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Paul Ames Fairall

Bond University

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Abstract

The remarkable case of Cogden offers a good example of the exculpatory force of sane delusions. Mrs Cogden killed her daughter under the influence of a nightmare that she was being attacked by North Korean soldiers. She was tried before the Supreme Court of Victoria and acquitted. Cogden is usually treated as an early example of sane automatism by sleep-walking. It was not a case of insanity and there was no reason for imposing a special verdict. A case such as Cogden may also be analysed in terms of the defence of mistake of fact. A mistaken belief may negate some fault element. It may also activate a defence (such as self-defence) not otherwise available on the objective facts. Delusions will be exculpatory in the second situation to the extent that the subjective beliefs of the accused are relevant to the particular defence which is raised. This note canvasses the law on the borderline of sanity, where sane delusions shade into insane delusions. Is there a difference between sane and insane delusions? Is there a distinction between the latter and full blown insanity? Recent cases yield some interesting answers.

Keywords

Cogden, criminal law, insanity, sane delusion

THE EXCULPATORY FORCE OF DELUSIONS - A NOTE ON THE INSANITY DEFENCE

By
Paul Ames Fairall
Associate Professor of Law
Bond University

Introduction

The remarkable case of *Cogden*¹ offers a good example of the exculpatory force of *sane* delusions. Mrs Cogden killed her daughter under the influence of a nightmare that she was being attacked by North Korean soldiers. She was tried before the Supreme Court of Victoria and acquitted. *Cogden* is usually treated as an early example of *sane automatism* by sleep-walking. It was not a case of insanity and there was no reason for imposing a special verdict. A case such as *Cogden* may also be analysed in terms of the defence of mistake of fact. A mistaken belief may negate some fault element. It may also activate a defence (such as self-defence) not otherwise available on the objective facts.² Delusions will be exculpatory in the second situation to the extent that the subjective beliefs of the accused are relevant to the particular defence which is raised. This note canvasses the law on the borderline of sanity, where sane delusions shade into insane delusions. Is there a difference between sane and insane delusions? Is there a distinction between the latter and full blown insanity? Recent cases yield some interesting answers.

The workings of insanity

Insanity is a protean defence, operating at several levels and in different ways. Mental illness may result in unconscious action, thus giving rise to a denial of both the *actus reus* and *mens rea*.

Case 1: D "puts"³ a baby into pot of boiling water in a state of confusion following a grand mal attack. She is not criminally responsible because there is no relevant actus reus.

Mental illness may distort reality so that even deliberate (voluntary) action may be regarded as inconsistent with *mens rea*.

¹ Supreme Court, Victoria, December, 1950. The case is unreported but discussed by Norval Morris in a memorable article entitled "Somnambulist Homicide: Ghosts, Spiders and North Koreans" (1951) 5 *Res Judicatae* 29.

² See *Walsh* (1991) 60 A Crim R 419, below n 11.

³ The word "puts" normally implies purposive action. There is no word which comfortably conveys the concept of moving an object whilst in a state of defective consciousness.

*Case 2: D puts a baby in a pot of boiling water thinking it is a doll. This is not murder because D lacks the intention to kill; nor is it manslaughter because D's conduct is neither unlawful nor grossly negligent. D is excused either on the ground that she did not understand what she was doing or that she did not know that it was wrong.*⁴

But mental illness may have exculpatory force independently of *mens rea*. Mental illness may undermine the capacity for normative appreciation. In this context, the defence of insanity operates as an independent exculpatory factor. It is independent in the sense that the accused may have deliberately formed an intention to bring about the proscribed state of affairs.

Case 3: D puts a baby into a pot of boiling water. She honestly believes the baby to be possessed by demons. She must kill the child to save its soul. She knows that killing in general is wrong, but honestly believes that this particular killing is not wrong. D is exempt from criminal responsibility despite the error of law implicit in her reasoning. She is excused because she did not know that her act was wrongful.

Case 3 may also be regarded as a case of *insane delusions*. The *M'Naghten's Rules*⁵ deal specifically with insane delusions in the following terms:

The fourth question which your Lordships have proposed to us is this:

If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?

To this question the answer must, of course, depend on the nature of the delusion but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the fact with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposed another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The criminal responsibility of the subject is determined on the basis of those facts which D believed to exist. This aspect of the insanity defence is usually regarded as redundant, on the basis that insane delusions would

⁴ The nature/quality test and the right/wrong test correspond loosely to the narrow and broad meanings of *mens rea*. A failure to appreciate what is done (its nature and quality) implies absence of "*mens rea*" in the broad sense in which *mens rea* implies blameworthy conduct. A lack of intention to kill a human being implies absence of "*mens rea*" in the narrow sense of the specific intent required for murder.

⁵ (1843) 10 Cl and Fin 200 at 211.

prevent a person knowing right from wrong. Indeed, the notion that a person may be insane with respect to some particular matter but otherwise sane is not accepted by modern medical science.⁶ And yet the *M'Naghten Rules* envisage that some "partial delusions" may exempt from punishment, whilst others will leave a person liable to punishment, according to whether the delusional facts gave rise to an excuse in law.

The Australian *Criminal Codes* contain similar provisions dealing with delusions. For example, section 16(3) of the Tasmanian *Criminal Code* provides:

A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.⁷

In principle, D should not be criminally responsible for an act if, at the time of committing the act, she did not possess the minimum level of rationality and self-control required for criminal liability as a result of mental illness. The fact that D laboured under some specific delusion may bring the case within the "right/wrong" test in the insanity defence, in which case a special verdict is appropriate. But under the statutory formulations of the *M'Naghten Rules* adopted in Queensland, Western Australia and Tasmania, it seems that specific delusions may exempt from criminal responsibility even though they are not caused by mental illness.⁸ Moreover, given that the persuasive burden of proof of insanity is upon the defence, the jury may simply fail to be satisfied on the balance of probabilities that D was insane at the time of the act, while considering it possible that D acted under a delusion associated with mental disorder. What then?

An initial response might be that if insanity is rejected on the balance of probabilities, the presumption of mental unsoundness survives, and evidence of mental disorder supporting the claim of a deluded belief can only be considered in relation to the defence of insanity. The jury would be told to consider the facts on the assumption that D's behaviour was the product of a rational mind. This is the approach adopted in dealing with automatism or involuntariness based upon evidence of mental illness.⁹

⁶ See *Chaulk v The Queen* (1991) 62 CCC (3d) 193, 4 Justices of the Supreme Court of Canada held that the specific delusions provisions contained in s16(3) did not operate independently of the insanity defence contained within s16(2) of the Criminal Code. Wilson J held otherwise, and 3 justices assumed without deciding that s16(3) did have scope for independent operation.

⁷ Section 27 of the Queensland and West Australian Criminal Codes are in substantially the same terms.

⁸ Neither section 16(3) nor section 27 limit delusions to those which are produced by "disease of the mind" or mental illness. By contrast the relevant *M'Naghten Rule* refer explicitly to *insane* delusions.

⁹ *Falconer v The Queen* (1990) 171 CLR 30; *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *Hawkins v The Queen*, unreported, 30 June 1994, High Court of Australia.

But this would extend the presumption of mental soundness in an unacceptable way. There is no presumption of fact moving from consciousness to any specific intention, belief or purpose. The presumption that a person intends the natural and probable consequences of her acts is not part of Australian law.¹⁰ Therefore, in dealing with the accused's beliefs (as opposed to the capacity for voluntary action), the existence and content of any alleged delusion should be considered as a matter of fact, subject to the presumption of innocence which casts the persuasive burden of proving guilt upon the Crown. This approach appears to be consistent with recent case law.

Delusional disorders

Cogden was referred to in the opening paragraph. Would the result in that case have been different if the delusion had been the product of an *insane* mind? It appears to depend upon the nature of the underlying disorder and the burden of proof. The nature of the medical evidence is critical.

The Tasmanian case of *Walsh v The Queen*¹¹ provides an interesting counterpart to *Cogden*. The accused was charged with murder. He shot the deceased with a rifle. He was a war veteran, having been severely wounded in Korea some days before the Armistice. He held a disability pension. He had been admitted on several occasions for treatment, including shock treatment. In 1988 he was beaten up by a gang of youths. There was evidence that at the time of the shooting the accused was suffering from post-traumatic stress disorder. A manifestation of that disorder can be "the sudden acting or feeling as if the traumatic event were occurring, including a sense of reliving the experience, illusions, hallucinations and dissociative flash-back episodes". The accused claimed to have shot the deceased under the delusional belief that he was under attack from a North Korean soldier. Defence counsel sought to call medical evidence in support of these claims. The defence of insanity under section 16 was not relied upon. The defence raised self-defence under section 46. The Tasmanian Supreme Court held that the evidence was relevant to both defences.¹² The case is significant because Slicer J ruled that if the jury rejected insanity on the balance of probabilities under section 16(2), then section 16(3) could provide a basis for pleading self-defence under section 46. It would then be for the Crown to prove beyond reasonable doubt that the accused was not justified in using such force as he did. The Court apparently accepted that the delusion could sustain a defence under section 46 leading to an outright acquittal. In these circumstances the accused was acquitted by reason of self-defence, not on the ground of

¹⁰ *Smyth v The Queen* (1957) 68 CLR 163; *Parker v the Queen* (1963) 111 CLR 610.

¹¹ (1991) 60 A Crim R 419 at 423.

¹² Section 46 provides that a person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.

insanity.¹³ *Walsh* is not an isolated case. In *Conlon*¹⁴ the New South Supreme Court held that subjective factors such as marijuana and alcoholic intoxication acting in combination with a schizoid personality disorder were relevant to the defendant's appreciation of the appropriateness of his response to an assault upon his property and person. Nor is this reasoning limited to self-defence. In *Voukelatos*¹⁵ the Victorian Court of Appeal held that evidence of a specific delusion (based upon a "delusional disorder" relating to his wife's supposed infidelity) could in principle¹⁶ provide a basis for pleading provocation. This was despite the rule requiring some act by the deceased inducing a loss of self-control.¹⁷ The process of logic which led to this conclusion caused two members of the Victorian Court of Appeal to call for the abolition of provocation itself.¹⁸ And recently, in *Hawkins v The Queen*¹⁹ the High Court of Australia ruled that where D is charged with an offence requiring proof of a specific intention, and there is evidence of mental illness falling short of insanity, such evidence may be considered by the jury in determining whether D had the necessary specific intent. If the jury is not satisfied beyond reasonable doubt that the necessary intent existed, D is entitled to a complete acquittal.

It is interesting to compare these decisions with the decision of the Supreme Court of Canada in *Chaulk*.²⁰ The defendants were teenagers aged 15 and 16. They suffered from a paranoid psychosis which made them believe that they had the power to rule the world. They believed that killing was a necessary means to that end. They knew the laws of Canada existed, but believed that they were above the law. They thought they had a right to kill the victim because he was a "loser". That, in essence, was the thrust of medical evidence given at trial.²¹ Under the Canadian *Criminal Code*, the matter of delusions is dealt with as follows:

16(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions cause that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

¹³ *Criminal Code* (Tas), s 381.

¹⁴ (1993) 69 A Crim R 92. And see also *Wang* [1990] 2 NZLR 529.

¹⁵ [1990] VR 1.

¹⁶ The Court held that the circumstances of the case did not warrant consideration of provocation. The effect of the High Court decision in *Stingel* (1990) 50 A Crim R 186 upon *Voukelatos* is not clear.

¹⁷ The conclusion that provocation can be raised even in the absence of any act by the accused immediately prior to the accused's loss of self-control has been achieved in some jurisdictions by statutory amendment: eg *Chhay* Unreported, Court of Appeal, NSW 4 March 1994, *Crimes Act* 1900 (NSW), section 23.

¹⁸ [1990] VR 1, at 20 (per Murphy J); at 26 (per Hampel J).

¹⁹ Unreported, 30 June 1994, High Court of Australia.

²⁰ (1991) 62 CCC (3d) 193.

²¹ *Ibid*, at 200.

This provision differs from the Australian provisions. Both section 27 of the *Griffith Code* and section 16(3) of the Tasmanian *Criminal Code* predicate the defence of specific delusions on the assumption that D is not otherwise exempt from criminal responsibility under the general insanity provisions. Lamer CJC was not prepared to read this in, rejecting counsel's submission that "in other respects sane" meant "does not fall within section 16(2)". He also rejected the submission that "justified or excused" enabled the accused to raise common law defences if the accused believed in a state of things that would at common law give rise to any such defence. The learned Chief Justice said:

An accused will be able to bring his claim within the scope of the second branch of the test set out in s 16(2) if he proves that he was incapable of knowing that his conduct was morally wrong in the particular circumstances, for example, if he believed that the act was necessary to protect his life. If he is not able to establish this fact, it must be concluded that he either knew or was capable of knowing that the act was wrong in the circumstances. He cannot then possibly succeed in claiming that the act would have been justified or excused had the perceived facts been true.

With respect, it is questionable whether this gives sufficient effect to the presumption of innocence in relation to the matter of justification or excuse. The jury may consider it possible, even though not probable, that the delusion was a factor relevant to the matter of justification or excuse. Madame Justice Wilson dissented on the different ground that there was no mandate for saying that every specific delusion had to be the product of "disease of the mind".²²

Criminal Code Bill

Section 7.3(7) of the Criminal Code Bill provides that:

If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

The meaning of this provision is obscure. It is not clear whether it means that only delusions caused by mental impairment have exculpatory force, or that insane delusions have no force unless the tribunal "is satisfied" that conduct was caused thereby, or perhaps both. The term "defence" is ambiguous. It may mean "any claim which, if accepted, would necessitate an acquittal".²³ In that case, the expression "cannot otherwise be relied upon

²² Above, at 259-260.

²³ Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986), at 163; *Chaulk* (1991) 62 CCC (3d) 193, at 204, per Lamer CJC.

as a defence” would bar the reasoning of *Walsh*, which treated the delusion as relevant to self-defence. Even if “defence” is limited to specific matters of justification or excuse, such as self-defence, that reasoning would be threatened, although then a delusion might still be considered relevant as a means of negating a fault element such as knowledge, belief, or intent. It is however difficult to predict what precise effect section 7.3(7) may have upon the reasoning in *Walsh*.

Conclusion

The strategies inherent in these cases are likely to arouse some interest as a possible pathway around the insanity defence. The challenge for defence counsel is to find a way to adduce psychiatric evidence without activating the insanity defence. The rule that only the defence can raise insanity has been relaxed, and the jury may return a special verdict even though the defence does not raise insanity. The jury is allowed to consider psychiatric evidence in relation to specific intent (*Hawkins*) or a matter of justification or excuse (*Conlon, Voukelatas*). The danger that a person may be convicted although there exists a reasonable doubt as to mental capacity or guilt is thus diminished. In that context, it may be that there is a need to reconsider the wisdom of section 7.3(7) of the Criminal Code Bill, which is at odds with this approach. The conclusion that delusions may have exculpatory force independently of the insanity defence is likely to excite interest, especially amongst the criminal bar.