NILQ 65(2): 153–66

The insanity defence in operation

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Little is known about how the M'Naghten Rules[1] operate in practice. This paper will attempt to redress this gap in knowledge by exploring available data on successful pleas of insanity over several decades. In doing so it will assess the value of such empirical studies and what they may bring to the reform agenda.

Other empirical studies

Although much has been written about the insanity defence and the M'Naghten Rules, very little of this work has considered how the rules operate in practice. In short, there have been very few empirical studies into the workings of the insanity defence in English law. Such studies as do exist have tended to focus on homicide with the result that other offences resulting in special verdicts have been excluded.[2] A notable exception, however, is the study by Professor Cheryl Thomas entitled 'Not Guilty by Reason of Insanity (NGRI) Verdicts (2006–2009)' commissioned by the Law Commission as part of its ongoing work into insanity and automatism.[3] This study covers the 28-month period of 1 October 2006 to 31 January 2009 and examines all Not Guilty by Reason of Insanity (NGRI) verdicts in relation to verdicts, defendants, cases and offences. In doing so it is stated that:

> This varied approach to analysing the data is important in order to present an accurate picture of Not Guilty by Reason of Insanity Verdicts. This is because it enables the analysis to take into account multiple charges and/or defendants, and therefore a single approach to analysing data can produce misleading results.[4]

Clearly, such a varied approach does add extra data and as such is a valuable addition to my own studies, which in turn I hope have not produced misleading results. In that connection, while it may be useful to have data on multiple verdicts, one must take care in how the overall figures are interpreted as it is stated that:

1 *R v M'Naghten* (1843) 10 Cl & F 200, 210; {1843–60] All ER Rep 229, 233.

2 See, for example, E Gibson and S Klein, *Murder 1957 to 1968: A Home Office Statistical Division Report on Murder in England and Wales* (The Stationery Office 1969); Nigel Walker, *Crime and Insanity in England* (Edinburgh University Press 1968); Matthew Large et al, 'Homicide Due to Mental Disorder in England and Wales over 50 years' (2008) 193 British Journal of Psychiatry 130.

3 See: Law Commission, *Insanity and Automatism: Supplementary Material to the Scoping Paper* (Law Com SP 2012) appendix B.

4 Ibid para B.2.

> In the 28-month time period covered by the CREST data, Not Guilty by Reason of Insanity verdicts (89) account for 0.3% of all Not Guilty jury verdicts reached by deliberation (33,865).[5]

While this may be so, it is important to note, as the study does in Table 1, that these 89 verdicts were the result of 40 cases in the sense that only 40 defendants were found NGRI during this research period. In essence, therefore, this study contains much of interest and is a welcome supplement to my own empirical studies as any additional data on the operation of the insanity defence are to be welcomed.

My older empirical studies

In my first study entitled 'Fact and Fiction about the Insanity Defence' published in 1990[6] and updated in 1995,[7] the legal position was that any successful insanity defence resulted in admission to hospital for an indefinite period of time with the result that the defence was rarely used. Despite this, the research revealed, firstly, that insanity was not confined to murder or attempted murder but was pleaded in respect of a wider variety of offences, particularly non-fatal offences; secondly, that the most common diagnosis used to support an insanity acquittal was that of schizophrenia, which in turn often led to a use of the 'wrongness' limb under the M'Naghten Rules; and, finally, that the majority of those acquitted on the grounds of insanity were being sent to local hospitals, where in some instances they were released within a mere matter of months. Taken together, these results suggested that the insanity defence was not quite as moribund as many had suggested. What followed was a policy paper from the then C3 Division of the Home Office favouring the introduction of flexibility of disposal for both insanity and unfitness to plead. This resulted in a Private Members' Bill which in turn resulted in the enactment of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. The 1991 Act signalled the end of mandatory hospitalisation except where the charge was one of murder. It did so by introducing four additional disposals for both insanity and unfitness to plead, namely admission to hospital without restrictions, a guardianship order, a supervision and treatment order and an absolute discharge. By giving judges this new range of disposals it seemed likely that the use of the insanity defence would increase.

My second empirical study was designed to explore the first five years' operation of the 1991 Act from 1992 to 1996.[8] In doing so it found that the 1991 Act had resulted in an increase in the use of the insanity defence. Offences against the person continued to predominate but there had been a marked decrease in the number of cases of murder. The most common diagnosis used to support a defence of insanity continued to be schizophrenia. The 'wrongness limb' under the M'Naghten Rules continued to be more regularly used in psychiatric reports than the 'nature and quality' limb. Further, in the majority of cases the insanity defence was not disputed by the prosecution with the jury having no real deliberative role in the sense of being required to decide whether the accused was legally insane. The majority of those found NGRI were not sent to hospital (52.2%) but received community disposals, particularly supervision and treatment orders (47.7%). In short, judges were making full use of the disposal flexibility introduced by the 1991 Act. These findings were mirrored in my third empirical study which explored the second five-

5 Ibid para B.12.

6 R D Mackay, 'Fact and Fiction about the Insanity Defence' [1990] Criminal Law Review 247.

7 See R D Mackay, *Mental Condition Defences in the Criminal Law* (Oxford University Press 1995) 102–05.

8 R D Mackay and G Kearns, 'More Fact(s) about the Insanity Defence' [1999] Criminal Law Review 714.

year period of the operation of the 1991 Act from 1997 to 2001.[9] In particular, there was a continued but gradual increase in the use of the insanity defence, with a five-year total of 72 including a maximum of 17 special verdicts in 1999. Once again the majority of those found NGRI were not sent to hospital but received community disposals (52.8%, n=38), particularly supervision and treatment orders (41.7%, n=30), but with some increase in absolute discharges.

My most recent empirical study was commissioned by the Law Commission as part of its ongoing work in relation to the reform of the insanity defence. This study was published on 18 July 2012 in the Commission's 'Supplementary Material to its Scoping Paper on Insanity and Automatism'[10] and is summarised in my paper entitled 'Ten More Years of the Insanity Defence'.[11] Before I discuss this study I will make a few remarks about the Scoping Paper,[12] the primary purpose of which was 'to discover how in the criminal law of England and Wales the defences of insanity and automatism are working, if at all'.[13] In doing so the Commission emphasised the need for evidence about the use of insanity and automatism, describing existing data as 'very limited', and thus 'it is very difficult to make a meaningful assessment of the way the defences operate in practice'.[14]. In the hope of resolving this difficulty, the Commission invited responses to 76 questions which it posed. Question 9 asked for information about unsuccessful pleas of insanity together with evidence of how frequently insanity pleas are made. In its analysis of responses to this question the Commission stated that 'It is rarely pleaded unsuccessfully'[15] but could provide no data to support this conclusion. Question 10 asked for reasons why cases of successful insanity pleas might not have been recorded in the official data. The analysis of responses suggested, first, that some NGRIs appeared from Crown Prosecution Service data to be recorded as ordinary acquittals and, secondly, that in the view of the Criminal Bar Association fewer clerks allocated to courts made it less likely figures would be entered. While the latter is difficult to verify, with regard to the data I receive from the Ministry of Justice this suggests that, rather than being recorded as ordinary acquittals, there is a minimal number of such cases where the court had not recorded them using the correct verdict code; instead, they had entered it as an 'Other' verdict code.[16]

The Commission received only 20 written responses and one telephone response to its Scoping Paper.[17] In summarising the primary purpose of the paper as being 'to draw out evidence of how the defences work in practice', the Commission commented: 'Given that one of the difficulties we had identified was the lack of data, we were not surprised that little further data was provided. The nature of many of the responses was anecdotal.'[18] Despite this lack of data, the Commission drew from the responses the conclusion that insanity is 'little used . . . is rarely pleaded, and is pleaded only if it is likely to be a successful

9 R D Mackay, B J Mitchell and L Howe, 'Yet More Facts about the Insanity Defence' [2006] Criminal Law Review 399.

10 Law Commission (n 3) appendix E.

11 Ronnie Mackay, 'Ten More Years of the Insanity Defence' [2012] Criminal Law Review 946.

12 Law Commission, *Insanity and Automatism*, A Scoping Paper, 18 July 2012.

13 Ibid para 1.1.

14 Ibid para 1.23.

15 Law Commission, *Criminal Liability: Insanity and Automatism: A Discussion Paper* (Law Com DP 2013) appendix B, para B.22.

16 As a result, my updated study discussed below includes 7 additional NGRI cases giving a total for the 10-year period 2002–2011 of 230 cases compared to 223 cases in my Law Commission study.

17 Law Commission (n 15) para B.1.

18 Ibid para 1.80.

plea'.[19] This is certainly the view that I have long held, namely that my empirical studies of successful pleas of insanity capture the vast majority of such pleas. Of course, I cannot prove this but the failure of the Commission's Scoping Paper to produce data which suggests otherwise bolsters my view.

I now turn to the empirical study of the insanity defence that I conducted for the Commission which covered the ten-year period 2002 to 2011, which I have now updated to include the year 2012.

Recent research results

What follows is a study of verdicts (successful pleas) of NGRI during the 11-year period from 2002 to 2012 in order to assess the continued impact of flexibility of disposal together with the effect of the changes implemented by the Domestic Violence, Crime and Victims Act 2004. At the outset, however, the limitations of this current study need to be emphasised for, unlike my three earlier studies referred to above, on this occasion access to court files, and in particular relevant psychiatric reports, was unavailable. Despite this, however, the following research tries to give an up-to-date picture relating to insanity verdicts in England and Wales. Although the Statistics of Mentally Disordered Offenders continue to give the number of NGRI verdicts annually in relation to restricted patients,[20] no official statistics are published on the use of the insanity defence where other disposals are given. A final caveat, therefore, relates to the consistency of the data which were collected for this study using three statistical returns from the Ministry of Justice. Inevitably, although some disparity has been found in relation to these three sources, as complete a picture as seems possible of NGRI verdicts has emerged for the purpose of this research.[21]

The research findings

The number of NGRI findings

Table 1 gives the annual number of findings of NGRI for the last 5 years of the operation of the original 1964 Act, the first 5 years, the second 5 years and the third and fourth 5 years of the 1991 Act. The figures in brackets give the percentage increase in NGRI findings for each 5-year period of the 1991 Act. Although the picture is of a gradual but steady rise in the number of NGRI verdicts, it is noticeable that the overall percentage increase in NGRI findings has been in decline. Thus, in the fourth 5 years there was an annual average of 25.2 NGRI verdicts giving a 21.2% increase compared with an average of 20.8 (44.4% increase), 14.4 (63.6% increase) and 8.8 (120% increase) verdicts in the third, second and first 5-year periods respectively. This compares to an average of 4 from 1987–1991 (and 3.6 in the previous 5 years from 1982–1986, n=18) with an overall total for the first 20 years of the 1991 Act of 346, giving an annual average of 17.3 NGRI verdicts.

Table 2 gives the annual number of NGRI verdicts for the research period for this study, namely 2002 to 2012. The total of NGRI verdicts during this period was 260, giving an annual

19 Ibid 1.81.

20 See Ministry of Justice Offender Management Caseload Statistics 2012 annual tables at Table A6.5. It should also be noted that the Ministry of Justice figures are based on the date of the hospital warrants rather than the date of the finding. This may have led to minor inconsistency in relation to the actual number of annual findings. Thus, the total number of NGRI verdicts which resulted in hospital orders with restrictions recorded by the Ministry of Justice in the above table for the 11-year period 2002 to 2012 is 74 while the number contained in this study for the same 11 years is 73 (see Table 5 below).

21 I would like to acknowledge my gratitude to all the agencies and personnel involved for the generous assistance I received from them in carrying out this research.

1a 1964 Act Final 5years		1b 1991 Act 1st 5 years		1c 1991 Act 2nd 5 years		1c 1991 Act 3rd 5 years		1d 1991 Act 4th 5 years	
Year	Number	Year	Number	Year	Number	Year	Number	Year	Number
1987	2	1992	6	1997	10	2002	23	2007	13
1988	4	1993	5	1998	16	2003	17	2008	29
1989	3	1994	8	1999	17	2004	20	2009	27
1990	4	1995	12	2000	14	2005	20	2010	21
1991	7	1996	13	2001	15	2006	24	2011	36
Total	20	Total	44 (120%)	Total	72 (63.6%)	Total	104 (44.4%)	Total	126 (21.2%)

Table 1: Findings of NGRI by 5-year periods from 1987–2011

Year	Frequency	Per cent	Cumulative per cent
2002	23	8.8	8.8
2003	17	6.5	15.4
2004	20	7.7	23.1
2005	20	7.7	30.8
2006	24	9.2	40.0
2007	13	5.0	45.0
2008	29	11.2	56.2
2009	27	10.4	66.5
2010	21	8.1	74.6
2011	36	13.8	88.5
2012	30	11.5	100.0
Total	**260**	**100.0**	

Table 2: NGRI verdicts 2002–2012

Age range of accused	**Sex of accused**		**Total**
	male	female	
up to 15	1	0	1
15–19	10	0	10
20–29	78	6	84
30–39	74	13	87
40–49	35	9	44
50–59	24	2	26
60–69	6	1	7
70–79	1	0	1
Total	**229**	**31**	**260**

Table 3: Sex/age distribution

	Frequency	Per cent	Cumulative per cent
Murder	5	1.9	1.9
Attempted murder	45	17.3	19.2
Manslaughter	1	0.4	19.6
GBH	56	21.5	41.2
ABH	32	12.3	53.5
Arson	35	13.5	66.9
Criminal damage	7	2.7	69.6
Robbery	11	4.2	73.8
Burglary	8	3.1	76.9
Indecent/sexual assault	18	6.9	83.8
Threats to kill	2	0.8	84.6
Kidnap/child abduction	3	1.2	85.8
(Death by) dangerous driving	9	3.5	89.2
Possession/ importation/supply of drugs	1	0.4	89.6
Endangering aircraft	1	0.4	90.0
Breach restraining order	1	0.4	90.4
Affray	8	3.1	93.5
False imprisonment	2	0.8	94.2
Having article with blade	3	1.2	95.4
Theft	1	0.4	95.8
Racially aggravated assault	2	0.8	96.5
Bomb hoax	1	0.4	96.9
Child cruelty	1	0.4	97.3
Possession offensive weapon	2	0.8	98.1
Indecent exposure	2	0.8	98.8
Aid/abet reckless driving	1	0.4	99.2
Blackmail	1	0.4	99.6
Breach anti-social behaviour order	1	0.4	100.0
Total	**260**	**100.0**	

Table 4: Offences

average of 23.6. In essence, therefore, the annual average number of NGRI verdicts has now reached over 20 for the first time, with the totals for 2011 and 2012 now having exceeded 30.

Table 3 gives sex/age distribution of those found NGRI. It shows that the vast majority of those found NGRI continue to be males, at 88.1 per cent (n=229), compared to 11.9 per cent for females (n=31). The mean age at the time of the offence was 35.3 (range 15 to 74), with males having a mean age of 35, whilst females had a higher mean age of 37.4. The most prevalent age range for males is 20–29 (n=78) and for females 30–39 (n=13) with the vast majority of those found NGRI falling within the age ranges of 20–29 or 30–39 (n=171, 65.8%).

The offences charged

Table 4 gives the main offence charged that in each case led to a verdict of NGRI. It can be seen from this that there continues to be a wide spread of offences, the most prevalent of which are grievous bodily harm (GBH) (n=56, 21.5%) and attempted murder (n=45, 17.3 %). Once again, however, what is apparent is the very small number of murder charges: in the 1997–2001 study the number of such charges was 7 (9.7%), and this has now fallen to only 5 (1.9%).

As in previous studies, offences against the person (including robbery, kidnap/child abduction, false imprisonment and child cruelty) remain the most common type of offence with a total of 148 (56.9%) non-fatal and only 6 (2.3%) fatal offences. Overall, there has been an increase in GBH and actual bodily harm (ABH) combined from 27.8 per cent to 33.8 per cent when compared to the 5-year period 1997–2001 with a reduction in attempted murder from 22.2 per cent to 17.3 per cent.

The disposals

Previous studies of the insanity defence revealed that community-based disposals formed slightly over 50 per cent of all the disposals. In the 1997–2001 study, the figure was 52.8 per cent, although if the 7 mandatory disposals given in relation to the murder charges are ignored this total rises to 58.5 per cent. Table 5 gives the disposals for the current study. It

	Frequency	Per cent	Cumulative per cent
Restriction order without limit of time	73	28.1	28.1
Hospital order	50	19.2	47.3
Guardianship order	2	0.8	48.1
Supervision (and treatment) order – 2 years	71	27.3	75.4
Supervision (and treatment) order – under 2 years	20	7.7	83.1
Absolute discharge	43	16.5	99.6
Defendant discharged – hung jury	1	0.4	100.0
Total	**260**	**100.0**	

Table 5: Disposals

Main offence charged	Disposals							Total
	Restriction order without limit of time	Hospital order	Guardian-ship order	Supervision (and treatment) order – 2 years	Supervision (and treatment) order – under 2 years	Absolute discharge	Defendant discharged – hung jury	
Murder	4	0	0	1	0	0	0	5
Attempted murder	23	10	0	11	0	1	0	45
Manslaughter	1	0	0	0	0	0	0	1
GBH	20	17	0	10	3	5	1	56
ABH	7	3	0	9	3	10	0	32
Arson	8	10	0	9	5	3	0	35
Criminal damage	0	1	0	5	0	1	0	7
Robbery	1	0	0	5	0	5	0	11
Burglary	1	1	1	2	1	2	0	8
Indecent/ sexual assault	2	2	0	5	4	5	0	18
Threats to kill	0	0	0	2	0	0	0	2
Kidnap/child abduction	1	0	0	1	0	1	0	3
(Death by) dangerous driving	1	1	0	2	1	4	0	9
Possession/ importation/ supply of drugs	1	0	0	0	0	0	0	1
Endangering aircraft	1	0	0	0	0	0	0	1

Table 6: Main offence charged/disposals crosstabulation

Breach restraining order	0	0	0	1	0	0	0	1
Affray	2	3	1	1	1	0	0	8
False imprison-ment	0	0	0	2	0	0	0	2
Having article with blade	0	0	0	1	1	1	0	3
Theft	0	0	0	0	0	1	0	1
Racially aggravated assault	0	0	0	0	0	2	0	2
Bomb hoax	0	0	0	1	0	0	0	1
Child cruelty	0	0	0	1	0	0	0	1
Possession offensive weapon	0	0	0	0	1	1	0	2
Indecent exposure	0	2	0	0	0	0	0	2
Aid/abet reckless driving	0	0	0	1	0	0	0	1
Blackmail	0	0	0	1	0	0	0	1
Breach anti-social behaviour order	0	0	0	0	0	1	0	1
Total	73	50	2	71	20	43	1	260

Table 6 (continued): Main offence charged/disposals crosstabulation

Domestic Violence Act		Frequency	Per cent	Cumulative per cent
Pre-2004 Act	2002	23	33.3	33.3
	2003	17	24.6	58.0
	2004	20	29.0	87.0
	2005	9	13.0	100.0
	Total	**69**	**100.0**	
Post-2004 Act	2005	11	5.8	5.8
	2006	24	12.6	18.3
	2007	13	6.8	25.1
	2008	29	15.2	40.3
	2009	27	14.1	54.5
	2010	21	11.0	65.4
	2011	36	18.8	84.3
	2012	30	15.7	100.0
	Total	**191**	**100.0**	

Table 7: Year of decision

Domestic Violence Act		Frequency	Per cent	Cumulative per cent
Pre-2004 Act	Murder	2	2.9	2.9
	Attempted murder	16	23.2	26.1
	GBH	9	13.0	39.1
	ABH	5	7.2	46.4
	Arson	12	17.4	63.8
	Criminal damage	1	1.4	65.2
	Robbery	2	2.9	68.1
	Burglary	5	7.2	75.4
	Indecent/sexual assault	3	4.3	79.7
	Threats to kill	1	1.4	81.2
	Kidnap/child abduction	1	1.4	82.6
	(Death by)dangerous driving	2	2.9	85.5
	Possession/importation/supply of drugs	1	1.4	87.0
	Endangering aircraft	1	1.4	88.4
	Affray	2	2.9	91.3
	False imprisonment	1	1.4	92.8
	Having article with blade	1	1.4	94.2
	Theft	1	1.4	95.7
	Racially aggravated assault	1	1.4	97.1
	Bomb hoax	1	1.4	98.6
	Aid/abet reckless driving	1	1.4	100.0
	Total	**69**	**100.0**	

Table 8a: Main offence charged pre-2004 Act

Domestic Violence Act		Frequency	Per cent	Cumulative per cent
Post-2004 Act	Murder	3	1.6	1.6
	Attempted murder	29	15.2	16.8
	Manslaughter	1	.5	17.3
	GBH	47	24.6	41.9
	ABH	27	14.1	56.0
	Arson	23	12.0	68.1
	Criminal damage	6	3.1	71.2
	robbery	9	4.7	75.9
	Burglary	3	1.6	77.5
	Indecent/sexual assault	15	7.9	85.3
	Threats to kill	1	.5	85.9
	Kidnap/child abduction	2	1.0	86.9
	(Death by)dangerous driving	7	3.7	90.6
	Breach restraining order	1	.5	91.1
	Affray	6	3.1	94.2
	False imprisonment	1	.5	94.8
	Having article with blade	2	1.0	95.8
	Racially aggravated assault	1	.5	96.3
	Child cruelty	1	.5	96.9
	Possession offensive weapon	2	1.0	97.9
	Indecent exposure	2	1.0	99.0
	Blackmail	1	.5	99.5
	Breach anti-social behaviour order	1	.5	100.0
	Total	**191**	**100.0**	

Table 8b: Main offence charged post-2004 Act

can be seen from this that the number of hospital orders with and without restrictions was 123 (47.3%) which is similar to the total for the 1997–2001 study which was 47.2 per cent. However, the percentage of restriction orders has fallen from 37.5 per cent to 28.1 per cent with a marked increase in those without restrictions from 9.7 per cent to 19.2 per cent. It is also clear that community-based disposals continue to be well utilised, accounting for 52.3 per cent (n=136) of all disposals (ignoring the single case where the jury could not reach a verdict after insanity was pleaded and the defendant was discharged). Although the percentage of supervision (and treatment) orders has fallen from 41.7 per cent to 35 per cent (n=91), absolute discharges have risen from 9.7 per cent to 16.5 per cent (n=43). Overall, therefore, this figure of 52.3 per cent is similar to that in the 1997–2001 study of 52.8 per cent community disposals.

As in previous studies, Table 6 shows that community-based disposals continue to be given for serious offences including one case of murder (for the first time), attempted murder, including an absolute discharge (n=12), GBH (n=18), arson (n=17) and robbery (n=10).

Domestic Violence Act		Frequency	Per cent	Cumulative per cent
Pre-2004 Act	Restriction order without limit of time	26	37.7	37.7
	Hospital order	7	10.1	47.8
	Guardianship order	2	2.9	50.7
	Supervision (and treatment) order – 2 years	21	30.4	81.2
	Supervision (and treatment) order – under 2 years	6	8.7	89.9
	Absolute discharge	7	10.1	100.0
	Total	**69**	**100.0**	
Post-2004 Act	Restriction order without limit of time	47	24.6	24.6
	Hospital order	43	22.5	47.1
	Supervision (& treatment) order – 2 years	50	26.2	73.3
	Supervision (& treatment) order – under 2 years	14	7.3	80.6
	Absolute discharge	36	18.8	99.5
	Defendant discharged – hung jury	1	0.5	100.0
	Total	**191**	**100.0**	

Table 9: Disposal

The effect of the Domestic Violence, Crime and Victims Act 2004

The 2004 Act was implemented on March 31 2005. The Act reduced NGRI disposals to three, namely:

1. a hospital order (with or without a restriction order);[22]
2. a supervision order;
3. an order for an absolute discharge.

With regard to the present study which spans a period of 11 years, 39 (29.5%) months of the research period were prior to the implementation of the 2004 Act and 93 (70.5%) months post implementation.[23]

The following tables give a split of these two respective periods in order to show something of the impact of the 2004 disposal regime. Table 7 shows the numbers of NGRI cases involved pre- and post- the 2004 Act. It can be seen from this that 191 (73.5%) of the

22 The hospital order is now identical to one made under the Mental Health Act 1983 and, where the NGRI accused is charged with murder and the court has the power to make such an order, it must impose restrictions.

23 Only those defendants arraigned on or after 31 March 2005 are subject to the new disposal regime; see *R v Hussein* [2005] EWCA Crim 3556 [14]: 'The fact that the appellant was committed or sent to the Crown Court long before 31st March 2005 is nothing to the point.' Although this decision deals with a case of unfitness to plead, Schedule 12 para 8(2)(b) of the 2004 Act makes it clear that the same is true for the insanity defence.

NGRI cases fell to be dealt with under the 2004 Act, compared to 69 (26.5%) dealt with before the Act.

Tables 8a and 8b give a breakdown of the main offences charged in the periods before and after the enactment of the 2004 Act. It can be seen from this that the pattern of offences has remained fairly consistent. However, the percentage of cases of attempted murder has fallen in the post-2004 Act period by around one-third while cases of GBH have risen from 13 per cent to almost 25 per cent.

Table 9 gives the disposals for the two periods. What is of particular note is that, although the percentage of restriction orders has fallen, there has been an increase in the use of hospital orders from 10.1 per cent in the pre-2004 Act list to 22.5 per cent in the post-2004 Act list. Overall, however, the percentage of hospital-based disposals has fallen from 47.8 per cent under the pre-2004 Act period to 47.1 per cent under the post-2004 Act period, while the overall percentage of supervision (and treatment) orders has fallen from 39.1 per cent (42% if guardianship orders are included) to 33.5 per cent with a marked rise in absolute discharges by around 86 per cent.

Concluding remarks

As in my earlier studies, the number of verdicts of NGRI has continued to rise. The increase from a maximum of 17 findings in 1999 to a peak of 36 verdicts in 2011 certainly suggests that the legislative changes contained in the 1991 and 2004 Acts are having an ongoing effect. Overall, during the 11-year research period, hospital-based disposals have remained almost identical, 123 (47.3%) to the overall percentage for the 1997–2001 study which was 47.2 per cent. However, although community-based disposals accounted for 52.5 per cent (n=136) of NGRI cases, which is broadly similar to that in the 1997–2001 study of 52.8 per cent, absolute discharges have risen from 9.7 per cent (n=7) to 16.5 per cent (n=43).

With regard to the possible impact of the Domestic Violence, Crime and Victims Act 2004, the percentage of post-2004 Act non-hospital disposals has again remained virtually the same with a marginal increase from 52.1 per cent to 52.3 per cent post-2004 Act. Overall, therefore, the percentage of hospital-based disposals has fallen from 47.8 per cent under the pre-2004 Act period to 47.1 per cent under the post-2004 Act period.

Finally, although there has been this gradual increase in the number of NGRI verdicts, it remains the case, as the Law Commission emphasised in its Scoping Paper, that the number of such verdicts remains 'surprisingly low'.[24] In order to achieve a better understanding of how frequently the insanity defence is used, the Commission asked consultees to 'offer explanations as to why the number of special verdicts is so low'.[25] In its analysis of this response, the Commission suggested a number of possible reasons for the paucity of special verdicts, only one of which might impact on whether my empirical studies of successful pleas of insanity capture the vast majority of such pleas. Once again it is that there may be cases where: 'The defence is raised but unsuccessfully and the accused is convicted.'[26] As mentioned above, there may be such cases and I cannot prove otherwise. However, I am convinced that they are rare. Some tentative support for this conclusion is the fact that, in an earlier empirical study of 72 NGRI verdicts where we had access to psychiatric reports, it was found that out of a total of 161 such reports in only 6 of these reports was 'there clear evidence of contradictory opinion between the psychiatrists as to

24 Law Commission (n 12) para 1.48.

25 Ibid para 1.52.

26 Law Commission (n 15) para B.28.

whether a finding of NGRI could be supported'. From this we concluded that 'it seems likely that cases giving rise to this type of disagreement are rare',[27] in which case it would seem to follow that, if contested cases are rare, then the same may be true of failed cases. In any event, my empirical studies have never claimed to include failed cases and, as mentioned above, the Commission's analysis of responses to the questions posed in its Scoping Paper provided no real additional empirical data about the insanity defence. This supports the view that I have long held, namely that my empirical studies of successful pleas of insanity capture the vast majority of such pleas and continue to reveal valuable research data which in turn feed into the reform process.

Furthermore, this gradual increase in the number of NGRI verdicts needs to be tempered with the fact that, as Table 1 above reveals, the overall percentage increase in successive 5-year periods has slowed down and now stands at 21.2 per cent for the 5-year period 2007–2011. This may mean that any increase in NGRI verdicts is levelling out and that a further increase in numbers, if any, will be modest.[28] In short, until a new test for the insanity defence is implemented, it seems more than likely that the number of NGRI verdicts will remain very low. In that connection, the Law Commission's discussion paper, which provisionally proposes a new defence and special verdict,[29] is of real importance as it could at long last signal the end of the M'Naghten Rules together with the introduction of a defence which is more appropriate for the twenty-first century.

27 Mackay et al (n 9) 405.

28 I am continuing to monitor the number of NGRI verdicts and it will be interesting to discover whether my prediction is correct.

29 Law Commission (n 15) paras 1.86–1.96.