Chapter 8: Expert Evidence and Its Use

The first part of the chapter contains general references as to how experts might be used by legal representatives for an accused; considers the relevant sections of the *Evidence Act* 2009 and applicable case law; and provides information about how the services of a psychiatrist could be utilised. The second part refers to and comments on relevant sections of the *Penal Code* and *Criminal Procedure Code* where they relate to mental illness defences, automatism, diminished responsibility and infanticide.

In many cases experts will be of significant assistance in proving the case for the prosecution or defence, but more importantly, they can assist in the process of avoiding a miscarriage of justice. Whether the expert is a medical practitioner, a forensic pathologist, a psychiatrist, a psychologist, an engineer, or a person from another specialist area who can provide an opinion based on their knowledge,[1] the same principles apply for the interaction between the practitioner and the expert. Many criminal law practitioners are, for example, well acquainted with the role of forensic pharmacologists who are often called upon to give opinion evidence on the blood alcohol level of an accused. In serious indictable cases such opinion evidence may also be useful to assist in determining the blood alcohol level of an eyewitness at the time he or she allegedly made an observation. Such evidence when coupled with that given by a forensic psychologist skilled in the area of perception may assist a tribunal of fact in determining the reliability and therefore the weight that should be given to the evidence of the eyewitness.

Briefing an Expert Witness

One of the principles that the practitioner should always adhere to when briefing an expert is that no attempt should be made to influence the opinion of the expert: relevant information should be provided and questions asked for the purpose of clarification. An attempt to influence an expert or for that matter any witness, to give testimony that does not reflect a true opinion or belief is to engage in unethical behaviour. In some instances the behaviour may be regarded as an attempt to pervert the course of justice. Even if an attempt to improperly influence an expert remains undetected, the result can often prejudice the outcome of a trial because the testimony may appear to be weak, and therefore be found by the tribunal of fact to be unreliable or dishonest.

Experts should be briefed with all available relevant information. The practitioner should provide written questions to the expert, along with any relevant case law so that attention is focused on relevant matters. The expert should also be asked to identify any additional documentation that is needed

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[1] Stephen Odgers in Uniform Evidence Law ,Lawbook, 2004, provides a useful summary of the factors that should be present for expert opinion evidence to be admissible at page 276.

prior to providing a report.

The expert should provide a written report, and at least one conference arranged prior to the hearing, to allow the practitioner to gain an understanding of the evidence that the expert could give, and to clarify any matters that are unclear in the report.

Experts are not only useful for the purpose of giving testimony at hearing, but they may also be useful in determining any further inquires the practitioner should make prior to the hearing.

When selecting an expert care should be taken to choosing one who has experience in giving evidence. This may not always be possible. Some experts find it very difficult when confronted with an adversarial environment in which they are exposed to cross-examination. Indeed, some will simply not make themselves available for this type of work.

When briefing an expert it is important that advice be given about their duty to the court. Although there are no guidelines in the Solomon Islands about an expert's duty to the court, assistance with the type of advice that can be given is found in Federal Court of Australia guidelines that state:

> **General Duty to the Court**
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> An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
>
> An expert witness is not an advocate for a party.
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> An expert witness's paramount duty is to the Court and not to the person retaining the expert.
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> **The Form of the Expert Evidence**
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> An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
>
> All assumptions made by the expert should be clearly and fully stated.
>
> The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.
>
> Where several opinions are provided in the report, the expert should summarise them.
>
> The expert should give reasons for each opinion.
>
> At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards

> as relevant have, to [the expert's] knowledge, been withheld from the Court."
>
> There should be attached to the report, or summarised in it, the following:
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> (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report
>
> (ii) the facts, matters and assumptions upon which the report proceeds; and
>
> (iii) the documents and other materials which the expert has been instructed to consider.
>
> If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.
>
> If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
>
> The expert should make it clear when a particular question or issue falls outside his or her field of expertise.
>
> Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

Where an expert report has been obtained by the prosecution which is relevant to the guilt or innocence of the accused, the prosecution is obliged to provide the report to the defence. However, where an expert report is obtained by the defence which does not assist the defence case, the report does not have to be provided to the prosecution. Indeed, it may be regarded as a breach of duty to a client, if a defence lawyer provides an expert report to the prosecution that damages the defence case.

Evidence Act 2009

As with all steps in the trial process, the practitioner has to be aware of the relevant statutory law. In the case of expert witnesses, who are called to give evidence, they are giving opinion evidence. The relevant sections of the *Evidence Act 2009* (under Part 9 Hearsay) contain the relevant sections regarding expert opinion. Section 130 governs the admissibility of expert opinion, it states:

130. (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

(2) An opinion by an expert is not inadmissible simply because it is about –

(a) an ultimate issue to be determined in a proceeding; or

(b) a matter of common knowledge.

(3) Subject to subsection (4), if an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

(4) If expert evidence that includes an opinion about the sanity of a person also includes a statement that the person made to the expert about the state of mind of the person, then –

(a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and

(b) neither the hearsay rule nor the prior inconsistent statements rule applies to evidence of the statement made by the person.

Sections 131 and 132 refer to opinion about handwriting and allows for lay opinion about to be given about the author of the writing, in certain circumstances, and for courts to draw inferences as to authenticity or identity. This has the effect of allowing the reception of evidence without the need to call a handwriting expert, although it does not exclude the calling of such an expert to give evidence.

Section 131 states:

131. (1) Where the court has to form an opinion as to the person by whom any document was written or signed, any person acquainted with the handwriting of the person by whom such document is alleged to have been written or signed may give evidence that in his or her opinion it was or was not written or signed by that person.

(2) A person shall be deemed to be acquainted with the handwriting of another person, when–

(a) he has seen that person write; or

(b) he or she has received documents purporting to be written by that other person in reply to documents written by

himself or herself or by his or her direction and addressed to that other person; or

(c) in the ordinary course of business documents purporting to contain that other person's handwriting have habitually come under his or her notice.

Section 132 states:

132. (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

(3) A court may compare a disputed writing with any writing that is genuine and act upon its own conclusions.

Section 133 allows for the tendering of expert reports if certain conditions are met. It states:

133. (1) Evidence of a person's opinion may be adduced by tendering a report signed by the person that –

(a) states the person's name;

(b) states that the person has specialised knowledge based on his or her training, study or experience, as specified in the report; and

(c) sets out an opinion that the person holds and that is expressed to be wholly or substantially based on that knowledge.

(2) Subsection (1) does not apply unless the party seeking to tender the report has served on each other party a copy of the report –

(a) not later than twenty-eight days before the hearing; or

(b) not later than a period ordered by the court, if, on application by the party before or after service, the court substitutes a different period, the beginning of that period.

(3) When such a report is so used, the court may, if it thinks fit, summon the expert, as the case may be, and examine him as to the subject-matter of such report.

The requirements as stated in s 130 of the *Evidence Act 2009* are reasonably broad and less restrictive than the test in *Frye v United States*.[2] The

[2] (1923) 293 F 1013.

reliability of the expert opinion is a matter that is determined by the tribunal of fact. What constitutes acceptable expert opinion is a developing area of case law. For example, an historian's view about life in the 19th Century was held to be not admissible as expert opinion.[3] A psychologist's opinion as to why an accused lied was also held to be not admissible, because it was not within her specialised knowledge.[4]

In *HG v The Queen*,[5] Gaudron J refers to s 80 of the *Uniform Evidence Act* 1995 that in some parts has similar wording to s 130 of the *Evidence Act* 2009, and comments on the meaning of 'specialised knowledge' in the context of an expert giving evidence about behavioural change in children who are exposed to the trauma of sexual assault. She states, *inter alia*:

> **Opinion evidence**
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> **57.** Putting relevance to one side, the admissibility of expert or opinion evidence is governed by Pt 3.3 of the *Evidence Act* 1995 (NSW) ("Evidence Act"). The "opinion rule" is set out in s 76 of that Act in these terms:
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> > "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."
> >
> > There then follow three exceptions to the rule. For present purposes, it is necessary to refer only to the exception specified in s 79. That section provides:
> >
> > "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion that is wholly or substantially based on that knowledge."
>
> And s 80 provides:
>
> > "Evidence of an opinion is not inadmissible only because it is about:
> >
> > (a) a fact in issue or an ultimate issue, or
> >
> > (b) a matter of common knowledge."
>
> **58.** So far as this case is concerned, the first question that arises with respect to the exception in s 79 of the Evidence Act is whether psychology or some relevant field of psychological study amounts to "specialised knowledge". The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment ... without the assistance of [those] possessing special

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3 *Bellevue Cresent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 346.
4 *R v Quesada* (2001) NSWCCA 216.
5 [1999] HCA 2.

> knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience": *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J; *Farrell v The Queen* (1998) 72 ALJR 1292 at 1295 per Gaudron J; 155 ALR 652 at 655; *Osland v The Queen* (1998) 159 ALR 170 at 184 per Gaudron and Gummow JJ. There is no reason to think that the expression "specialised knowledge" gives rise to a test which is in any respect narrower or more restrictive than the position at common law.[6]

In the case of *Velevski v The Queen*, Gummow and Callinan JJ refer, *inter alia*, to:

1. If forensic pathologists can give opinion evidence about whether wounds are self-inflicted or not. They conclude that such evidence can be regarded as expert evidence if there is a suitable foundation of experience, study and training.

2. The fact that it is for the jury to determine the cogency of conflicting expert opinions.

3. Even if an expert gives evidence that he or she is not entitled to give, a miscarriage of justice does not automatically arise.

4. Failure to call all expert witnesses referred to in evidence does not necessarily lead to a miscarriage of justice.

5. Conflicting expert evidence always calls for careful evaluation, and a trial judge has an important role in directing a jury about how they should consider the evidence.[7]

The facts of the case and the court's findings are a good example of how the evidence of a forensic pathologist can be considered.

The Use of Psychiatric Evidence

Defence practitioners frequently use the evidence of psychiatrists. They are also extensively used by the prosecution practitioners, less so by police except in the most serious cases requiring psychiatric expertise in profiling or to assist with formulating questions for witnesses who may have a mental illness.

In indictable criminal cases the following issues may need to be considered before a trial commences:

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6 Ibid.

7 [2002] HCA 4.

1. Is the accused fit to stand trial;

2. Was the accused insane at the time the offence was committed;

3. Where the accused is charged with murder, it needs to be considered whether or not that person was suffering from substantial impairment;

4. Does the accused suffer from an intellectual disability;

5. Is insane automatism applicable;

6. Sane automatism.

In every serious criminal case, it is essential that both the prosecution and the defence consider the mental health of the accused.

The Defence Lawyer's Duty

The defence lawyer needs to be aware of mental health issues because he or she is representing the best interests of the accused. The defence lawyer is also an officer of the court with ethical responsibilities to assist in the avoidance of a miscarriage of justice while still acting as an advocate for the accused.

It is often difficult for a defence practitioner to determine whether or not a client has a mental health problem or an intellectual disability. The practitioner should try to assess if a psychological or psychiatric assessment of a client is necessary before trial. However, failure to assess a client who is later found to be mentally ill or intellectually disabled does not necessarily constitute a miscarriage of justice, based on incompetent or negligent legal representation grounds.[8]

Where a client may be intellectually disabled, the following useful guidelines have been developed.

1. There should be a series of shorter conferences rather than one long conference, as the client may become tired and lose concentration. Give the client plenty of time to consider and give their answer as they need a little extra time. Let the client answer for themselves.

2. If appropriate, ask whether the client wishes to be accompanied by a friend or their 'citizen advocate'.

3. Subject to instructions, contact the client's welfare officer to obtain more information about the client.

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8 *Ignjatic v R* (1993) 68 A Crim R 333.

4. Take into consideration that there is a correlation between low intelligence and poor memory and that an intellectually disabled client may not remember, may try to fill in that loss of memory, or may agree with questions because they are 'suggestible'. A full statement should be obtained as early as possible.

5. There may be on-going difficulties in getting 'instructions' at all, as the client may change their mind, refuse to express any wishes and rely totally on the lawyer's advice, or only want to discuss the possible sentence. The lawyer should take more time to explain the advice and allow more time for the client to consider the course of action they wish to follow. If the lawyer considers that the client cannot give instructions, they must then consider raising the issue of the client's fitness to plead, as the ability to give instructions is an important element in the procedure.[9]

It is preferable to gather all the evidence, analyse it, and advise a client before instructing a psychiatrist. Indeed, there may be no need to seek the assistance of a psychiatrist if the best defence approach is to make the prosecution prove its case beyond reasonable doubt: the defence being, 'I didn't do it'. Where the evidence is such as to *prima facie* show that the accused committed the offence then instructions should be sought from the client, before the psychiatrist is instructed, confirming that he or she was involved in the commission of the offence. If the client's instructions confirm that he or she was involved in the offence then the psychiatrist should be asked to see the client and prepare a report.

It is important that the psychiatrist interview the client before preparing a report. Consideration may also need to be given to obtaining a report from a psychologist especially if the client appears to be of low intelligence. Such a report may be of significant help to the psychiatrist when giving an opinion.

In most cases the psychiatrists will only interview the client once and may not confirm any history given by the client with family members or witnesses. This fact places an important obligation on the practitioner to obtain as much background from the client and family members and witnesses as is relevant and probative.

It is essential that the practitioner have a working knowledge of these areas of law so that he or she can appropriately advise the psychiatrist about the matters that need to be covered in a report on the client. The practitioner should not assume that even the most experienced forensic psychiatrist is acquainted with the law relevant to the various mental state defences. Therefore, the written instructions given to the psychiatrist should include some detail of the law.

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[9] Summarised from Mark Ierace, Intellectual Disability, Redfern Legal Centre Publishing, 1989, 9 -13.

The Psychiatrist's Report
Where a psychiatrist is employed to prepare a report, it may be helpful if it included the following:

1. A list of all documents supplied by the practitioner upon which the psychiatrist is relying;

2. A history of the event as provided by the prosecution;

3. The accused's recollection of events where an admission is involved;

4. A complete medical and psychiatric history of the client;

5. A medical and psychiatric history of the accused;

6. Any family history of psychiatric illness;

7. The developmental history of the client;

8. The current mental status of the client;

9. How the mental status may relate to the offence;

10. A diagnosis of the client with reference to the DSMIV revised;

11. Prognosis;

12. The opinion of the psychiatrist generally and in particular any prognosis; and

13. Where a report is prepared for sentence, a history of any offences committed by the accused;

14. How any previous offences may relate to the current offence;

15. Likelihood of re-offending;

16. Treatment programme;

The practitioner should not assume that even the most experienced forensic psychiatrist is acquainted with the relevant law. Therefore, it may be useful to provide some detail about the law. A summary of the law is contained below.

History and Principles - the Unsound Mind and Crime

> 'It is a cardinal principle of our law that no man can be tried for a crime unless he is in a position to defend himself, and that includes his being in a

> mental condition to defend himself . . . .' – per Humphreys J in *R v Dashwood.*[10]

The legislative origin of provisions that provide for acquittal of an accused because of insanity is the English *Criminal Lunatics Act 1800*. The *Act* provided that:

> In all cases in which it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that he was insane at the time of committing the offence, and he be acquitted, the jury shall find especially whether he was acquitted on account of insanity, and if so, the court shall order him to be kept in strict custody, in such manner as it shall think fit, until the King's Pleasure be known and the King may give such order for his safe custody as he shall think fit; and so in all like cases before the passing of that Act.

Since the *Criminal Lunatics Act 1800* there has been the development of a distinction between insanity, diminished responsibility, unfitness to stand trial and sane and insane automatism.

Presumption of Sanity

Section 11 of the *Penal Code* states the common law position that people are presumed to be sane unless the contrary is proved. It states:

> **11.** Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question until the contrary is proved.

There is at common law a presumption both of voluntariness and sanity. A voluntary act is one done in consciousness of the nature of the act and in exercise of a choice to do an act of that nature: *R v Falconer.*[11] In every criminal case it is necessary for the act of an accused to have been voluntary in order for an offence to have been committed.

Considering the Issues Before Trial

In indictable criminal cases the following issues may need to be considered before a trial commences:

1. Is the accused fit to stand trial
2. Was the accused insane at the time the offence was committed
3. Where the accused is charged with murder, it needs to be considered whether or not that person was suffering diminished responsibility
4. Does the accused suffer from an intellectual disability
5. Is insane automatism applicable
6. Sane automatism.

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[10] [1942] 2 ALL ER 586, 587.

[11] [1990] HCA 49; (1990) 171 CLR 30, 39.

Where one of these issues arises it is important to ensure that the law is properly applied. There are a number of difficulties that are confronted by practitioners when clients suffer from a mental illness or disability. Apart from obtaining appropriate expert opinion about the extent of the illness or disability and the prognosis, there is an overriding issue related to the application of the common law principles and legislation, and how these relate to the best interests of the client.

Unfitness to Stand Trial

The first matter to be considered is whether or not an accused person is fit to stand trial. There are minimum standards that an accused must meet for a trial to be conducted fairly. If the accused fails to meet to those minimum standards, then the trial cannot be conducted without the possibility of unfairness or injustice being caused to the accused.

The minimum standards of involvement required of an accused are found in *R v Presser.*[12] Smith J lists the requirements as follows:

> 'He needs . . . to be able to understand what he is charged with.'
> 'He needs to be able to plead to the charge and exercise his right of challenge.'
> 'He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with.'
> 'He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities.'
> 'He needs to be able to understand . . . the substantial effect of any evidence that may be given against him. . . .'
> ' . . . he needs to be able to make a defence to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is.'
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> 'He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able 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.'[13]

The above requirements were extended in *Kesavarajah v R*,[14] in the sense that the jury determining the issue of fitness is to consider to capacity of the accused in the light of the length of the trial.

> In the context of a trial, fitness to be tried is to be determined by reference to the factors mentioned by Smith J in Presser and by reference to the length of the trial. It makes no sense to determine the question of fitness

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12 [1958] VR 45, 48.

13 Ibid.

14 [1994] HCA 41; (1994) 123 ALR 463.

> to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial. There is simply no point in embarking on a lengthy trial with all the expense and inconvenience to jurors that it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating condition which can affect the accused's fitness to be tried. Of course, that is not to exclude from the jury's consideration the question whether the condition is such that difficulties can be accommodated by an adjournment if and when they arise.[15]

The purpose of allowing consideration of unfitness is provided in *Presser* when Smith J poses the following question:

> And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.[16]

Unfitness to stand trial can occur where the accused is mentally ill or intellectually disabled.

The Criminal Procedure Code

Section 144 of the *Criminal Procedure Code* provides for those of 'unsound mind' where they are unable to make their defence. Where a person is unable to make their defence they are considered 'unfit to stand trial'; which is sometimes called 'unfit to plead'.

Section 144 states:

> **144**. (1) When in the course of a trial or preliminary investigation the court has reason to believe that the accused is of unsound mind so that he is incapable of making his defence, it shall inquire into the fact of such unsoundness.
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> (2) If the court is of opinion that the accused is of unsound mind so that he is incapable of making his defence, it shall postpone further proceedings in the case.
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> (3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.
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> (4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy

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15 Ibid 475.

16 [1958] VR 45, 48.

thereof to the Director of Public Prosecutions for consideration by the Governor-General.

(5) Upon consideration of the record, the Governor-General in his discretion may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with such order; and such warrant shall be sufficient authority for the detention of the accused until the Governor-General in his discretion makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in manner provided by sections 147 and 148.

Section 144 is a procedural section that does not identify the bases upon which a court can find a person unfit to stand trial, that is, the criteria for establishing what 'incapable of making his defence' is - such as to allow the section to apply. The section also does not provide for definite periods of review, and potentially allows an innocent person to be indefinitely detained. Additionally, it relies on the prosecuting authority and the Governor-General to act, with potentially no reference to the legitimate legal and human rights interests of an accused person. Although the intention of parliament may not have been to allow for indefinite detention at the Governor-General's pleasure the section can allow this to occur. Holding an accused at the 'Governor-General's pleasure' is an old, unfair procedure that is gradually falling out of use in the common law world, especially in cases involving unfitness to stand trial.

In instances where a person is unfit to stand trial there is the potential for the individual to spend a longer time in custody than would be the case if they were found guilty and sentenced.

Sections 147, 148 and 149 of the *Criminal Procedure Code* are relevant when considering unfitness to stand trial. Section 147 states:

Procedure where person of unsound mind subsequently found capable of making defence

147. (1) If any person detained in a mental hospital or other place of custody under section 144 or section 256 is found by the medical officer in charge of such mental hospital or place to be capable of making his defence, such medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning such person under section 144 or section 256 whether it is the intention of the Crown that proceedings against such persons continue or otherwise.

(3) In the former case, such court shall thereupon order the removal of such person from the place where he is detained and shall cause him to be brought in custody before it, and shall deal with him in manner provided by section 148; otherwise the court shall forthwith issue an order that such person be discharged in respect of the proceedings brought against him and released from custody and thereupon he shall be released, but such discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

Section 147(1) provides for appropriate notification when a person has been medically certified as fit to stand trial. However, is does not provide a reasonable time limit for notification of fitness or unfitness so as to allow the procedures contained in other sections to be activated.

Section 148 states:

Resumption of preliminary investigation or trial

148. (1) Whenever any preliminary investigation or trial is postponed under section 144 or section 256, the court may at any time, subject to the provisions of section 147, resume the preliminary investigation or trial and require the accused to appear or be brought before such court, when, if the court considers him capable of making his defence, the preliminary investigation or trial shall proceed, or begin again, as to the court may appear expedient.

(2) Any certificate forwarded to the Director of Public Prosecutions under section 147 may be given in evidence in any proceedings under this section, without further proof, unless it is proved that the medical officer by whom it purports to be signed did not in fact sign it, but, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before it for the first time.

Section 148(1) allows for circumstances where a person who is unfit to stand trial and is not in the custody of a 'medical officer in charge of a mental hospital' as provided for in section 147(1). Section 148(2) gives the court power to determine if a person is fit to stand trial. It also allows for medical certificates to be tendered except where they have not been properly endorsed. The *Evidence Act* 2009 provides the procedure for tending expert reports.

Section 149 of the *Criminal Procedure Code* states:

Procedure when accused does not understand proceedings

149. (1) If the accused, though not insane, cannot be made to understand the proceedings-

(a) in cases tried by a Magistrate's Court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the Governor-General's pleasure; but every such order shall be subject to confirmation by the High Court;

(b) in cases which are the subject of a preliminary investigation by a Magistrate's Court and of trial by the High Court-

(i) the Magistrate's Court shall hear the evidence for the prosecution, and if satisfied that a prima facie case has been proved shall commit the accused for trial by the High Court, and either admit him to bail or commit him to prison for safe keeping; and

(ii) if the Director of Public Prosecutions has filed an information, the High Court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction, it shall order the accused to be detained during the Governor-General's pleasure;

(iii) If the Director of Public Prosecutions states that he does not intend to file an information, the accused shall be at once discharged in respect of the charge made against him, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged, but such a discharge shall not operate as a bar to any subsequent proceedings against him on account of the same facts

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(2) A person ordered to be detained during the Governor-General's pleasure shall be liable to be detained in such place and under such conditions as the Governor-General may in his discretion from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody.

(3) The Governor-General in his discretion may at any time of his own motion, or after receiving a report from any person or persons thereunto empowered by him, order that a person detained as provided in subsection (2) be discharged or otherwise dealt with, subject to such conditions as to the person remaining under supervision in any place or by any person, and

> such other conditions for ensuring the welfare of the said person and the public, as the Governor-General thinks fit.
>
> (4) When a person has been ordered to be detained during Governor-General's pleasure under paragraph (a) or paragraph (b) of subsection (1), the confirming or presiding Judge shall forward to the Director of Public Prosecutions a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

Section 149 provides for the situation where a magistrate is hearing evidence to determine guilt or is conducting a preliminary inquiry. Where a case is being brought in the Magistrate's Court it is usual that upon entering a conviction the offender will either be given a fine or a short custodial sentence. The section allows for indefinite detention, at the Governor-General's pleasure, even where a small fine might have been the penalty. This situation first arises in section 144. There is a requirement for confirmation of the order by the High Court, however, no assistance is given about how this is to occur or what factors the High Court is to take into account, or about the orders it can make.

Section 149(1)(a)(ii) further extends the Governor-General's role stating, 'if the court is of the opinion that the evidence which it has heard would justify a conviction, it shall order the accused to be detained during the Governor-General's pleasure'. This procedure effectively allows for an indefinite period of detention after a finding of guilt. If the offence is minor it is important to avoid having an accused subjected to the consequences allowed by the section.

Insanity: The Principle

> The purpose of the law in punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. It may be that there is an element of retribution in the criminal law, so that when people have committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depredations of dangerous and vicious people. Now, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.[17]

Legal Standard

The legal standard for a finding of insanity is found in *M'Naghten's* case.[18] The relevant words are:

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[17] *R v Porter* [1933] HCA 1; (1933) 55 CLR 182, 186.

[18] [1843-60] All ER Rep 229.

> . . . jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[19]

The principle is qualified in the case of *Sodeman v R*:

> On the emotional and volitional side the acts of the accused in this case show a deranged deviation from normality. But the law, for purposes of criminal responsibility, emphasises the cognitive aspect of the mental content at the time when the act constituting the offence is done. Neither extreme anger in itself nor uncontrollable impulse in itself is a defence in law, even if resulting from mental disease. The defence of insanity is established in law only if it is shown that the accused did not, at the relevant time, know the nature and quality of his act or, if he did, did not know that it was wrong, and that this absence of knowledge arose from a defect of reason amounting to a disease of the mind.[20]

The requirement for the defence to be made out is that the accused was suffering from a defect of reason from a disease of the mind which resulted in either:

1. the accused not knowing the nature and quality of the act; or

2. not to know that what he was doing what was wrong.

Defect of reason and disease of the mind is qualified in *R v Porter* in the following way:

> Mere excitability of a normal man, even stupidity, obtuseness, lack of self-control, are quite different things. . . .[21]

In *Batty v Attorney-General for Northern Ireland* further qualification is made in respect of defect of reason amounting to a disease of the mind:

> The major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. . . . any mental disorder which manifests itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.[22]

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19 Ibid 233.
20 [1936] HCA 75; (1936) 55 CLR 192, 205.
21 [1933] HCA 1; (1933) 55 CLR 182, 188.
22 (1963) AC 386, 412.

Not to know the nature and quality of the act is explained in *R v Porter*:

> In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object. In such a case he would not know the physical nature of what he was doing. He would not know the implications and what it really amounted to.[23]

In *R v Jenkins* the concept of '**Did not know he was doing what was wrong**' is discussed in the following way:

> For the question whether a man knows in the legal sense of intellectual awareness that an act is wrong is one capable of no little refinement in the minds of twelve laymen. Could their verdict be interpreted as excluding, as they seem to have done here, the basic psychiatric concept of diminished degrees of consciousness? I think so, and the effect of judicial decisions has been to exclude such a concept. A man is, in law, either perceptive and appreciative or he is not. 'Consciousness' and 'knowing', . . . are not lights, either on or off, they are like a finely graded scale. But the law interprets 'know' as used in the M'Naghten rules in a rigid and absolute way, for the rules are to be applied absolutely in New South Wales where the concept of diminished responsibility is not recognised as it is in England. So in answering the question whether the defence of insanity is established or not these degrees of knowing, though perhaps psychologically true, are legally inapplicable.[24]

In *R v Porter* the concept of **'wrong' and 'reasonable people'** is discussed:

> The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by 'wrong'? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. . . . not that he reasoned wrongly, or that being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right or wrong.[25]

Wrong at law is referred to in *Stapleton v R*:

> The truth perhaps is that, from a practical point of view, it cannot often matter a great deal whether the capacity of the accused person is measured by his ability to understand the difference between right or wrong according to reasonable standards, or to understand what is punishable by

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23 [1933] HCA 1; (1933) 55 CLR 182,188.
24 (1963) 81 WN (Pt. 2) (NSW) 44, 52.
25 [1933] HCA 1; (1933) 55 CLR 182, 189, 190.

> law, because in serious things the two ideas are not easily separable. But in certain cases, where the insane motives of the accused arise from complete incapacity to reason as to what is right or wrong (his insane judgment even treating the act as one of inexorable obligation or inescapable necessity) he may yet have at the back of his mind an awareness that the act he proposes to do is punishable by law.[26]

The insanity has to be at the time of the offence.

The *Criminal Procedure Code* contains provisions that are applicable to questions of unfitness to stand trial and insanity. Section 256, for example, requires consideration of whether a person is of 'unsound mind' if they stand mute when arraigned. It states:

> **256.** If any accused person being arraigned upon any information stands mute of malice, or neither will, nor by reason of infirmity can, answer directly to the information, the court, if it thinks fit, shall order the Registrar or other officer of the court to enter a plea of "not guilty" on behalf of such accused person, and the plea so entered shall have the same force and effect as if such accused had actually plead the same; or else the court shall thereupon proceed to try whether the accused person be of sound or unsound mind, and, if he shall be found of unsound mind, and consequently incapable of making his defence, shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the court thinks fit, and shall report the case for the order of the Governor-General.
>
> The Governor-General may order such accused person to be confined in a mental hospital, prison, or other suitable place for safe custody.

The words 'unsound mind' are applicable to people who are unfit to stand trial and those who are insane. They are words that are not defined in the statutes. The words are also used in the *Mental Treatment Act* and can be regarded as having a very wide meaning that would include people who are suffering from a mental illness or a mental disability.

Sections 145 and 146 of the *Criminal Procedure Code* deals with some of the criminal procedures relevant to insanity, it states:

> **Defence of unsoundness of mind at preliminary investigation**
>
> **145.** When the accused person appears to be of sound mind at the time of a preliminary investigation, the court, notwithstanding that it is alleged that, at the time when the act was committed in respect of which the accused person is charged, he was by reason of some disease of mind labouring under a defect of reason as to be incapable of knowing the nature and quality of the act or, if he did know it, that he did not know that it was contrary to law, shall proceed with the case and, if

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[26] [1952] HCA 56; (1952) 86 CLR 358 at 375.

the accused person ought, in the opinion of the court, to be committed for trial on information, the court shall so commit him.

Defence on unsoundness of mind on trial

146. (1) (a) Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that at the time when the act was done or omission made, he was by reason of a disease of mind labouring under a defect of reason as to be incapable of knowing the nature and quality of the act, or if he did know it that he did not know it was contrary to law, then if it appears to the court before which such person is tried that he did the act or made the omission charged but was incapable as aforesaid at the time when he did or made the same, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(b) When such special finding is made the court shall report the case for the order of the Governor-General and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

(c) The Governor-General, in his discretion, may order such person to be confined in a mental hospital, prison or other suitable place of safe custody.

(2) The officer in charge of a mental hospital, prison or other place in which any person is detained by an order of the Governor-General under subsection (1) shall make a report in writing to the Director of Public Prosecutions for the consideration of the Governor-General in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the Governor-General's order and thereafter at the expiration of each period of two years from the date of the last report.

(3) On the consideration of any such report, the Governor-General in his discretion may order that the person so detained be discharged or otherwise dealt with, subject to such conditions to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the Governor-General thinks fit.

(4) Notwithstanding the provisions of subsections (2) and (3), any person or persons thereunto empowered by the Governor-General may, at any time after a person has been detained by order of the Governor-General under subsection (1), make a special report to the Director of Public Prosecutions, for transmission to the Governor-General, on the condition, history and circumstances of the person so detained, and the Governor-General, on consideration of any such report, in his discretion,

> may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the Governor-General thinks fit.
>
> (5) The Governor-General, in his discretion, may at any time order that a person detained by order of the Governor-General under subsection (1) be transferred from a mental hospital to a prison or from a prison to a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

Automatism

The issue of voluntariness must be resolved before any issue of specific intent. Criminal responsibility does not arise if an act is done in a state of automatism. Where the act is: not done in consciousness of the nature of the act; and not in exercise of choice to do an act of that nature, then automatism arises as a defence.[27]

Insane Automatism

If there is an underlying mental infirmity, which is prone to recur, which deprives the accused of the capacity to control his or her act and which prevents him or her from appreciating its nature and quality, then insane automatism is an issue.

Voluntariness, intent and mental disease were considered by the High Court in *Hawkins v The Queen.*[28]

Sane Automatism

This may arise where there is a transient, non-current mental malfunction caused by external factors, whether physical or psychological, which the mind of an ordinary person would be likely to not have withstood and which produces incapacity to control his or her acts.[29]

Examples of sane automatism include:

1. the act of a sleepwalker;
2. the post-traumatic loss of control due to head injury;
3. an act done in a state of temporary or transient dissociation following severe emotional shock or psychological trauma. Not prone to recur and which the mind of an ordinary person (of the accused's age and circumstances and of normal temperament and control) would be likely not to have withstood;

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27 *Ryan v R* [1967] HCA 2; (1967) 121 CLR 205, 213; *The Queen v Falconer* (1990) 171 CLR 30, 39.

28 *Hawkins v R* [1994] HCA 47; (1994) 179 CLR 500.

29 *R v Falconer* [1990] HCA 49; (1990) 171 CLR 30, 30, 53.

4. an act done under the influence of an anaesthetic;
5. some forms of epilepsy, depending on their aetiology.

Sane automatism does not involve any question of disease of the mind. It is concerned with involuntariness, which does not derive from disease of the mind or mental illness.

Where there is evidence capable of demonstrating automatism, then it must be left to the jury to determine whether the automatism was sane or insane in nature.

In *R v Akaua* Davis CJ acquitted the accused after a successful defence of automatism was raised.[30] He stated:

> But counsel for the defence also suggested to the court in his closing address that this was a case in which the defence of automatism applied, being one in which the accused had stabbed the deceased involuntarily while in a state of concussion from the blow to the head he had received from the deceased. As I say, the first mention of this defence was made in counsel's closing address. The Court had the benefit of no medical evidence that the accused could, unknown to himself after receiving a blow to the head of the sort described in evidence, have stabbed the deceased in the manner in which Dr Gude described the deceased's chest injury to have been caused. The only evidence is that of the accused himself and that of Nawere that the accused received a severe blow to the head at the time that the deceased must have received the injury that caused his death.
>
> Is this evidence enough on which to base the defence of automatism?
>
> In the case of Bratty v. Attorney-General for Northern Ireland (1962) 46 CAR 1 (H.L.), Lord Denning said this (p. 16): -
>
> "My Lords, in the case of Woolmington v. The Director of Public Prosecutions (1935) 25 Cr. App. R. 72 at p. 96; (1935) A.C. 452 at p. 482 Viscount Sankey L.C. said that "when dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused." The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as "automatism "- means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleep-walking. The point was well put by Stephen J. in 1889: "Can anyone doubt that a man, who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing," see Tolson (1889) 23 Q.B.D. 168, 187."

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30 [1980] SBHC 4; [1980-1981] SILR 7.

And later (p. 20)

"My Lords, I think that the difficulty is to be resolved by remembering that, whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption, they must give some evidence from which the contrary may reasonably be inferred. Thus a drunken man is presumed to have the capacity to form the specific intent necessary to constitute the crime, unless evidence is given from which is can reasonably be inferred that he was incapable of forming it, see the valuable judgment of the Court of Session in (Kennedy v. H.M. Advocate, supra) 1944 S.C. (J) 171 at p. 177 which was delivered by Lord Normand. So also it seems to me that a man's act is presumed to be a voluntary act unless there is evidence from which it can reasonably be inferred that it was involuntary. To use the words of Devlin J., the defence of automatism "ought not to be considered at all until the defence has produced at least prima facie evidence," see Hill v. Baxter (1958) 42 Cr. App. R. at p. 59; (1958) 1 QB at p. 285; and the words of North J. in New Zealand: "unless a proper foundation is laid, "see Cottle (1958) NZLR at p. 1025. The necessity of laying this proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury, any more then the defence of drunkenness (Kennedy v. H.M Advocate, supra), provocation (Gauthier (1943) Cr. App. R. 113) or self-defence (Lobell (1957) 41 Cr. App. R. 100; (1957) 1 QB 541) need be.

What then is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a blackout": for "blackout," as Stable J. said in Cooper v. McKenna (1960) Queensland L.R. at p. 419, "is one of the first refuges of a guilty conscience and a popular excuse." The words of Devlin J. in Hill v. Baxter (1958) 42 Cr. App. R. at p. 59; (1958) 1 QB at p. 285 should be remembered: "I do not doubt there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent." When the only cause that is assigned for an involuntary act is drunkenness, then it is only necessary to leave drunkenness to the jury, with the consequential directions, and not to leave automatism at all. When the only cause that is assigned for it is a disease of the mind, then it is only necessary to leave insanity to the jury, and not automatism. When the cause assigned is concussion or sleep-walking, there should be some evidence from which it can reasonably be inferred before it should be left

to the jury. If it is said to be due to concussion, there should be evidence of a severe blow shortly beforehand. If it is said to be sleep-walking, there should be some credible support for it. His mere assertion that he was asleep will not suffice.

Once a proper foundation is thus laid for automatism, the matter becomes at large and must be left to the jury. As the case proceeds, the evidence may weigh first to one side and then to the other: and so the burden may appear to shift to and fro. But at the end of the day the legal burden comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act.

I refer also to the obiter dictum of the Lord Chancellor in the same case at p. 14: -

"Where the defence succeeds in surmounting the initial hurdle (see Mancini, supra), and satisfies the judge that there is evidence fit for the jury to consider, the question remains whether the proper direction is - (a) that the jury will acquit if, and only if, they are satisfied on the balance of probabilities that the accused acted in a state of automatism; or (b) that they should acquit -if they are left in reasonable doubt on this point. In favour of the former direction it might be argued that, since a defence of automatism is (as Lord Goddard said in Hill v. Baxter (supra) very near a defence of insanity, it would be anomalous if there were any distinction between the onus in the one case and in the other. If this argument were to prevail, it would follow that the defence would fail unless they established on a balance of probabilities that the prisoner's act was unconscious and involuntary in the same way as, under the M'Naghten Rules, they must establish on a balance of probabilities that the necessary requirements are satisfied.

Nevertheless, one must not lose sight of the overriding principle, laid down by this House in Woolmington's case (supra), that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind; normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further. But, if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary mens rea - if indeed the actus reus - has not been proved beyond reasonable doubt."

I sit in this case as both judge and jury, as judge of both law and fact. It is therefore for me to decide (1) as a matter of law, whether the evidence in this case discloses a sufficient foundation for the defence of automatism and (2) as a matter of fact, whether I am satisfied beyond reasonable doubt (a) that the accused did cause the wound from which the deceased died and (b) that he was not in a state of automatism when he did so.

As regards (1), I have come to the conclusion that, even without medical evidence, the evidence of the blow to the accused's head struck by the deceased, together with the accused's own evidence as to his state of mind

> after receiving that blow, is sufficient foundation for the defence of automatism put forward in this case.
>
> As regards 2(a) I have come, to the conclusion that I am satisfied beyond reasonable doubt that the accused did cause the injury to the deceased that caused his death. I should add here that I am not satisfied beyond reasonable doubt that the accused caused any of the other injuries found by Dr. Gude on the deceased's body.
>
> As regards 2(b), there is no direct evidence before me as to how the accused caused the injury to the deceased's chest from which the deceased died. There is no evidence that this was caused by a voluntary as opposed to an involuntary act of the accused. In my view the prosecution have not been able to discharge the burden upon it that the accused when he struck. The deceased was acting voluntarily and with knowledge that what he was doing would probably cause the death of, or grievous bodily harm to, the deceased. Accordingly I find that I am not satisfied beyond reasonable doubt that the accused killed the deceased with malice aforethought. I am not satisfied beyond reasonable doubt that when he struck the deceased the accused was not in a state of automatism in that he struck the deceased, without any knowledge as to what he was doing, involuntarily, acting as an automaton as a result of the blow to the head he had received from the deceased. If he had no knowledge of what he was doing at the time he struck the deceased he cannot be found guilty of murder and he is entitled to be acquitted.
>
> Accordingly I acquit the accused and he is discharged.[31]

Diminished Responsibility

Where there is a charge of murder diminished responsibility may be an issue that requires an expert opinion. Section 203 of the *Penal Code* states:

> **Persons suffering from diminished responsibility**
>
> **203.** (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

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[31] Ibid.

> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

An 'abnormality of mind' has been found to include brain damage due to the long term deleterious effects of the consumption of alcohol, however, it does not include the temporary state of intoxication.[32]

The concept of diminished responsibility is discussed in *R v Spriggs*:

> This conception of diminished responsibility is a novelty in English law. It is borrowed from the Scottish law, where it has apparently always been part of the common law of Scotland. I see that I was reported yesterday as having said, and no doubt I did, that the Lords of Justiciary in Scotland had always had difficulty in explaining this matter to a jury. Perhaps that might be thought to be not quite polite to the Scottish judges, but what I meant was that the Scottish judges have always found that it is a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what 'diminished responsibility' means.[33]

The case of *H. M Advocate v Braithwaite* is cited with approval in Spriggs and the following instruction to the jury from that case is provided as an appropriate example.

> '". . . that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions. . . And I think one can see running through the cases that there is implied . . . that there must be some form of mental 'disease'. The matter has been put in different words by other judges. I notice in a later case that the condition was referred to for short as 'partial insanity'; and that this was explained as meaning 'that weakness or great peculiarity of mind which 'the law recognised as possibly differentiating a case of murder from one of culpable homicide.' . . . 'Was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?' You will see, ladies and gentlemen, the stress that has been laid in all these formulations upon weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like."

Diminished responsibility arises on a charge of murder where all other issues, including self defence and provocation, have been determined in

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[32] *R v De Luca* (1959) 43 Cr App R 167 at 173–174; *R v Jones* (1986) 22 A Crim R 42. See also *R v Ryan* (1995) 90 A Crim R 191.

[33] [1958] 1 QB 270, 274, 275.

favour of the Crown. Abnormality of mind is restricted to the accused's capacity to:

- understand events; or
- to judge whether his or her actions were right or wrong; or
- to control himself or herself.

The impairment must be substantial. The underlying condition has to be a pre-existing mental or psychological condition that is not transitory. The underlying condition does not have to be permanent. Self-induced intoxication is to be disregarded.

Infanticide

Section 206 of the *Penal Code* allows for the offence of infanticide which is treated as manslaughter when the offending woman is convicted. Section 206 states:

> **Infanticide**
>
> **206**. Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child.

Where the partial defence of infanticide is raised the evidence of a psychiatrist or psychiatrist would be useful. Such expert opinion would also be useful on sentence.[34]

In this chapter some examination was made of the use of expert evidence: much of such opinion evidence falls under an exception to the hearsay rule. The next chapter examines hearsay evidence in some detail, an area of law that many practitioners have difficulty understanding and even more difficulty applying at trial. It is, however, an area of law that requires understanding and where necessary application.

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[34] Some Solomon Island cases where infanticide was an issue are: *Regina v Hong* [2004] SBCH 33; *Regina v Irobako* [1992] SBCH 30; *Regina v Emmanuel* [2010] SBCH 21; and *Regina v Faununu* SBCH 28.