

Insanity and automatism: notes from over the border and across the boundary

JAMES CHALMERS*

University of Glasgow

Introduction

The English Law Commission's recent discussion paper on insanity and automatism¹ follows only a few years after the defence of insanity was replaced with a plea of mental disorder excluding criminal responsibility in Scots law, which itself followed from work by the Scottish Law Commission. The proximity of two law reform projects in this area, in jurisdictions which have taken a similar but not identical approach to this area of the law in the past, offers a useful opportunity for contrasts to be drawn. As there is surprisingly little written on the Scottish law of insanity and automatism,² this paper begins with an account of the development of these two defences in Scots law, demonstrating their close relationship with the English McNaghten Rules, before drawing comparisons with the English Law Commission's proposals, raising concern in particular about the proposed boundary between automatism and the proposed new defence of 'not criminally responsible by reason of recognised medical condition'.

The development of the Scots law of insanity: a brief history

The relationship between the Scottish and English laws of insanity is a curious one, alternating between acceptance and rejection. There are no significant reported cases on insanity in Scots law prior to the McNaghten Rules,³ and in the first significant post-McNaghten case in Scotland, the trial judge quoted the rules in his charge to the jury.⁴ In the same set of reports in which that charge appears, the editor saw fit to insert the Rules as an appendix given that they were of 'such general importance'.⁵

* I am grateful for the support of the Leverhulme Trust.

1 Law Commission, *Criminal Liability: Insanity and Automatism* Discussion Paper (Law Com DP 2013).

2 Aside from detailed discussion in two textbooks: see G H Gordon, *The Criminal Law of Scotland* 3rd edn by M G A Christie, vol 1 (W Green 2000) ch 10; James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green 2006) ch 7.

3 The closest is *Eugene Whelps* (1842) 1 Broun 278, but this is no more than a brief account of a charge to a jury.

4 *James Gibson* (1844) 2 Broun 332, where Lord Justice-Clerk Hope said (355) that the rules 'expresse[d] the law of Scotland, as well as of England, upon the matter'.

5 See the editor's footnote to *James Gibson* *ibid*, 355.

There is nothing especially surprising about this. The older Scottish writers had formulated their discussions of insanity in terms which were strikingly similar to the rules.⁶ The Rules themselves added little to Scots law, but as a contemporary source, they were of use to judges who wished to repel contentions that modern medical knowledge should lead to a change in the courts' approach to the defence.⁷

The courts were not wholly blind to medical writing, and some nineteenth-century judges did pay heed to writers who argued that cognitive approaches to insanity were unduly narrow,⁸ directing juries that they could find insanity established if the accused knew that his actions were wrong but had acted under an irresistible impulse.⁹ Such judges found themselves in a minority,¹⁰ although the absence of any appeal court prior to 1926¹¹ meant that there was no opportunity for the divergence of judicial opinion to be addressed.

Even after the creation of that court, reported decisions on insanity invariably came in the form of charges to juries by trial judges. Most of the cases reported in the late nineteenth century were the work of one judge, Lord Moncrieff – 'an eccentric in this branch of the law'¹² – and involved almost abandoning any attempt at definition whatsoever, leaving it to the jury to decide simply whether or not an accused was 'responsible'¹³ but without meaningful guidance on how to approach this task. One result of this was an increasing inconsistency in the approach of judges to charging juries,¹⁴ so that when the Royal Commission on Capital Punishment carried out its work between 1949 and 1953, it was difficult for the judicial witnesses to the Royal Commission to say 'just what the Scots law on insanity was',¹⁵ although with a sense of where the wind might be blowing, the most senior Scottish judge (Lord Justice-General Cooper) downplayed the extent to which the McNaghten Rules might be regarded as part of Scots law.¹⁶

When, therefore, the Royal Commission reported that the McNaghten Rules could not be 'defended in the light of modern medical knowledge and modern penal views',¹⁷ it was easy for Scots judges to adjust course and proclaim that they formed no part of Scots law.¹⁸ In *Brennan v HM Advocate* in 1977, the appeal court finally produced an authoritative statement

6 A Alison, *Principles of the Criminal Law of Scotland* (1833) 645; D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* 4th edn by B R Bell (1844) vol i, 37. Although the fourth edition of Hume's text was published after the McNaghten Rules were formulated, the text remained unchanged from previous editions; the editor (Bell) had restricted his work to adding supplemental notes on recent cases.

7 In *Gibson* (n 4), defence counsel had referred to Issac Ray's *A Treatise on the Medical Jurisprudence of Insanity* (1838). Lord Justice-Clerk Hope instructed the jury (356) to disregard Ray's 'fantastic and shadowy definitions'.

8 See e.g. G F Blandford, *Insanity and its Treatment* (1884) 360.

9 *James Denny Scott* (1853) 1 Irv 132; *John McFadyen* (1860) 3 Irv 650. See also *Isabella Blyth* (1852) J Shaw 567.

10 See Chalmers and Leverick (n 2) para 7.13.

11 Criminal Appeal (Scotland) Act 1926.

12 Gordon (n 2) para 10.35.

13 *Archibald Miller* (1874) 3 Coup 16, 17. See further Chalmers and Leverick, (n 2) paras 7.14–15.

14 Chalmers and Leverick (n 2) para 7.17.

15 Gordon (n 2) para 10.39.

16 *Minutes of Evidence Taken Before the Royal Commission on Capital Punishment* (1950) para 5465. For criticism of Lord Cooper's evidence, see Chalmers and Leverick (n 2) para 7.10.

17 *Report of the Royal Commission on Capital Punishment* (Cmd 8932 1953) para 291.

18 See, for example, *Mackenzie v Mackenzie* 1960 SC 322, 325 (Lord Walker); *HM Advocate v Kidd* 1960 JC 61, 71 (Lord Strachan); *Breen v Breen* 1961 SC 158, 185 (Lord Patrick); *Brennan v HM Advocate* 1977 JC 38, 46 (Lord Justice-General Emslie).

on what was meant by insanity in Scots law: ‘total alienation of reason in relation to the act charged as the result of mental illness, mental disease or defect or unsoundness of mind’.¹⁹

Automatism’s emergence in Scots law

Despite this McNaghten scepticism, the relatively recent recognition of automatism as a defence in Scots law brought McNaghten back to the fore insofar as the insanity plea was concerned. The Scots law of automatism is sometimes traced back to the 1926 decision in *HM Advocate v Ritchie*,²⁰ where a motorist who hit and killed a pedestrian was charged with culpable homicide, and pled not guilty on the basis of ‘temporary mental dissociation due to toxic exhaustive factors’. The judge allowed this defence to go to the jury, who acquitted Ritchie. In the late twentieth century, the case was almost invariably read as one where a driver had been overcome by car exhaust fumes, and therefore an obvious candidate for an automatism plea.²¹ In fact, that was not what had happened at all – the ‘toxic exhaustive factors’ were poison entering Ritchie’s blood from an abscess in his lungs²² – but the misreading of *Ritchie* provided a false foundation for the modern recognition of the automatism defence, meaning that identifying its origins in 1926 is simultaneously both erroneous and correct.

Building on *Ritchie*, the defence of automatism was formally recognised in the 1991 case of *Ross v HM Advocate*,²³ where the accused’s drink had been ‘spiked’ with temazepam and LSD, causing him to behave uncontrollably and violently. The court identified three requirements for the defence: first, there must be an external factor; secondly, it must be neither self-induced nor something which the accused was bound to foresee; thirdly, it must result in a total alienation of reason.²⁴

The use of ‘total alienation of reason’ as one of the criteria for the defence aligns it directly with insanity, something which is made clear in the parallel drawn between the two defences by the court.²⁵ In Scots law, therefore, the two common law defences are not simply closely related but two sides of the same coin. Both are based on a total alienation of reason, and are distinguished by reference to the cause of that alienation, with the further caveat that the automatism defence is unavailable where the alienation has been caused by the prior fault of the accused.

Subsequently, the appeal court offered further guidance on the meaning of ‘total alienation of reason’ in *Cardle v Mulrainey*,²⁶ where an accused whose drink had been spiked with amphetamine attempted to steal a number of motor cars. Mulrainey’s defence of automatism – on the basis that he had been aware of his actions and of their wrongful nature, but that he had been unable to stop himself committing them – was rejected by the court, which held that a ‘total alienation of reason’ was not made out where an accused ‘knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong’.²⁷ Because the concept of total alienation of reason is core to

19 1977 JC 38, 45 (Lord Justice-General Emslie).

20 1926 JC 45.

21 See, for example, *Ross v HM Advocate* 1991 JC 210, 215 (Lord Justice-General Hope); Gordon (n 2) para 3.20.

22 Chalmers and Leverick (n 2) para 7.34; J Ross, ‘A Long Motor Run on a Dark Night: Reconstructing *HM Advocate v Ritchie*’ (2010) 18 *Edinburgh Law Review* 193.

23 1991 JC 210, overruling *HM Advocate v Cunningham* 1963 JC 80, which had denied the existence of any such defence.

24 See *Ross* (n 21) 222 (Lord Justice-General Hope).

25 *Ibid* 213–14 (Lord Justice-General Hope).

26 1992 SLT 1152.

27 *Cardle v Mulrainey* 1160 (Lord Justice-General Hope).

both insanity and automatism, this language, which is practically identical to that found in the McNaghten Rules, effectively (re)incorporated the core of the rules into the Scottish law of insanity.

Statutory reform of the Scots law of insanity

The Scottish law of insanity was reformed in 2010,²⁸ following on from a review by the Scottish Law Commission.²⁹ The relevant Scottish project was concerned only with insanity and diminished responsibility, in contrast to the English Law Commission's recent work. This is unfortunate: as the English Law Commission observed, the defence of automatism 'is so closely related to that of insanity that reform of one entails reform of the other'.³⁰

As the above account of Scots law makes clear, that is – or should be – *a fortiori* the case in Scots law, given the interrelationship between the two defences. Sadly, that was not recognised as part of the Scottish reform project. It had originated in the work of the Millan Committee, which had reviewed mental health legislation in Scotland.³¹ In its report, the committee had noted dissatisfaction and difficulty amongst psychiatrists who had to consider the legal tests applicable where insanity or diminished responsibility was raised.³² Insanity 'depend[ed] on terms and definitions which [were] largely meaningless to those with the responsibility of giving expert evidence to the court',³³ while the definition of diminished responsibility was 'obscure, and difficult to apply in individual cases'.³⁴ Accordingly, the committee recommended that the matter be referred to the Scottish Law Commission, and this was taken up. Although it is unsurprising that psychiatrists did not recognise the relationship between the defences of insanity and automatism, it is regrettable that this was not identified at a subsequent point in the law reform process.

Before the issue was even formally referred to the Scottish Law Commission, the practical difficulties with the defence of diminished responsibility were addressed in the case of *Galbraith v HM Advocate*.³⁵ *Galbraith* largely aligned the Scottish law of diminished responsibility with the statutory definition then found in English law.³⁶ While the appeal court was far from explicit about this parallel,³⁷ it was hardly objectionable given that the English statute had been drafted specifically to 'introduce into English law the Scottish doctrine of diminished responsibility'.³⁸ In the light of *Galbraith*, the Scottish Law Commission's proposals – subsequently enacted in legislation³⁹ – were essentially a statutory restatement of the common law as formulated in that case.⁴⁰

28 Criminal Justice and Licensing (Scotland) Act 2010, s 168.

29 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195 2004).

30 Law Com DP (n 1) para 1.29.

31 Scottish Executive, *New Directions: Review of the Mental Health (Scotland) Act 1984* (SE/2001/56 2001).

32 Also, and perhaps particularly, in relation to unfitness to plead: *ibid* para 29.29.

33 *Ibid* para 29.43.

34 *Ibid* para 29.55.

35 2002 JC 1. The judgment in *Galbraith* was issued in July 2001; the reference to the Scottish Law Commission was made in October of the same year. See Scot Law Com No 195 (n 29) para 1.1.

36 Homicide Act 1957, s 2, subsequently amended by the Coroners and Justice Act 2009, s 52.

37 On which see James Chalmers, 'Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate* (No 2)' (2002) 6 *Edinburgh Law Review* 108.

38 HC Debs 27 November 1956, col 318 (statement of the Attorney-General). See also the Home Secretary's statement at HC Debs 15 November 1956, col 1153.

39 Criminal Procedure (Scotland) Act 1995, s 51B, inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s 168.

40 Gerry Maher, 'The New Mental Condition Defences: Some Comments' 2013 SLT (News) 1, 3. Maher was formerly the commissioner responsible for this law reform project.

Nor were the Scottish Law Commission's proposals on insanity particularly radical. Gone was the earlier Scottish scepticism about McNaghten; the Scottish Law Commission was impressed by Finbarr McAuley's remark that if the McNaghten Rules did not exist, 'it would be necessary to invent something like them'.⁴¹ The test suggested by the Scottish Law Commission, and subsequently enacted by the Scottish Parliament, is concise: a person is not criminally responsible for their conduct 'if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct'.⁴² Although this abandons the terminology of 'total alienation of reason', it simply replaces that phrase with the definition offered in *Cardle v Mulrainey*⁴³ and represents the most recent stage in McNaghten's rise, fall, and rise in Scots law.

This does not mean that Scots and English law are identical. There is one particularly important distinction, which is that the approach to 'wrongfulness' taken in the two jurisdictions differs. The English courts have held that 'wrongfulness' in this context means *legally* wrong, so that a man who knows his actions are prohibited legally but, because of mental disorder, believes them to be morally justified, has no recourse to the plea.⁴⁴ The Scottish courts have previously accepted that the plea can be based on a failure to appreciate moral wrongfulness, allowing a plea of insanity in a case where a mentally ill man had 'formed the idea' that he had to kill the two youngest members of his family to 'ease the burden' on his wife, regarding this as a 'solemn sacrifice which he was called upon to make' despite appreciating the legal penalty which would follow from it.⁴⁵ The Scottish approach is consistent with the view taken in other jurisdictions,⁴⁶ and the Scottish Law Commission recommended that it should continue.⁴⁷ This broader approach to wrongfulness now also has the support of the English Law Commission.⁴⁸

Although the legislation following on from the Scottish Law Commission's work is in many respects a restatement of the common law position, there is one particularly important if inelegantly executed change. The defence is no longer called insanity. This is welcome: the term 'insanity' has long been regarded as outdated and inappropriate.⁴⁹ What is unfortunate is that the Scottish Law Commission was able to decide only what the defence should *not* be called. Having rejected the name 'mental disorder' as confusing and inaccurate, it decided it was sufficient that the relevant section be headed 'Criminal responsibility of persons with mental disorder'.⁵⁰ Regrettably, this has led to the defence being referred to as simply 'mental disorder',⁵¹ despite the Scottish Law Commission rightly identifying that as inadequate. A formulation such as 'mental disorder excluding criminal responsibility', while perhaps slightly cumbersome, would have avoided the difficulties identified by the Scottish Law Commission.

41 See Scot Law Com No 195 (n 29) para 2.44, quoting F McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press 1993) 25.

42 Scot Law Com No 195 (n 29) 78 (s 1(1) of Draft Bill); Criminal Procedure (Scotland) Act 1995, s 51A, inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s 168.

43 1992 SLT 1152, discussed at text to n 26 above.

44 *R v Windle* [1952] 2 QB 826.

45 *HM Advocate v Sharp* 1927 JC 66, 69 (Lord Constable).

46 See, for example, *Stapleton v R* (1952) 86 CLR 358; *R v Chaulk* [1990] 3 SCR 1303.

47 Scot Law Com No 195 (n 29) paras 2.46–51. The Scottish Law Commission makes no reference to *Sharp*, the significance of which has often been overlooked. See Chalmers and Leverick (n 2) para 7.41.

48 Law Com DP (n 1) para 4.33.

49 See e.g. *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244 1975) para 18.18.

50 Scot Law Com No 195 (n 29) paras 2.21–23. The Commissioner responsible has since described the failure to name the defence as 'unfortunate': Maher (n 40) 1.

51 See e.g. T H Jones and M G A Christie, *Criminal Law* 5th edn (W Green 2012) para 8.11.

Some other consequences of the Scottish Law Commission's review are worthy of note. First, the legislation now expressly provides that the plea cannot be based on psychopathy,⁵² something which was probably already true at common law but had not been clearly established.⁵³ Secondly, the defence can only be raised by the person charged,⁵⁴ contrary to the common law position.⁵⁵ That is unfortunate. Where an accused's mental disorder is such as to exclude *mens rea*, the Scottish position now seems to be, at least in theory, that it is open to him to deny *mens rea* on the basis of that condition without pleading insanity and receive an unqualified acquittal.⁵⁶ The English Law Commission's proposal that the prosecution should have a limited power to itself raise the defence in such cases is surely preferable.⁵⁷

Thirdly, while the Scottish Law Commission initially proposed that the common law rule placing the burden of proof on the accused should be reversed,⁵⁸ so that the Crown would bear the burden of disproving a mental disorder-based defence beyond reasonable doubt if it were raised, it was persuaded to abandon this suggestion. This proposal, particularly the Scottish Law Commission's basis for it, was strongly criticised,⁵⁹ and the Scottish Law Commission changed its position, accepting that the reverse burden was not contrary to the European Convention on Human Rights and that requiring the Crown to prove sanity would pose considerable practical difficulties.⁶⁰ On this issue, the Law Commission for England and Wales has taken a different view, suggesting that the European Commission on Human Rights may have fallen into error in holding the reverse burden compatible with the European Convention on Human Rights,⁶¹ and proposing instead that the accused should bear an 'elevated evidential burden'.⁶² The difference in practice between an 'elevated evidential burden' and a persuasive one may, of course, be rather narrow.

Fourthly, the Scottish Law Commission rejected proposals that the defence of insanity should include an 'irresistible impulse' or volitional component, noting that the mental health experts they met with were 'virtually unanimous in rejecting a category of mental disorder which was purely volitional in nature and which had no impact on cognitive functions'⁶³ and that none of their consultees could identify a case for which such a defence would be necessary and appropriate.⁶⁴ The Law Commission for England and Wales does not identify such a case either, although it does refer to the example of a 'compulsive

52 Criminal Procedure (Scotland) Act 1995, s 51A(2), referring to 'a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct'.

53 See Maher (n 40) 2.

54 Criminal Procedure (Scotland) Act 1995, s 51A(4).

55 *HM Advocate v Harrison* (1968) 32 JCL 119, where the Crown was permitted to argue that the basis for H's plea of diminished responsibility in fact amounted to insanity.

56 A difficulty recognised in *R v Cottle* [1958] NZLR 999, 1027 per North J. See Chalmers and Leverick (n 2) para 7.05.

57 Law Com DP (n 1) para 4.131.

58 Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility* (Scot Law Com DP No 122 2003) para 5.19.

59 James Chalmers, 'Reforming the Pleas of Insanity and Diminished Responsibility: Some Aspects of the Scottish Law Commission's Discussion Paper' (2003) 8 SLPQ 79.

60 Scot Law Com No 195 (n 29) paras 5.2–28. See now Criminal Procedure (Scotland) Act 1995, s 51A(4).

61 Law Com DP (n 1) paras 8.20–21, discussing *H v UK* App no 15023/89, unreported.

62 Law Com DP (n 1) para 8.50.

63 Scot Law Com No 195 (n 29) para 2.54.

64 *Ibid.*

hoarder' as someone who lacks self-control but cannot be said to lack rationality.⁶⁵ Surprisingly, the English Law Commission notes the practical difficulties associated with such a plea,⁶⁶ briefly quotes Mackay as saying that these are 'perhaps too negative'⁶⁷ (without further elaboration on the reasons for this view), notes further practical difficulties,⁶⁸ and then abruptly concludes that such a defence should be allowed.⁶⁹

Boundary issues

One of the most significant issues in the English Law Commission's discussion paper, and a useful point of contrast between Scots and English law, is the boundary between the defence of automatism and an alternative 'mental disorder' or 'medical condition' defence. This is where the deficiencies in the Scottish project of reviewing insanity in isolation from automatism become clearly evident.

Prior to this, the Scottish courts had adopted a noticeably flexible approach to distinguishing between the defences. Automatism, it was said, was based on an 'external cause';⁷⁰ insanity was based on 'mental illness, mental disease or defect or unsoundness of mind'.⁷¹ Neither of these formulations had, however, been developed further by the courts, and various decisions made it clear that they were unlikely to be applied rigorously. For example, it was accepted that sleepwalking should be dealt with as automatism despite the absence of an external cause,⁷² while the courts' approach to physical illnesses varied, treating 'psychic epilepsy' as the basis for a plea of insanity in one case⁷³ and internal injuries causing blood poisoning leading to 'temporary mental dissociation' as the basis for an unqualified acquittal in another.⁷⁴ There has been no discussion in the Scottish cases of whether the concept of 'mental illness, mental disease or defect or unsoundness of mind' can be interpreted broadly to include conditions which *affect* the mind even if they are 'physical' rather than 'mental' in nature.⁷⁵

The statutory formulation of the new Scottish defence of mental disorder excluding criminal responsibility is such that 'mental disorder' is restricted to mental illness, personality disorders and learning disabilities, a test which was adopted from existing mental health legislation apparently without analysis on the Scottish Law Commission's part.⁷⁶ The logical consequence of this seems to be that any other condition which leads to a 'total alienation of reason' – which remains the test for automatism – must be entitled to an acquittal. Although the automatism defence must in theory be based on an 'external cause', that was simply a mechanism for distinguishing it from the cognate plea of insanity. The

65 Law Com DP (n 1) para 4.48.

66 Ibid paras 4.50–51.

67 Ibid para 4.51, quoting RD Mackay, *Mental Condition Defences in the Criminal Law* (Oxford University Press 1995) 116.

68 Law Com DP (n 1) para 4.52.

69 Ibid para 4.53.

70 *Ross* (n 21) 214 (Lord Justice-General Hope).

71 *Brennan v HM Advocate* 1977 JC 38, 46 (Lord Justice-General Emslie).

72 *Finegan v Heywood* 2000 JC 444. In this case, F's sleepwalking was regarded as externally caused (by alcohol consumption) and the defence was excluded on the basis of prior fault, but the court proceeded on the basis that this external cause excluded what would otherwise have been a valid defence.

73 *HM Advocate v Mitchell* 1951 JC 53.

74 *HM Advocate v Ritchie* 1926 JC 45.

75 As in *R v Kemp* [1957] 1 QB 399.

76 Criminal Procedure (Scotland) Act 1995, s 307; Mental Health (Care and Treatment) (Scotland) Act 2003, s 328(1).

courts have made it clear that a total alienation of reason is an absence of *mens rea*,⁷⁷ which in itself entitles the accused to an acquittal, and that would be true where the cause of the alienation is internal but does not amount to mental disorder. The only exception to this is that, if they are at fault in bringing about that alienation, *mens rea* will be presumed by the application of a legal fiction.⁷⁸

The effect of the Scottish legislative reforms, therefore, is to reposition moderately the boundary between the defences of insanity/mental disorder and automatism, marginally broadening the latter. This is crucially important because, of course, the distinction has significant consequences: first, in terms of stigma, which may attach to the mental disorder defence but is unlikely to do so where automatism is concerned, and, secondly, because the former defence does not result in an unqualified acquittal but leaves the accused subject to the coercive power of the state.

Here, the approach of the Law Commission for England and Wales is a radically different one. It recommends a new defence of ‘not criminally responsible by reason of recognised medical condition’. Automatism would remain, but as a wholly residual defence. This is brought out vividly by a table in the English Law Commission’s paper which ‘illustrates how existing cases would be decided were they to be tried under the law contained in our proposals’.⁷⁹ The table lists 16 cases decided by the courts between 1955 and 2007, alongside a fictional example – a swarm of bees entering a car and causing the driver to swerve – mentioned in a 1945 decision.⁸⁰ One of the cases would be determined under the rules on self-induced intoxication and the other 15 would be considered for the defence of recognised medical condition, although it would not succeed in all of them. It is only the fictional example of a swarm of bees where automatism would apply. The fact that the only case the English Law Commission can identify which would be dealt with as automatism under its proposed scheme is a fictional example is a clear demonstration of just how practically irrelevant automatism would become on its approach.

Does this matter? In one respect, the boundary change is a hugely welcome one, because it does more to combat stigma than a mere renaming of the insanity plea ever could.⁸¹ Insofar as the verdict is a statement about the culpability of the defendant, avoiding any distinction between ‘mental’ and ‘physical’ illnesses is to be welcomed.

However, a second consequence of the change is a far less welcome one. Automatism results in an unqualified acquittal. The recognised medical condition defence would not. This is not an accident; the English Law Commission has consciously reached the view that the recognised medical condition defence provides ‘more appropriate disposal powers’, suggesting that it is unnecessary to be concerned about the net-widening involved in this proposal because the verdict is ‘non-stigmatising’.⁸²

Coercive powers following acquittal: is prior fault an alternative approach?

An acquittal, simply stated, is a decision that someone has not been established to be morally blameworthy, and it follows from this that the state is not entitled to inflict

77 As is clear from *Ross* (n 21). It is thought that, despite this approach, the defence would remain available in respect of offences of strict liability: see Chalmers and Leverick (n 2) para 7.05.

78 See *Ross* (n 21) 215 (Lord Justice-General Hope). This is a problematically harsh rule: see further Chalmers and Leverick (n 2) paras 7.44–45.

79 Law Com DP (n 1) para 4.169.

80 *Kay v Butterworth* (1945) 61 TLR 452.

81 See Law Com DP (n 1) para 4.57.

82 *Ibid* para 6.47.

punishment on them. For a variety of well-understood reasons, it may be reasonable for someone who is acquitted on the ground of mental disorder to be subjected to coercive measures, particularly because it may be unreasonable to expect them voluntarily to take the necessary steps to address their condition. What the English Law Commission suggests, however, is rather different. Under its proposals, someone who *is* competent to deal with a medical condition, but was not at fault in failing to do so, would be subject to the coercive power of the state despite being neither at fault nor in some way lacking in competence. In justifying one aspect of the breadth of the recognised medical condition defence, the English Law Commission suggests that it resolves an inconsistency in the law relating to those with diabetes:⁸³

Under the present law the outcomes in cases involving diabetic defendants who plead a lack of capacity are inconsistent. A diabetic who fails to take insulin and then commits an allegedly criminal act while totally incapacitated will be found not guilty by reason of insanity. This result flows from the fact that the incapacity had an ‘internal cause’ (the diabetes). If, on the other hand, she took insulin in accordance with a medical prescription, but was unable to take it with food or had an unexpected reaction to it through no fault of her own, and committed an allegedly criminal act while lacking capacity, she would be entitled to a verdict of not guilty for all crimes since the loss of capacity was involuntary. We think that it is illogical that one blameless defendant should be entitled to a complete acquittal while the other is labelled insane, for the same reasons as explained above. Under our proposal, the verdict in both cases would be not criminally responsible by reason of a recognised medical condition.

The English Law Commission is correct to identify an illogicality here, but it does not follow from this that *both* individuals should be denied complete acquittals. The illogicality could equally be avoided by affording a complete acquittal to both. The state, after all, has no power to take coercive measures against a competent person simply by virtue of their being diabetic; it is doubtful that any necessity for such a power has ever been suggested. It is, therefore, unclear why it should obtain such a power because a person with diabetes is found not guilty of a criminal offence.

The English Law Commission emphasises that the recognised medical condition defence will be excluded where prior fault exists.⁸⁴ The prior fault rule, however, may be sufficient on its own to deal with such cases. If an individual is at fault in managing a medical condition, so that they lose capacity and act in a blameworthy fashion, they will not be entitled to the defence. While the existence of this rule can be justified simply as a matter of culpability, it also allows the courts to protect the public against individuals who are unable or unwilling to manage their own medical conditions. However, in a case where the defendant was not at fault, what is the justification for treating them as a person who must be subjected to coercion in order to ensure that they manage their condition in future? If such a justification exists, why should it be contingent on a criminal prosecution?

To take the example of a person with diabetes, if a person is clearly entitled to the recognised medical condition defence on this basis, it would not be appropriate to prosecute them, because there would be no reasonable prospect of conviction.⁸⁵ In such cases there would be no civil mechanism whereby coercive measures might be sought (in contrast to those available under mental health legislation). Coercive measures of any sort would therefore be ruled out in cases where the defence was clearly made out on the facts as

83 Law Com DP (n 1) para 6.50.

84 *Ibid*, para 3.19; the principle of prior fault is discussed in more detail throughout the paper.

85 Crown Prosecution Service, Code for Crown Prosecutors (CPS 2013) para 4.4.

known to the prosecution prior to trial, and there is no obvious principled basis for holding that they should be available (and only available) where there was some doubt about the defence which justified a prosecution. The likelihood, of course, is that coercive measures would rarely if ever be applied by the courts in cases not involving mental disorder, if only because there seems to be no clearly identified need for them in such cases. To that extent, the English Law Commission's proposals would be unlikely to lead to practical difficulties, but they represent a surprisingly relaxed approach to the extent to which it is appropriate for the state to claim coercive powers to restrict the liberty of the individual.