<sup>175</sup> PJ Schwikkard Presumption of Innocence 1999 94

<sup>176</sup> PJ Schwikkard Presumption of Innocence 1999 117

<sup>177</sup> PJ Schwikkard Presumption of Innocence 1999 117

## CHAPTER 4

### COMPARATIVE STUDY

#### A. INTRODUCTION

The insanity defence has existed since the twelfth century<sup>178</sup>. Initially it was not considered an argument for the defendant to be found not guilty, but a way for a defendant to receive a pardon or a way to mitigate his sentence<sup>179</sup>.

The concept that insanity could prevent conviction of a defendant in American Law, arose in the early nineteenth century in *The Medical Jurisprudence of Insanity* by an influential scholar named Isaac Ray, as well as in the influential decision in England in the M'Naghten case<sup>180</sup>. This chapter explores the legal position regarding the insanity defence in both English and American law.

#### B. ENGLISH LAW

Mental state is the principle device used to measure culpability<sup>181</sup>. Today, criminal responsibility is determined in England, according to the rules formulated in 1843 following the trial of Daniel M'Naghten<sup>182</sup>. In this well-documented case, the most important in the history of the plea of insanity, Lord Chief Justice Nicholas Tindal instructed the jury: "If you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, then he is a responsible agent."<sup>183</sup>

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<sup>178</sup> <http://criminallaw.uslegal.com/defense-of-insanity/> accessed 10 October 2011

<sup>179</sup> <http://criminallaw.uslegal.com/defense-of-insanity/> accessed 10 October 2011

<sup>180</sup> <http://criminallaw.uslegal.com/defense-of-insanity/> accessed 10 October 2011

<sup>181</sup> Slovenko Psychiatry and Criminal Culpability (1995) 17

<sup>182</sup> Slovenko Psychiatry and Criminal Culpability (1995) 17

<sup>183</sup> Slovenko Psychiatry and Criminal Culpability (1995) 17

M’Naghten decided to kill Sir Robert Peel, the Prime Minister as he felt persecuted by the Tories<sup>184</sup>. Instead, he shot Edward Drummond as he was stepping out of Peel’s carriage thinking he was shooting Peel<sup>185</sup>. His defence was based mainly on the ideas of Isaac Ray whose work, *A Treatise on the Medical Jurisprudence of Insanity*, published a few years prior<sup>186</sup>. Nine physicians testified for the defence and the jury found the defendant “not guilty on the ground of insanity”<sup>187</sup>.

Under the rule, to be deemed ‘not responsible’ the accused must suffer from a disease of the mind so severe as to render the accused incapable either of knowing the nature and quality of his act or of knowing that the act was wrong<sup>188</sup>. In a literal application of the M’Naghten rule two classes of lawbreakers are exempt from punishment:

- (a) a person who did not know the nature and quality of the act he was doing; or
- (b) he did not know he was doing what was wrong<sup>189</sup>.

The rule is not concerned with whether the lawbreaker knew the difference between right and wrong in general but whether he knew what he was doing was wrong, or, perhaps thought he was right in doing it<sup>190</sup>.

The M’Naghten rule has been criticized, primarily because it concerns itself with cognition or intellectual understanding and makes no reference to control or emotion<sup>191</sup>. The Judges in M’Naghten decided on a narrow exculpatory provision resulting in only persons laboring under a “defect of reason” were exempt from criminal responsibility<sup>192</sup>. In England, the courts and the public have generally

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<sup>184</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 17

<sup>185</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 17

<sup>186</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 17

<sup>187</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 19

<sup>188</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 19

<sup>189</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 20

<sup>190</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 20

<sup>191</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 20

<sup>192</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 21

been satisfied with the M'Naghten rule, or the doctrine of diminished responsibility<sup>193</sup>.

One of the fundamental presumptions in the English criminal law and criminal liability is that the defendant is normal, that is to say, able to function within the normal range of mental and physical capabilities<sup>194</sup>. A person who is mentally ill may fall below this assumed standard and it would be unfair to hold him responsible for his behaviour<sup>195</sup>. The accused pleading insanity has the burden of introducing evidence to establish it (to counter a presumption of sanity)<sup>196</sup>. Proof is discharged on a balance of probabilities and not beyond a reasonable doubt<sup>197</sup>.

The presumption of innocence is considered to be a cornerstone of English criminal law and is protected by Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950<sup>198</sup>.

There are two burdens of proof in English law:

- (a) the legal burden of proof, the persuasive or ultimate burden; and
- (b) the evidential burden of proof, the burden of introducing enough evidence to be placed before the jury or other tribunal of fact<sup>199</sup>.

The evidential burden can primarily be seen as an aspect of the reasonable proposition that there must be a degree of evidence on asserted issues before there can be a matter for trial<sup>200</sup>. The prosecution has to adduce enough evidence of the guilt of the accused for the judge to be satisfied that there is a case against the accused, in other words, it has the evidential burden<sup>201</sup>. The prosecution also has the legal burden on the same matter and this is the normal

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<sup>193</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 21

<sup>194</sup> Ashworth, *Principles of Criminal Law* (1991) 180

<sup>195</sup> Ashworth, *Principles of Criminal Law* (1991) 180

<sup>196</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 133

<sup>197</sup> *R v Carr-Briant* 1943 KB 607 (CCA)

<sup>198</sup> Peter Murphy *Murphy on Evidence* (2009) 20

<sup>199</sup> Peter Murphy *Murphy on Evidence* (2009) 20

<sup>200</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

<sup>201</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

state of affairs directed at convincing the jury of the defendant's guilt beyond reasonable doubt (the criminal standard)<sup>202</sup>. It becomes difficult where there is a separation of the legal and evidential burden<sup>203</sup>. This happens in situations where the prosecution cannot be expected to put up evidence to anticipate every specific defence the accused may present<sup>204</sup>. Thus in order to plead insanity the accused will have to provide some evidence to enable the court to consider the matter but the legal burden stays with the prosecution<sup>205</sup>.

In criminal cases the onus always rests on the prosecution to prove the guilt of the accused beyond a reasonable doubt. In *Woolmington v DPP*<sup>206</sup>, where the accused was convicted of murder, Swift J held:

*“Once it is shown to the jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy the jury that what happened was something less, something which must be alleviated, something must be reduced to a charge of manslaughter, as something which was accidental, or something which could be justified.”*<sup>207</sup>

The accused appealed his murder conviction successfully to the House of Lords, where Sankey LC said:

*“Where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory provisions.”*<sup>208</sup>

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<sup>202</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

<sup>203</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

<sup>204</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

<sup>205</sup> [http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011

<sup>206</sup> *Woolmington v DPP* [1935] AC 462

<sup>207</sup> *Woolmington v DPP* [1935] AC 472-473

<sup>208</sup> *Woolmington v DPP* [1935] AC 481



One exception to the “golden-thread or the so-called *Woolmington* principle is insanity as defined under the M’*naghten* rule<sup>209</sup>. Where an accused pleads insanity, he bears the evidentiary burden, which is discharged on a balance of probabilities<sup>210</sup>. If the prosecution raises the defence, they must prove it beyond a reasonable doubt<sup>211</sup>.

The reason for the shifting of the burden in the case of the defence of insanity in English law is that, normally the presumption of mental capacity is sufficient to prove that the accused acted consciously and voluntarily<sup>212</sup>. The presumption is one of sanity, not responsibility<sup>213</sup>. Although the prosecution need go no further to prove that the accused has mental capacity, it must nevertheless discharge the legal burden of proving *mens rea*<sup>214</sup>.

As the presumption of innocence continues to occupy such a fundamental place in the common law, the judges have ensured that all common law presumptions which form part of the law of evidence are subordinated to this principle<sup>215</sup>. These rules do not place a burden of proof on the accused which he has to discharge on a balance of probabilities.<sup>216</sup> All the accused has to do is raise a reasonable doubt as to his guilt<sup>217</sup>. That is not to say that these evidential rules

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<sup>209</sup> Peter Murphy *Murphy on Evidence* (2009) 23

<sup>210</sup> Peter Murphy *Murphy on Evidence* (2009) 23

<sup>211</sup> Peter Murphy *Murphy on Evidence* (2009) 23

<sup>212</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>213</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>214</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>215</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>216</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>217</sup> **Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division)** <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

are insignificant<sup>218</sup>. In many cases they can have a vital bearing on the outcome of the trial, depending on how easy or how difficult it is for the accused to rebut the presumption<sup>219</sup>. But the burden of proving his guilt beyond reasonable doubt remains with the prosecution throughout the trial<sup>220</sup>. It has not been suggested in this case that these common law evidential presumptions are incompatible with the presumption of innocence<sup>221</sup>.

A significant reform in the form of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 resulted from dissatisfaction with the way in which those found unfit to plead not guilty by reason of insanity were dealt with under the Criminal Procedure (insanity Act of 1964)<sup>222</sup>. The judge now has disposal options when deciding how to deal with disordered offenders<sup>223</sup>. This Act did however not change the test for insanity which is still governed by the M'Naghten rules, but provided it with much needed flexibility<sup>224</sup>.

## C. UNITED STATES OF AMERICA

### 1. THE HINCKLEY CASE

The trial of John Hinckley gave rise to many questions surrounding the proper allocation of the burden of proof for insanity<sup>225</sup>. The reason for this being that, at

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<sup>218</sup> Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench

Division) <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>219</sup> Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench

Division) <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>220</sup> Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench

Division) <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>221</sup> Judgments - Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench

Division) <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm>

<sup>222</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>223</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 91

<sup>224</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>225</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 117

the time of the trial, federal state prosecutors were required to prove beyond a reasonable doubt that Hinckley was sane at the time that he shot President Reagan, before the insanity defence could be rejected and he could be convicted<sup>226</sup>. The burden seemed to pose an impossible feat and Hinkley was found not guilty by reason of insanity<sup>227</sup>. This led to the position being reconsidered by many of the States and by Congress<sup>228</sup>.

The M’Naghten rule states that jurors are to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven to their satisfaction<sup>229</sup>. By virtue of the presumption of sanity, the onus is placed on the accused to come forward with evidence of insanity<sup>230</sup>. Only persons suffering from a “defect of reason” were exempt from criminal responsibility<sup>231</sup>.

There have always been three main criticisms against the M’Naghten rule:

- (a) the rule is not in accord with psychiatric knowledge,
- (b) the rule does not permit complete and adequate testimony as it was not required to be based on medical principles, and
- (c) the psychiatric expert testifying does not make a scientific contribution but assumes the role of judge<sup>232</sup>.

## 2. THE DURHAM RULE

1954 saw the revolution of the laws governing insanity defence following the Durham trial<sup>233</sup>. Judge David L. Bazelon formulated the Durham rule, with the

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<sup>226</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 117

<sup>227</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>228</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>229</sup> Slovenko Psychiatry and Criminal Culpability (1995) 134

<sup>230</sup> Slovenko Psychiatry and Criminal Culpability (1995) 134

<sup>231</sup> Slovenko Psychiatry and Criminal Culpability (1995) 21

<sup>232</sup> Slovenko Psychiatry and Criminal Culpability (1995) 22

<sup>233</sup> Slovenko Psychiatry and Criminal Culpability (1995) 134

help of psychiatrists, as follows: “An accused is not criminally responsible if his unlawful act was the product of mental disease or defect”<sup>234</sup>

The Durham standard was a much more lenient guideline for the insanity defense than the M’Naghten Rule, however, the Durham rule drew much criticism because of its expansive definition of legal insanity<sup>235</sup>. Bazelon stated that the purpose of the Durham rule was to incorporate psychiatric testimony in insanity cases<sup>236</sup>. In the end, however, the Durham test failed because it allowed the psychiatric profession to have too much of a say in determining the defendants criminal responsibility<sup>237</sup>.

In 1955, merely a year after the Durham trial, the American Law Institute (hereafter ALI), recommended the following test for non-responsibility:

“a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct with the requirements of law”<sup>238</sup>

### 3 THE ALI TEST

The ALI test states that repeated anti-social conduct does not in itself constitute mental illness, thus keeping psychopaths within the scope of criminal responsibility<sup>239</sup>. This test proved very popular and was applied by the majority of the country’s jurisdictions, two decades after its formulation<sup>240</sup>. The American Psychiatric Association pointed out in a statement on the insanity defence, that “it is commonly believed that the likely effect of assigning the burden of proof to the defendants rather to the state in insanity trials will be to decrease the number of

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<sup>234</sup> Slovenko Psychiatry and Criminal Culpability (1995) 22

<sup>235</sup> <http://crime.about.com/od/issues/a/insanity.htm> accessed 3 October 2011

<sup>236</sup> Slovenko Psychiatry and Criminal Culpability (1995) 23

<sup>237</sup> Slovenko Psychiatry and Criminal Culpability (1995) 23

<sup>238</sup> Slovenko Psychiatry and Criminal Culpability (1995) 24

<sup>239</sup> Slovenko Psychiatry and Criminal Culpability (1995) 24

<sup>240</sup> Slovenko Psychiatry and Criminal Culpability (1995) 24

such successful defences”<sup>241</sup>. Altering the burden of proof seems to be a more effective way of reducing the use of insanity defence than changing the test<sup>242</sup>.

#### 4. OTHER TESTS AND PROPOSALS

Prior to the Hinckley trial, the burden of proof in all federal courts, and around half the states, was on the prosecution to prove the accused’s insanity beyond a reasonable doubt. The shifting of the onus back to the defendant became a major subject of controversy.<sup>243</sup>

Psychiatric and legal professionals called for the modification, rather than the total abolition of the insanity defense, which ultimately resulted in legislation being passed in the form of the Insanity Defense Reform Act of 1984. The insanity defense was not abolished, but the A.L.I. test was discarded in favour of a stricter version which reverted back to the M’Naghten approach. Besides relocating the burden of proof in insanity trials to the defendant, and severely limiting the scope of expert testimony in insanity cases, the level of mental illness or defect that must be shown to qualify as severe (as required by the M’Naghten test) was specified.<sup>244</sup>

In order to escape liability under this test, the defendant must show that his mental disease or defect is "severe." The "volitional" prong of the test, which excused a defendant who lacked the capacity to control his behavior, was eliminated. In effect, Congress returned to the 19th century "right/wrong" standard, echoing Queen Victoria's response to the M’Naughten acquittal<sup>245</sup>.

Today, around two-thirds of the States which accept the insanity plea now place the burden of proof on the defendant, usually by a preponderance of the evidence<sup>246</sup>. Federal Law and that of the State of Arizona have been changed to

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<sup>241</sup> Mackay Mental Condition Defences in the Criminal Law (1995)117

<sup>242</sup> Mackay Mental Condition Defences in the Criminal Law (1995)117

<sup>243</sup> <http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25/10/2011

<sup>244</sup> <http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25/10/2011

<sup>245</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> accessed 8 October 2011

<sup>246</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

require a defendant to prove his insanity by 'clear and convincing evidence', both of which have survived constitutional challenges in *US v Amos*<sup>247</sup> and *Arizona v Moorman*<sup>248</sup>, respectively<sup>249</sup>. The other state jurisdictions place the burden of proof on the prosecutor to disprove the elements of the defendant's insanity defence beyond reasonable doubt<sup>250</sup>.

The courts and legislatures have based their allocation of the burden of proof of sanity or insanity on the perceptions of the relationship between sanity and *actus reus* or *mens rea*<sup>251</sup>. Courts that place the burden of proof on the prosecution view sanity as necessary to the formulation of the requisite culpable mental state or voluntariness of the conduct and therefore an essential element of the crime<sup>252</sup>. Those that place the burden on the defendant do not consider a necessary relationship between sanity and *actus reus* or *mens rea*, or they simply want to discourage use of the plea and make it more difficult for a defendant to be found not guilty by reason of insanity<sup>253</sup>.

The introduction of the "guilty but mentally ill" (hereafter GBMI) verdict in many states is the biggest development in insanity defense law post-Hinckley<sup>254</sup>. An alternative verdict to an acquittal by reason of insanity, a defendant who is found to be GBMI is still considered legally guilty of the crime in question, but since he is mentally ill, he is entitled to receive mental health treatment while institutionalized<sup>255</sup>. If his symptoms should subside, he is required to serve out the remainder of his sentence in a regular correctional facility, unlike a defendant who was acquitted by reason of insanity, who must be released if it is determined

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<sup>247</sup> *US v Amos* 803 F 2d 419 (8<sup>th</sup> Cir 1986)

<sup>248</sup> *Arizona v Moorman* 744 P 2d 679 (1987)

<sup>249</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>250</sup> Slovenko Psychiatry and Criminal Culpability (1995) 134

<sup>251</sup> Slovenko Psychiatry and Criminal Culpability (1995) 135

<sup>252</sup> Slovenko Psychiatry and Criminal Culpability (1995) 135

<sup>253</sup> Slovenko Psychiatry and Criminal Culpability (1995) 135

<sup>254</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> accessed 8 October 2011

<sup>255</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> accessed 8 October 2011

he is no longer dangerous to himself or others<sup>256</sup>. This verdict, however, is conceptually confusing and holds no benefit to the defendant, as it does not result in an acquittal or reduction of sentence<sup>257</sup>.

## 5. CURRENT STATUS OF THE INSANITY DEFENCE AMONG THE STATES

The following list gives the status of the insanity defence in all 50 states, describes the test used, the party on whom the burden of proof lies, and whether the state uses the guilty but mentally ill verdict.

**ALABAMA:** M'Naghten Rule, burden of proof on defendant.

**ALASKA:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**ARIZONA:** M'Naghten Rule, burden of proof on defendant.

**ARKANSAS:** ALI Model Penal Code standard, burden of proof on defendant.

**CALIFORNIA:** M'Naghten Rule, burden of proof on defendant.

**COLORADO:** M'Naghten Rule with irresistible impulse test, burden of proof on state.

**CONNECTICUT:** ALI Model Penal Code standard, burden of proof on defendant.

**DELAWARE:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**DISTRICT OF COLUMBIA:** ALI Model Penal Code standard, burden of proof on defendant.

**FLORIDA:** M'Naghten Rule, burden of proof on state.

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<sup>256</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> accessed 8 October 2011

<sup>257</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 123

**GEORGIA:** M'Naghten Rule with irresistible impulse test, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**HAWAII:** ALI Model Penal Code standard, burden of proof on defendant.

**IDAHO:** Abolished insanity defense.

**ILLINOIS:** ALI Model Penal Code standard, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**INDIANA:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**IOWA:** M'Naghten Rule, burden of proof on defendant.

**KANSAS:** Abolished insanity defense.

**KENTUCKY:** ALI Model Penal Code standard, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**LOUISIANA:** M'Naghten Rule, burden of proof on defendant.

**MAINE:** ALI Model Penal Code standard, burden of proof on defendant.

**MARYLAND:** ALI Model Penal Code standard, burden of proof on defendant.

**MASSACHUSETTS:** ALI Model Penal Code standard, burden of proof on state.

**MICHIGAN:** ALI Model Penal Code standard, burden of proof on state, guilty but mentally ill verdicts allowed.

**MINNESOTA:** M'Naghten Rule, burden of proof on defendant.

**MISSISSIPPI:** M'Naghten Rule, burden of proof on state.

**MISSOURI:** M'Naghten Rule, burden of proof on defendant.



**MONTANA:** Abolished insanity defense, guilty but mentally ill verdicts allowed.

**NEBRASKA:** M'Naghten Rule, burden of proof on defendant.

**NEVADA:** M'Naghten Rule, burden of proof on defendant.

**NEW HAMPSHIRE:** Durham standard, burden of proof on defendant.

**NEW JERSEY:** M'Naghten Rule, burden of proof on state.

**NEW MEXICO:** M'Naghten Rule with irresistible impulse test, burden of proof on state, guilty but mentally ill verdicts allowed.

**NEW YORK:** M'Naghten Rule (modified), burden of proof on defendant.

**NORTH CAROLINA:** M'Naghten Rule, burden of proof on defendant.

**NORTH DAKOTA:** ALI Model Penal Code standard (modified), burden of proof on state.

**OHIO:** ALI Model Penal Code standard, burden of proof on defendant.

**OKLAHOMA:** M'Naghten Rule, burden of proof on state.

**OREGON:** ALI Model Penal Code standard, burden of proof on defendant.

**PENNSYLVANIA:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**RHODE ISLAND:** ALI Model Penal Code standard, burden of proof on defendant.

**SOUTH CAROLINA:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**SOUTH DAKOTA:** M'Naghten Rule, burden of proof on defendant, guilty but mentally ill verdicts allowed.

**TENNESSEE:** ALI Model Penal Code standard, burden of proof on state.

**TEXAS:** M'Naghten Rule with irresistible impulse test, burden of proof on defendant.

**UTAH:** Abolished insanity defense, guilty but mentally ill verdicts allowed.

**VERMONT:** ALI Model Penal Code standard, burden of proof on defendant.

**VIRGINIA:** M'Naghten Rule with irresistible impulse test, burden of proof on defendant.

**WASHINGTON:** M'Naghten Rule, burden of proof on defendant.

**WEST VIRGINIA:** ALI Model Penal Code standard, burden of proof on state.

**WISCONSIN:** ALI Model Penal Code standard, burden of proof on defendant.

**WYOMING:** ALI Model Penal Code standard, burden of proof on defendant.<sup>258</sup>

## **6. THE CASE OF CLARK v ARIZONA**

The case of *Clark* answers a significant question: namely whether a state may require defendants to bear the burden of negating *mens rea*, a burden usually carried by the prosecution which has to be proven beyond a reasonable doubt<sup>259</sup>.

Clark, who had previously been institutionalised and prescribed medication for mental illness, told acquaintances that the town was being invaded by aliens and that he was going to kill a policeman<sup>260</sup>. On the night of the killing he was driving through a residential neighbourhood with his sound system blaring when a police

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<sup>258</sup> <http://www.enotes.com/everyday-law-encyclopedia/insanity-defense> accessed 2011/10/09

<sup>259</sup> P.Westen The Supreme Court's Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 143.

<sup>260</sup> P.Westen The Supreme Court's Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 144

officer pulled him over<sup>261</sup>. Clark shot and killed the officer and then fled<sup>262</sup>. He later told psychiatrists that he thought Moritz was an alien<sup>263</sup>.

Clark was tried for the first degree murder of Moritz, in other words, the crime of killing while “intending” or “knowing” that Moritz was a police officer<sup>264</sup>. The question then arose as to whether Arizona could require Clark to bear the burden of proving the aforementioned “knowledge”<sup>265</sup>.

The state of Arizona requires a defendant to show by clear and convincing evidence that because of mental illness he *did not know* his act was wrong<sup>266</sup>. Here the judge is required to make a decision regarding criminal insanity<sup>267</sup>. If the burden was on the prosecution to prove beyond a reasonable doubt, that despite his mental illness, the defendant *did know* his act was wrong, the judge has to make a decision regarding mens rea<sup>268</sup>.

In the end, Clark was convicted of first degree murder<sup>269</sup>. The reason for the conviction was that the state of Arizona abolished any requirement that the prosecution bear the burden of proving “knowledge” beyond a reasonable doubt

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<sup>261</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 144

<sup>262</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 144

<sup>263</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 144

<sup>264</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 144

<sup>265</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 157

<sup>266</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 157

<sup>267</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 157

<sup>268</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 157

<sup>269</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 159

in cases in which defendants allege that they lacked such knowledge because of mental illness<sup>270</sup>.

Westen suggests that this problem can be remedied if the courts distinguished between evidence proving “mental illness” and evidence proving “capacity”<sup>271</sup>. As capacity is one of the elements of a crime, the burden should always be borne by the prosecution<sup>272</sup>. If the defence presents evidence to show that Clark lacked “knowledge” for reasons other than mental illness, the evidence should be considered under the prosecution’s burden of persuasion<sup>273</sup>. If however the defence offers evidence for the reason that it intends to show that because of mental illness such “knowledge” was lacking, such testimony must be considered under the defendant’s burden of persuasion<sup>274</sup>. In his opinion, the court failed to understand the substantive issue of criminal law, namely the relationship between *mens rea* of “knowledge” and the mental states that M’Naghten negates<sup>275</sup>.

#### **D. CONCLUSION**

The debate surrounding the insanity defence is very much alive and well<sup>276</sup>. On the one hand there are no right solutions but some solutions seem more acceptable than others<sup>277</sup>. In Anglo-American jurisprudence, the M’Naghten rules still prevail<sup>278</sup>.

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<sup>270</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 159

<sup>271</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 162

<sup>272</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 162

<sup>273</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 162

<sup>274</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 162

<sup>275</sup> P.Westen The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law Vol 4:143 at 163

<sup>276</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>277</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

<sup>278</sup> Mackay Mental Condition Defences in the Criminal Law (1995) 142

In England, courts and the public have in general been satisfied by the M’Naghten rule<sup>279</sup>. In the United States the M’Naghten rule continues to be a topic of discussion and subject to modification despite the infrequent use of the plea as well as the liberal interpretation usually invoked when it is used<sup>280</sup>.

Clearly the United States has moved closer to the English approach with regards to the insanity defence by embracing a more punitive model when excusing the mentally abnormal accused<sup>281</sup>. The same model has succeeded in England in reducing the practical effect of the insanity defence to virtual non-existence<sup>282</sup>. A general insanity defence in English law does not exist today, however the passing of the 1991 Act, may mean that this defence will be evoked more frequently in future<sup>283</sup>. It is questionable if this can occur while the M’Naghten, with its narrow rules which few defendants can satisfy, are still in operation<sup>284</sup>.

In the United States, procedures and tests regarding the insanity plea vary widely from state to state, but the trend has been towards a stricter disposition of schemes<sup>285</sup>. All of the tests on criminal liability have been criticized and defended but there has been no empirical work done regarding how different standards and tests affect court rulings<sup>286</sup>. Two-thirds of all states re-evaluated the insanity defence resulting in twelve states adopting the guilty but mentally ill test, seven narrowed the substantive test, sixteen shifted the burden of proof, and twenty-five tightened release provisions in the case of those defendants found to be not guilty by reason of insanity<sup>287</sup>. Three states adopted legislation that purported to abolish the insanity defence, but actually retained the mens rea exception<sup>288</sup>.

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<sup>279</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 21

<sup>280</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 21

<sup>281</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>282</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>283</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>284</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>285</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>286</sup> Mackay *Mental Condition Defences in the Criminal Law* (1995) 142

<sup>287</sup> <http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25/10/2011

<sup>288</sup> <http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25/10/2011

In both English and American criminal law, the burden of proving that one suffered from a mental illness or defect at the time of the commission of a crime lies with the defendant. Although it is clear that the weight of the burden on the accused is not the same as the burden the state bears to prove guilt, it is still questionable in both jurisdictions whether this allocation of proof infringes fundamental rights of the accused.

## CHAPTER 5

### CONCLUSION

The law applicable in South Africa in respect of the defence of mental illness is contained in the provisions of the Criminal Procedure Act, which replaced the criteria set out in the M’Naghten rules<sup>289</sup>. The insanity defence is therefore fundamentally, but not exclusively a statutory defence in South African criminal law today<sup>290</sup>.

Section 78(1) of the Criminal Procedure Act stipulates that in order to not be responsible for an alleged crime the accused must have committed an act which constitutes an offence and must at the time of said commission have suffered from a mental illness or mental defect which rendered him incapable of (a) appreciating the wrongfulness of his actions; or (b) acting in accordance with an appreciation of the wrongfulness of his actions<sup>291</sup>.

The test for insanity is therefore a mixed one in which expert testimony is vital. This is as a result of section 78(2) and 79 of the Act requiring an inquiry be held and a report submitted by a panel of psychiatrists on the accused’s criminal responsibility where the insanity defence is in issue<sup>292</sup>. In addition to this, the legislature elected not to define ‘mental illness’ and ‘mental defect’ which renders them a matter to be determined to be determined by expert evidence but ultimately adjudicated upon by the courts<sup>293</sup>.

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<sup>289</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 130

<sup>290</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 130

<sup>291</sup> FFW van Oosten The insanity defence: its place and role in criminal law SACJ (1990) 1 SAS 131

<sup>292</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 131-132

<sup>293</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 132

The presumption of innocence, which means that the burden of establishing the elements of criminal liability lies with the prosecution, is a fundamental aspect of the South African criminal justice system<sup>294</sup>. In terms of the common law<sup>295</sup>, the accused bears the onus of proving his criminal insanity on a balance of probabilities<sup>296</sup>. The presumption of innocence enshrined in section 35(3) of the Constitution, requires that the State bear the full burden of proof in relation to each element of the criminal offence<sup>297</sup>. It is only once the State has established each element of the crime, beyond a reasonable doubt, that the burden of proof shifts to the accused to create reasonable doubt<sup>298</sup>. Where a presumption of fact has the effect of prematurely placing a burden on an accused to establish his innocence on a balance of probabilities, without the State having proved every element of an offence beyond a reasonable doubt, the presumption will be regarded as creating a reverse onus.<sup>299</sup> Not only is the due process threatened by placing the onus on the accused, but under current South African law this reverse onus in insanity cases can lead to gross inequality in the treatment of the accused<sup>300</sup>.

The South African legal system differentiates between two types of presumptions which have a significant effect on the burden of proof placed on an accused during criminal proceedings<sup>301</sup>. The first creates a legal burden and imposes an obligation on a court to draw a conclusion from proof of a basic fact, until the

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<sup>294</sup> Burchell Principles of Criminal Law (2007) 392

<sup>295</sup> The First M’Naghten rule (“Every man is presumed to be sane until the contrary is proved”) which has remained unaffected by the provisions of section 78 of the Act.

<sup>296</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 132

<sup>297</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> accessed 12 October 2011

<sup>298</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> accessed 12 October 2011

<sup>299</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> accessed 12 October 2011

<sup>300</sup> Burchell Principles of Criminal Law (2007) 392

<sup>301</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> accessed 12 October 2011



contrary is proved<sup>302</sup>. It will then fall to the accused to disprove the presumed fact on a balance of probabilities<sup>303</sup>. Such a presumption will lead to a risk of conviction where an accused does not introduce evidence to the contrary, despite the existence of reasonable doubt<sup>304</sup>. The imposition of such a reverse onus will in insanity cases, infringe a fundamental right of the accused, the presumption of innocence.<sup>305</sup> In contrast, an evidentiary burden obliges a court to draw a conclusion from proof of a basic fact in the absence of evidence to the contrary<sup>306</sup>. Such a burden will exist where a court is required to regard the establishment of one fact as prima facie evidence of another fact<sup>307</sup>. The existence of an evidentiary burden will oblige an accused, in order to escape conviction, to adduce evidence which will raise reasonable doubt as to the presumed fact<sup>308</sup>. As a general rule, where a presumption has the effect of lessening the burden of proof borne by the State, if only in respect of a single element of a composite offence, such a provision may be found to infringe the presumption of innocence<sup>309</sup>.

In *S v Kok*<sup>310</sup>, Scott JA drew attention to the anomaly regarding the allocation of the burden of proof being dependant on whether the accused raised pathological or non-pathological incapacity. Without making a ruling on the matter he stated

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<sup>302</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>303</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>304</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>305</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>306</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>307</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>308</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>309</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

<sup>310</sup> *S v Kok* 2001 (2) SACR 106 (SCA)

that whether the distinction ‘can be upheld in our modern law with the enactment of the new Constitution is doubtful’<sup>311</sup>.

For the accused the non-pathological criminal incapacity defence has a number of advantages over the pathological criminal incapacity defence, namely:

1. In the former defence the onus lies with the prosecution to establish the accused’s criminal capacity beyond a reasonable doubt, whereas in the latter defence the accused bears the burden of proving his criminal incapacity on a balance of probabilities<sup>312</sup>.
2. A successful defence of non-pathological incapacity will result in an acquittal of the accused, whereas a successful defence of pathological incapacity will lead to the verdict of not guilty coupled with a section 78(6) detention order<sup>313</sup>.
3. The defence of non-pathological criminal incapacity is not dependent upon psychiatric evidence whereas a pathological criminal incapacity defence cannot succeed without such expert evidence<sup>314</sup>.

From the accused’s viewpoint, the defence of non-pathological criminal incapacity is far more attractive than the pathological criminal incapacity defence<sup>315</sup>. It would therefore be accurate to predict that in future, greater reliance will be placed on the non-pathological criminal incapacity defence than on the pathological criminal incapacity defence, irrespective if the accused is in

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<sup>311</sup>S v Kok 2001 (2) SACR 106 (SCA) at 110-11.

<sup>312</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 146

<sup>313</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 146

<sup>314</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 146

<sup>315</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 146

fact mentally ill or not<sup>316</sup>. This may contribute to the gradual deterioration of the pathological incapacity defence at the expense of the mentally ill accused, who would derive benefit from detention and treatment, as well as society in general<sup>317</sup>.

Furthermore, the presumption of innocence<sup>318</sup>, the right to equality before the law and the equal protection of the law<sup>319</sup>, would be infringed by the rule of law that places the onus in insanity cases on the accused and such a rule could hardly be regarded as a justifiable limitation in an open and democratic society based on freedom and equality<sup>320</sup>.

*Burchell* suggest the following solution:

*“A practical solution to this problem would be to realize that the presumption of sanity has its origin in a system of law in which a clear distinction was not often drawn between a presumption which casts a burden of proof on a balance of probabilities onto the accused and a presumption which casts merely an evidential burden onto the accused. It is surely consistent with principle, equal treatment of accused persons and compatible with both the reasoning behind the presumption of sanity (or capacity) and the presumption of innocence to say that everyone is presumed to be sane and that this means that anyone who wishes to refute this presumption must lead compelling evidence to the contrary. South African judges have already acknowledged that a firm foundation for the defence of intoxication or any other non-pathological factor affecting criminal capacity must be laid, but have refused to place a*

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<sup>316</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 146

<sup>317</sup> FFW van Oosten Non-pathological criminal incapacity versus pathological criminal incapacity SACJ (1993) 6 SAS 147

<sup>318</sup> Section 35(3) (h) of the Constitution of the Republic of South Africa

<sup>319</sup> Section 9 (1) of the Constitution of the Republic of South Africa

<sup>320</sup> Burchell Principles of Criminal Law (2007) 392

*burden of proof, properly so called on the accused. Why treat the person who alleges insanity any different?*<sup>321</sup>

Placing the onus on the accused to prove his insanity would relieve the prosecution of having to establish this element of liability, and as a result, infringe the presumption of innocence<sup>322</sup>. There is no evidence to suggest that placing an evidentiary burden on accused persons to produce evidence of insanity will lead to the exploitation of mental illness defences<sup>323</sup>. The presumption of innocence is the cornerstone of criminal justice and placing an evidentiary burden on the accused in insanity cases will be least invasive on the presumption of innocence<sup>324</sup>. This will result in a uniform approach in which persons raising all defences will have the same evidentiary burden and persons who are mentally ill will not be subjected to additional discriminatory treatment<sup>325</sup>.

To date there has been no definitive ruling regarding the application of the presumption of innocence and the allocation of the burden of proof to regulatory offences<sup>326</sup>. The Constitutional Court is yet to make a distinction between mandatory and permissive evidential burdens which leaves the possibility of conviction despite the existence of reasonable doubt<sup>327</sup>. The courts will have to engage in the limitation analysis to determine whether the lessening of the onus on the prosecution, by relieving it of the duty to prove an element of the offence, offends against the presumption of innocence<sup>328</sup>.

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<sup>321</sup> Burchell Principles of Criminal Law (2007) 393

<sup>322</sup> Burchell Principles of Criminal Law (2007) 394

<sup>323</sup> Burchell Principles of Criminal Law (2007) 394

<sup>324</sup> Burchell Principles of Criminal Law (2007) 395

<sup>325</sup> Burchell Principles of Criminal Law (2007) 395

<sup>326</sup> PJ Schwikkard Presumption of innocence (1999) at 173.

<sup>327</sup> PJ Schwikkard Presumption of innocence (1999) at 174

<sup>328</sup> <http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14>  
accessed 12 October 2011

## BIBLIOGRAPHY

Ashworth, *Principles of Criminal Law* (1991)

B Hoggett *Mental Health Law* Sweet and Maxwell London (1976)

Burchell *Principles of Criminal Law* (2006)

Burchell *Principles of Criminal Law* (2007)

Du Toit et al *Commentary on the Criminal Procedure Act* (2008)

FFW van Oosten *Non-pathological criminal incapacity versus pathological criminal incapacity* SACJ (1993) 6 SAS 147

FFW van Oosten *The insanity defence: its place and role in criminal law* SACJ (1990) 1 SAS 2

Gillmer, Louw, Verschoor *Law and psychology: An explanation of the conceptual interface* SACJ (1997)

<http://crime.about.com/od/issues/a/insanity.htm> accessed 3 October 2011 at 19:00

<http://criminallaw.uslegal.com/defense-of-insanity/> accessed 10 October 2011 at 21:00

<http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25 October 2011 at 18:00

<http://law.jrank.org/pages/1135/Excuse-Insanity-Hinckley-its-aftermath.html> accessed 25 October at 18:00

<http://www.enotes.com/everyday-law-encyclopedia/insanity-defense> accessed 9 October 2011 at 19:00

[http://www.oup.com/uk/orc/bin/qanda/sample\\_chapters/spencer\\_ch02.pdf](http://www.oup.com/uk/orc/bin/qanda/sample_chapters/spencer_ch02.pdf) accessed 10 October 2011 at 21:00

<http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html> accessed 8 October 2011 at 19:00

<http://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> accessed 12 October 2011 at 21:00

<http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-2.htm> accesses 16 September 2011 at 18:30

M S Moore *Legal Conceptions of Mental Illness*

Mackay *Mental Condition Defences in the Criminal Law* (1995)

Milton “*Law Commission Project 89: Declaration and detention of state patients*”  
South African Journal of Criminal Justice (1998) 230.

P.Westen *The Supreme Court’s Bout with Insanity: Clark v Arizona Ohio State Journal of Criminal Law* Vol 4:143 at 163

Peter Murphy *Murphy on Evidence* (2009)

PJ Schwikkard *Presumption of Innocence* (1999)

R Cross *The Golden Thread of the English Common Law: The burden of Proof* (1976)

Slovenko *Psychiatry and Criminal Culpability* (1995)

Snyman *Criminal Law* (2008)

Steytler *Constitutional Criminal Procedure* (1998)

SZ Kaliski *My brain made me do it-how neuroscience may change the insanity defence* SAJP volume 15 No 1 March 2009

Visser & Vorster *General Principles of Criminal Law Through the Cases* (1982)

[web.uct.ac.za/depts./psychology/psy400w/insanity.pdf](http://web.uct.ac.za/depts./psychology/psy400w/insanity.pdf) accessed 12 September

2011

## **LEGISLATION**

The Constitution of the Republic Of South Africa Act 108 of 1996

The Criminal Matters Amendment Act 68 of 1998,

The Criminal Procedure Act 51 of 1977

The Drugs and Drug Trafficking Act 149 of 1992

The Gambling Act 51 of 1965



## TABLE OF CASES

*Arizona v Moorman* 744 P 2d 679 (1987)

*Kesavarajah v R* (1994) 123 ALR 463

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

*R v Downey* (1992) 13 CR (4<sup>th</sup>) 129 (SCC)

*R v Downey* (1992) 13 CR (4<sup>th</sup>) 129 (SCC)

*R v Harris* 1965 (2) SA 340 (A) at 365 B-C

*R v Ndhlovu* 1945 AD 369.

*R v Oakes* 1986 50 CR (3d) 1 (SCC)

*R v Schwartz* 1989 66 CR (3d) 251 (SCC)

*Regina v. M'Naghten, 10 Clarrk and F. 200, 8 Eng. Rep 718 (1843))*

*S v de Beer* 1995(1) SACR (SE)

*S v Gwadiso* 1996 (1) SA 388 (CC)

*S v Kok* 2001 (2) SACR 106 (SCA)

*S v Matjhesa* 1981 (3) South African 851 (O)

*S v Pratt* 1960 (4) SA 743 (T)

*S v Romer* [2011] ZASCA 46 at [1]

*S v Shapiro* 1994 (1) SACR 112 (A) at 123c-f.

*S v Sindane* 1992 (2) SACR 223 (A)

*S v Stellmacher* 1983 (2) SA181 SWA at 87

*S v van As* 1989 (3) SA 881 (W)

*S v van Graan* 2002 JDR 0815 (C)

*S v Zuma* 1995 (1) SACR 568 (CC)

*Scagell v Attorney General of the Western Cape* 1996 (11) BCLR 1446 (CC)

*US v Amos* 803 F 2d 419 (8<sup>th</sup> Cir 1986)

*Woolmington and Mancini v DPP* [1942] AC 1, [1942] 3 All ER 272

*Woolmington v The Director of Public Prosecutions* [1935] AC 462 (HL) 481.