THE LAW IS THE KILLER: A RE-ASSESSMENT OF THE MENTAL STATE DEFENCES IN HOMICIDE

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The deep caverns of the human mind have always challenged the psychic adventurer who has searched for the causes of human behaviour. Even to the expert, the mind refuses to yield the secrets necessary to fully understand the problems of experience.

When human conduct is dangerous, society attempts to control and punish it through its criminal law system. In its early history, the law cared little for the working of the mind and persons were convicted and sentenced on the basis of doing the forbidden deed. As human knowledge and science progressed, attempts have been made to refine the callous attitudes of the past and in a sense, the law now cares too much for the mental element of crime.

This is not to say that the law cares too much for the accused or his victim. The mental element in crime which seems to pre- occupy the minds of jurists today does not help the accused, his victim or society, in theory or in practice, but rather is a desperate attempt to control and punish conduct which it has failed to adequately deal with in the area of a criminal trial.

The struggle by the administration of criminal justice in the attempt to come to grips with the workings of the human mind is seen most clearly in the law relating to the crime of murder.

When there is a killing, we immediately think in the terms of the victim and the assassin. Tonight I want to direct your minds to the consideration of another killer, the law. The law I speak of is the criminal law which is the basis of order in any organized society. A community must have the means to protect its members from those who would cause destruction. Those means must be effective and just. The content and administration of that law assume an impersonal, but nonetheless real responsibility and duty to society. It goes without saying that if the duty is neglected, society suffers.

Let me now turn to review some evidence that points to the failure of our legal system in its protective duty to society.

In 1964 "J.D." presented himself to his General Practitioner, complaining of tiredness, insomnia, nervousness and being fed up. His doctor wondered if he should see a psychiatrist. In 1966 his family and friends reported to the new General Practitioner that "J.D." was suffering personality changes. He was taken to Larundel, but released after a few days as probably suffering from a physical illness. He returned to his local doctor who did not think his illness was physical and referred him to a psychiatrist. The psychiatrist noted on examining "J.D." "that he is undoubtedly a very dangerous homicidal maniac at the present with a basis of schizophrenia". He certified him to Royal Park and after a short time he was released. He was next seen by his local doctor when the police brought him in for assessment after he had threatened his former girlfriend and her present male friend. Apparently no action was taken as he recovered in a couple of days from his jealousy.

In 1972 his family reported again to his doctor that he was unwell. Oral treatment supervised by his family was instituted. Later that year he was in trouble over assaulting "Mr. C." by pouring petrol over him with the unfulfilled intention of burning "Mr. C." to death. He was charged with this offence and was released on probation with the condition that he accept treatment given to him by his local doctor. This was October, 1973. He continued to visit his doctor off and on and, on 26th November, 1974, was brought to his local doctor again by his father who told him that he was very worried about "J.D." and that he was not well again. On the following day his sister reported to the doctor that he was suffering from insomnia and was very concerned about him, so he was seen again and given an injection of a major tranquillizer with long lasting effect. "J.D." left the doctor's surgery and, on his way home, decided to kill "Mr. C." which he did by shooting him in front of his own mother and another independent witness—a scene he had arranged by subterfuge. Then, having accomplished what he had intended to do years earlier in a different way, he hitch-hiked to the police station, singing "When the Saints Go Marching In".

"J.D." stood his trial in the Supreme Court at Melbourne this year, and after a fifteen minute retirement, the jury found him not guilty on the ground of insanity. No doubt with that verdict, his family, his local doctor and others, breathed a sigh of relief.

But the verdict did not erase years of insecurity and worry his family had suffered, nor did anything for his victim. "J.D." is an example of a man who not only had been diagnosed as a homicidal maniac eight years before his killing, but had been in the hands of the law at least on two occasions during that period. Although his condi-

tion was known at least to members of the medical profession and was known, or should have been known, to those entrusted with the protection of the community through the criminal law, it can be said that the interests of the community were neglected.

There are many other such cases as "J.D.'s". Some will be known to one or other of the branches of the professions I am addressing tonight.

The question immediately posed is, can society really protect itself against such sagas as those of which you have heard but one example? No laws and no societies are perfect and we will always have violence whether it should have been anticipated or not. The point I wish to make is that urgent measures are needed for improvement.

Before suggesting to you any legal reform, let me ponder over some of the problems which confront the community when they are dealing with the mentally ill. His family is often the obstacle to his diagnosis and efficient treatment. They have a natural and understandable inclination to cover up his condition. They themselves often live in an atmosphere of fear.

Others with whom the mentally ill come into contact are often fearful to act in a way which may be misunderstood by the sick person and this includes members of both our professions. In the case cited, one of the doctors hoped that E.C.T. treatment of the maniac might erase from his memory the identity of the person who had certified him, such was his conviction of the homicidal nature of the illness. Then when the sick patient is in the hands of a responsible and reliable doctor or psychiatrist, there is the immediate and often insuperable problem of treatment and disposal. Time and time again we note that doctors have certified patients to appropriate institutions in this State only to see them released after a few days. I myself have been told by some of the most eminent psychiatrists in Melbourne that it is useless to certify and send to some of these institutions because of the apparent policy prevailing in the Mental Health Department at the moment. I do not wish to enter the arena of the conflict between those who hold differing views as to treatment of the mentally ill, but it would be foolish to ignore the facts and they do suggest that there is, at times, an almost irresponsible attitude on the part of some practising in this area. It is obviously for the medical profession, and particularly those who have chosen to care for the mentally ill, when dealing with those who show any potential danger in their mental illness to have the interests of the community constantly in their minds regardless of the convenience or utility of the moment.

I turn now to what should be the lawyers' prime consideration in

dealing with the threat presented by the dangerous mentally sick person, and to preface my remarks, I repeat what Sholl J. said in *R. v. Starecki* [1960] V.R. 141 at p. 142:

> "The whole of this question of the mental capacity of accused persons and the way it is tried, in my opinion calls urgently for some legislative consideration".

Ten years later Morris and Hawkins in *The Honest Politician's Guide to Crime Control* (1970) wrote:

> "We believe there has been a gross failure both by leading forensic psychiatrists and those responsible for the criminal justice system sufficiently to mobilize psychiatric resources for the prevention and treatment of crime. We believe part of the fault lies in our national monomania, our *folie à collective* concerning criminal responsibility and the defense of insanity".

I am conscious of the fact that the abolition of the defence of insanity has been advocated many times previously and that a good deal has already been written to the effect that the accused's mental condition should not be at issue in a trial which otherwise should merely determine whether or not a forbidden act had, in fact, been committed by a particular person. There is much of value offering in these criticisms and suggestions.

I agree with Dr. Alan Bartholomew and Mr. Kerry Milte who are at present researching and writing on this problem that mental state defences should be abolished at least in the area of homicide and that the accused's mental state should be only relevant to his sentence and treatment. This does not mean that there would not continue to be an ordinary trial to try the issue of fact to prove or disprove whether the accused had in fact killed, or whether the prosecution had proved beyond reasonable doubt that he had done so without lawful justification and that his act was a deliberate one and not an accidental one.

If such were the case, then much time, effort and money could be channelled towards determining the social dangerousness of an offender and setting up special institutions for the treatment and, if necessary, custody of dangerous psychiatrically disturbed offenders.

Now that the death penalty has, in fact, been removed from the Statute Book at this date, at long last, then the problems concerning the diagnosis and treatment of those found guilty of homicide can be discussed in a more rational and helpful way, and perhaps the law will no longer be regarded as a killer in the eyes at least of the relatives of the victim of the homicidal maniac.

If I may, again, borrow from Milte and Bartholomew (1975) 49 A.L.J. 160—

"In our opinion, if such a scheme as we have proposed was implemented, much court time would be saved, much forensic psychiatric sophistry done away with and to that extent the 'responsibility quagmire' drained and the forensic psychiatrist given an opportunity to conduct research into such important matters as 'dangerousness' and to investigate and treat the various offenders who might well benefit from some treatment régime. Lord Jowitt ((1955) 100 J. Ment. Sci. 351) once commented 'that psychiatrists not infrequently feel aggrieved by their treatment at the hands of lawyers' and by the following additional fact 'They feel, too, that counsel, and sometimes even Her Majesty's Judges, have not got a scientific approach to these problems. I confess, too, that Her Majesty's Judges have sometimes admitted to me that they do not derive as much help as they would have expected from the evidence of the psychiatrists.' He then continued: 'I do not myself think that either the lawyers or the psychiatrists are to blame for this undoubted state of affairs. The fault perhaps lies rather in the system than in the individuals. Yet it is by no means easy to see how the system can be altered.' It must be appreciated that no claim is made here to be offering a cut and dried blueprint for an alteration of the system. Rather, it is hoped that the suggestions made above will be taken for what they are and no more and that they will stimulate discussion. It is hoped that the writers' thoughts regarding these matters, if mistaken, are at any rate mistakes which offer some illumination."

There are other deficiencies in the law in its manner of dealing with persons of defective powers of reasoning. In theory it is difficult to understand how a person who was insane at the time of the crime, and can almost immediately thereafter look after his own legal interests in briefing and instructing lawyers to act for him, can adequately appreciate the defences, if any, which are open to him. In practice, however, some of these defects vanish when one considers that after a murder charge has been laid it is invariably the relatives and friends of the accused who in fact engage lawyers. The question of what defences may be open to the accused is generally resolved by the Coroner's inquest into the death of the victim and in the vast majority of cases, where the accused is in fact suffering from a mental illness, there is usually no question as to the identity of the killer, and the facts rarely give rise to defences of accident or self defence. However, far more difficulty is met with in practice when the trial of the accused is about to commence and his defence is one of insanity. If he is a person suffering from a major mental illness which has been the real cause of his otherwise criminal act, then it is difficult to understand how the psychiatrists could ever be sure he is fit to plead to the charge at a trial,

even though he may appear to understand what he is charged with and to go through the motions of saying Not Guilty and challenging when he is prompted to do so in respect of his jury. The other criteria laid down in *R. v. Presser* [1958] V.R. 45 are that he needs to understand generally the nature of the proceeding and to be able fully to understand the course of the proceedings so as to understand what is going on in court, in a general sense, and he needs to be able to understand the substantial effect of any evidence which may be given against him and he needs to be able to answer to the charge through his counsel and to have sufficient capacity to be able to decide what defence he will rely upon, and if necessary, to give his version of the facts. In *R. v. Jeffrey* [1967] V.R. 467 at p. 480, Barry J. stated:

> "As she was sane and of mature years when she stood her trial, the law must assume that the appellant was capable of exercising proper judgment in connexion with the defence she desired to be put forward on her behalf. I confess that I have considerable doubt that the assumption is well founded."

In the same case Gillard J. at p. 489, stated that :

> "Although it is implicit in the acceptance of the fitness of the accused person to plead that she also had the ability to instruct her legal practitioners, there formed in my mind a grave doubt whether even in her lucid moments, she had the necessary capacity either to assimilate advice given to her or to decide competently the course to be taken for her defence."

I must confess that I have had similar reservations about some who have, in fact, been tried and have pleaded "Not Guilty on the grounds of insanity". There is justification for at least one blind eye being turned to the reality of the situation when one considers the awful alternative of an accused person being locked up and being kept in strict custody until he is considered fit to plead, if and when that ever occurs, whilst he is in law not guilty of the charge he is in custody for. There is no provision in our law for the acceptance by the Court of a plea of Not Guilty on the ground of insanity, so even if the person were fit to plead at his trial, he is still prevented by law from having the trial disposed of in the manner of a plea.

When that eminent judge, Lawton L. J. spoke of "This quagmire of law, seldom entered nowadays save by those in desperate need of some kind of defence", he may well have added that the quagmire was not the creation of the mentally ill and those psychiatrists who strive courageously and tirelessly to help them, but the result of the inadequacies, defects and neglect found in the law which is at least metaphorically, if not, really, at times a killer.