Insanity: A Defence of General Application

By Elisabeth Bussey-Jones

The case of *Loake v Crown Prosecution Service* [2017] EWCA (Admin) 2855 (16th November 2017) dealt with a point of law as to the availability of '*insanity*' as a defence to a charge which did not require the Crown to prove criminal intent.

Relevant Background

The defence of insanity is one that can be raised by a defendant, supported by medical evidence, and on which the defence bear the burden of proof on the balance of probabilities.

The case came before the Queen's Bench Division (Divisional Court) by way of case stated from the Crown Court, which itself had heard the case by way of an appeal from the Magistrate's Court. The question arising from the stated case was as follows:

> "Is the defence of insanity available for a defendant charged with an offence of harassment, contrary to section 2(1) Prevention from Harassment Act 1997?"

The case of Mrs Loake concerned a Defendant seeking to appeal her conviction in the Magistrate's court for a section 2 harassment offence: namely, sending a large number of text messages over a period of time to her ex-husband. No question arose as to fitness to plead or fitness to stand trial and the matter in the Divisional Court was approached on the basis that the acts had been done but there was evidence which could have founded a defence of insanity, if such a defence was available to that charge.

On a preliminary issue in the appeal from the Magistrate's Court to the Blackfriars Crown Court, the Appellant sought to argue that the M'Naughten Rules apply not only to the *mens rea* for an offence but also the *actus reus*. The Prosecution argued that the offence required no proof of the intention or knowledge of wrong doing that could be negatived by the defence of insanity, and that the offence was made out by the acts together with the

objective test of whether the appellant ought to have known her actions amounted to harassment.

Mr Recorder Nicklin Q.C., as he then was sitting in Blackfriars Crown Court together with two magistrates, agreed with the Crown's submissions and the key aspects of their ruling were as follows:

(1) To be convicted of the offence under section 2(1), the prosecution had to prove

(a) that the Applicant had pursued a course of conduct amounting to harassment;

and

(b) either that the Applicant knew that the act amounted to harassment or a

reasonable person in possession of the same information would think the course

of conduct amounted to harassment.

(2) Applying the case of *R v Colohan* [2001] EWCA Crim 1251, the test of whether a reasonable person would consider the course of conduct amounted to harassment was wholly objective.

(3) The prosecution were not required to establish any *mens rea* and a prosecution could succeed on proof of the acts done and that they amounted to harassment, objectively judged. "Whether the Defendant thought that the act amounted to harassment was irrelevant".

(4) Following *DPP v H* [1997] 1 WLR 1406, 1409B-E *per* McCowan LJ the defence of insanity has no relevance to a charge that does not require proof of *mens rea.*

Accordingly, the decision in the Crown Court was that the Applicant's alleged insanity was not available as a defence to the harassment offence, although it may have been relevant to mitigation.

In a judgment given by Irwin LJ and Julian Knowles J in the Divisional Court, the Court said that in order to resolve the issues before them, it was important to examine closely how the defence of insanity operates so as to relieve a defendant of the criminal liability which would otherwise attach to their actions. In order to do that, close examination was given to the reasoning behind the two well known limbs of what are commonly known as the M'Naughten's rules, namely 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".

Their Lordships note the slightly "anomalous" historical status of those rules which appear to have come from discussion in the House of Lords in 1843 following the case which dealt with the shooting of Sir Robert Peel's Secretary by Daniel M'Naughten. Nonetheless, it is noted that "they have been repeatedly accepted as laying down the law of England as to insanity at the time of the alleged offence" (para 19).

At paragraph 20, their Lordships quote from the authors of *Smith and Hogan's Criminal Law* (14th Edn, 2015) to summarise those two limbs of the defence of insanity as follows:

> "1. He must be found not guilty by reason of insanity if, because of a disease of the mind, he did not know the nature and quality of his act (effectively a denial of mens rea); or
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> 2. Even if he did know the nature and quality of his act, he must be acquitted if, because of a disease of the mind, he did not know it was 'wrong'."

The first limb refers to the physical nature and quality of the act and 'not to its moral or legal quality', as per *R v Codere* (1917) 12 Cr App R 21.

The second limb means a defendant did not know it was 'legally wrong' rather than 'morally wrong'. Their Lordships gave the example of a person not succeeding on the defence of insanity where knowing their act to be legally wrong, they nonetheless felt they were morally justified. (*Windle* [1952] QB 826 cited)

In their judgment, Irwin LJ and Knowles J found it unnecessary to rehearse another controversial area concerning this defence, namely what constitutes a 'disease of the mind'. Save to say at paragraph 33 they note: "... the kind of disorder that is relevant is not necessarily a disease in the ordinary sense of that word, and the word "mind" is not interpreted to mean "brain". A range of conditions may qualify as a "disease of the mind" for the purposes of the defence, as long as they produce a malfunctioning of the mind".

The Court ruled that (para 35):

> "At the heart of the rationale for the insanity defence is the principle that criminal punishment should only be imposed upon those who are responsible for their conduct. As Professor Hart put it in Punishment and Responsibility (1968), p15:
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> > "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent..... the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice".

The Court drew on the words of Lord Diplock in *R v Sullivan* [1984] AC 173, and that with the passage of time since the M'Naughten's rules were formulated "it might more aptly be expressed as "He did not know what he was doing". Indeed that is the way direction to Juries are now worded".

The Court agreed with the proposition that 'insanity is based on the absence of mens rea' may be true for the first limb of M'Naughten's Rules, where a defendant is asserting they did not know the nature and quality of their act, but that is not necessarily the case in relation to the second limb of the M'Naughten's rules which require a defendant not to know what they were doing was wrong:

> "Such a defendant may have the mens rea for the offence but nonetheless receive the benefit of the special verdict (in the Crown Court) if he shows that he did not know the nature and quality of his act".

In their reasons for finding that the cases of *Director of Public Prosecutions v Harper* [1997] 1 WLR 1406 and *R v Horseferry Road Magistrates Court ex parte K*, [1997] Q.B. 23 should also not be followed on this point, they referred to these decisions being inconsistent with "*Hennessy [1989] 1 WLR 287,* where insanity was held to be an appropriate defence to charges which included the strict liability offence of driving while disqualified".

They agreed, as per the authors of *Smith and Hogan,* that the defence of insanity "is of general application".

Accordingly, they found that:

"If insanity is available as a defence even to a person who possesses the mens rea for the offence of harassment, then even if that person commits conduct which viewed objectively amounts to harassment then he will not be guilty if he does not know that what he is doing is wrong, in the sense of the conduct being contrary to law".

To illustrate their decision they referred to the example of a person repeatedly telephoning their neighbour in the deluded belief that he has received a divine order or direction to do so, and that it is therefore in their mind lawful to comply, then that person is not guilty by reason of insanity under the second limb of the M'Naughten Rules and they said that would be so, notwithstanding that he has committed the *actus reus* of the offence and his conduct, viewed objectively, amounts to harassment: "such a man does not know that what he is doing is wrong and therefore as a matter of principle should not be subject to criminal punishment".

The judgment ends with a word of warning against the 'floodgates' of those seeking to rely on an ill founded defence and made the point that Judges should be vigilant to assure the basis of the defence is made out.

Conclusion

The case is of particular significance because it concludes that "insanity actually rests on a broader base than mere absence of mens rea" and that in so far a previous cases and the authors of Archbold (in repeated editions but at paragraph 17-84 of the current edition) have stated that "Insanity at the time of the commission of the alleged offence is merely a particular situation where *mens rea* is lacking", that statement goes too far and such an interpretation is misleading.

This judgment clarifies a controversial and critical aspect of the defence of insanity: ensuring that those operating under a malfunctioning of the mind are not deprived of the defence simply because of the limited elements the Crown may need to prove for a given offence.

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