Mental Health and The Charter

R. v. Chaulk and *R. v. Swain*
INSANITY AND THE CONSTITUTION

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The effect of the cases of *Chaulk*[1] (delivered December 20, 1990) and *Swain*[2] (delivered May 2, 1991) is that an extensive review of the substantive, procedural, and evidentiary provisions of the law of insanity has been conducted by the Supreme Court of Canada. There is not sufficient space in a forum such as this to discuss all of the issues and their ramifications. As a result, only the major Charter issues will be dealt with in detail.

CHAULK: WHAT TO PROVE? SANITY OR INSANITY?

The Facts

On September 3, 1985, Robert Chaulk and Darren Morrisette, 15 and 16 years of age respectively broke into an elderly man's home, ransacked it, and viciously beat the occupant to death with various implements. Their only defence was insanity. The evidence was that they suffered from a joint delusion (labelled a paranoid psychosis) that they had the power to rule the world. In order to achieve that objective they believed that it was necessary for them to kill the victim. They knew this was against the law as it existed, but believed themselves to be above the law. They believed that, given their powers, they had a right to kill "losers" such as the deceased.

They were tried and convicted of first degree murder. This conviction was upheld by the Manitoba Court of Appeal.

Relevant Statutory Provisions

Criminal Code

16. (1) No person shall be convicted of an offence in respect of an act omission on hiss part while that person was insane.

(2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(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 caused 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.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

Non-Charter Issues

The primary issue argued before the Supreme Court of Canada was that the word "wrong" in section 16(2) of the *Criminal Code* ought to be interpreted as meaning "morally wrong". In order to succeed, the appellants would have to convince the Court to overrule its previous decision in *R. v. Schwartz*[3]. In that controversial decision, the Court decided 5-4 that the proper interpretation was "legally wrong". If the earlier decision was upheld, there would be no defence available on this ground. Instead, the Court reversed itself and held 6-3 that "wrong" henceforth would mean "morally wrong". As a result, on this ground alone, a new trial was ordered.

The Court also considered the interpretation to be given to the concept of "specific delusions" in section 16(3). The majority held that in view of the expanded meaning of "wrong" in section 16(2), this provision had been effectively rendered superfluous. That is, any person falling within the provisions of this section would also fall within the provisions of section 16(2). As a result, it was not necessary to separately interpret this section.

In addition, the Court confirmed the right of the Crown to present its evidence on the issue of insanity by way of rebuttal. This splitting of the Crown's case was allowed, since the Crown was under no obligation to challenge a defence that might be raised by the accused. This is the case, even if the Crown in aware of the nature of that defence.

The Onus of Proof

The constitutional issue dealt with by the Court was whether the section 16(4) of the *Criminal Code*, which puts the onus on the accused to establish insanity on a balance of probabilities, was inconsistent with section 11(d) of the *Charter*. If this were the case, then it was necessary to determine whether or not the provision could be justified under s.1 of the *Charter*.

The Court split on this question. Lamer C.J. (Dickson C.J., La Forest and Cory JJ. concurring) and Wilson J. (in separate reasons) held that the provision was inconsistent with the *Charter* provision. McLachlin J., (L'Heureux-Dubé, Sopinka and Gonthier JJ. concurring) held that there was no inconsistency. The split resulted from differing views of the nature of insanity as a legal concept. Lamer C.J. took the position that if a person is insane, that person will be found not guilty. In his view it was irrelevant for the purpose of section 11(d) whether insanity is characterised as "as a denial of *mens rea*, an excusing defence, or ... as an exemption based on criminal incapacity". It therefore followed that since it was necessary to be sane to be guilty, the presumption of innocence required that there be proof

beyond a reasonable doubt of this factor when it was in dispute. As a result, the principle enunciated by the Court in *R. v. Whyte*,[4] (any provision that permitted a conviction while a reasonable doubt existed was inconsistent with the *Charter*) was applied and section 16(4) was held not to meet the standard set out in section 11(d).

McLachlin J. saw the issue of insanity not as a defence, but a matter that determined whether or not accused persons could be held to be criminally responsible for their actions. She was of the view that since an individual who successfully pleaded insanity was not released immediately, but was held at the pleasure of the Lieutenant-Governor, insanity could not be treated as a true exculpatory defence. That is, the guilt of the accused person was not dependent upon the proof of sanity. She stated that since the Crown had to prove both *actus reus* and *mens rea*, and negative any exculpatory defences raised beyond a reasonable doubt, all elements that constituted guilt had to be proved by the Crown. Since sanity was not an element that had to be proved in order to result in a guilty verdict, the presumption of innocence was not violated by section 16(4).

Lamer C.J. then went on to consider whether or not the provision was a justifiable limit under section 1 of the *Charter*. In order to resolve the question he utilised the framework set out in *R. v. Oakes*[5]. He stated that the objective of the legislation was to avoid placing the impossibly onerous burden on the Crown of disproving insanity and thereby to secure the conviction of the guilty. The burden was in this form because of the relatively meagre state of society's knowledge of mental illness, the fact that the Crown could not force an accused person to undergo a psychiatric examination or to co-operate with such an examination, and that the Crown may not know that insanity will be an issue until sometime after the event.

For these reasons he held that the objective was sufficiently important to warrant limiting constitutionally protected freedoms. He did not, however, give any reasons, nor did he discuss why he viewed the matter as a pressing concern.

Given that the reverse onus is one that will alleviate the Crown's impossible burden of proving insanity, the provision was rationally connected with the objective. The question of whether the provision impaired the right as little as possible was also positively answered. This problem was addressed by determining whether "less intrusive means would achieve the same objective or achieve it as effectively." In his view any alternate means would have the effect of increasing the number of cases where insanity would be asserted by accused persons and as a result, there would be more persons found not guilty by reason of insanity. Therefore any lesser burden would not achieve the objective as some persons who are not in fact insane would be found not guilty on this basis. Although this may not be the absolutely least intrusive means of achieving the objective, it was within an acceptable range of such means.

On the question of proportionality between the means and the objective, he stated that imposing the burden on the accused of proving insanity on a balance of probabilities, rather than imposing the "full criminal burden" (presumably beyond a reasonable doubt), achieved an appropriate balance by ensuring that the Crown would not have to meet an impossible burden, resulting in the conviction of the truly guilty and the acquittal of the truly insane. He was prepared to accept the fact that some persons who are in fact insane will be convicted. In his view, this was inevitable given the state of medical knowledge at the present time. In the result, section 16(4) is still operative and the onus remains on an accused person to prove insanity on a balance of probabilities.

Wilson J. severely criticised Lamer C.J.'s section 1 analysis. She stated that the purpose of the section is to prevent "perfectly sane persons" from being acquitted on bogus claims of insanity. In her view, in order to justify the provision, evidence would have to led to show that sane persons had successfully pleaded insanity in significant numbers and that this was a problem that had to be dealt with. This could not be shown since the provision was a restatement of the common law and there had never been a provision in Canadian law that gave rise to the problem. As a result, there was no "pressing and substantial concern" which would justify an interference with section 11(d) of the *Charter*.

As a result, in her view, the purpose of the provision is to guard against a problem that might arise if the provision were not there. This is a purely hypothetical situation and an infringement on the *Charter* ought not to be justified where there is no history of an actual problem caused by the use of another burden of proof. In addition, she did not accept Lamer C.J.'s premise that proving insanity beyond a reasonable doubt is an "impossibly onerous" one. In her view, the fact that the accused has to bring forward some evidence of insanity within the meaning of the *Criminal Code* means that the Crown need only address the evidence presented within the context of the definition of insanity. Depending on the facts of the case, this may or may not be difficult. As a result, there is no reason for stating that the burden was an impossibly onerous one.

In her view, in order to address such a hypothetical situation, there should be some evidence from other jurisdictions to support the notion that putting the burden of proof on the prosecution resulted in a pressing and substantial problem. She reviewed the American experience (where the various jurisdictions are evenly split between having the accused prove insanity on a balance of probabilities and the Crown disprove it beyond a reasonable doubt) in order to determine if an analogy could be drawn. This review, together with a review of commentaries made on the American experience, led her to the conclusion that there was no problem in that country and, as a result, no basis for believing that there will be an increase in the number of successful pleas of insanity by those who are, in fact, not insane.

Comment

The decision in *Chaulk* represents a significant clarification of the substantive law of insanity and a standstill position in the procedural and evidentiary aspects of that defence. In reality, given the infrequency with which the defence is proffered, there will be no noticeable change in the number of successful pleas of insanity.

Of significant interest, however, is the basis upon which a problem will be considered pressing and substantial for the purposes of section 1 of the *Charter*. Four members of the Court were prepared to declare a problem that had not existed in Canada to be of that nature. The reasons for this declaration were at best meagre and unconvincing. Although some concerns may be self evident, that was not the case here. Prior to holding that an interference with constitutionally protected rights is justified, there should be some solid evidence to back up that proposition. There was no such evidence here. In fact, much of the evidence seemed to lead to the opposite conclusion. Wilson J. was correct when she stated that, in the event that there is some room for debate, the debate ought to be resolved in favour of a solution that will result in a "guilty person being (sic) found not guilty by reason of insanity and committed for psychiatric treatment than an insane person be convicted of a crime."

SWAIN: WHO DECIDES INSANITY?

The Facts

Owen Swain attacked his wife and infant children causing superficial injuries. At the time he appeared to be fighting with the air and talking about spirits. He testified that he felt that his family was under attack by devils and that in order to protect them he had to do certain things. Mr. Swain spent seven weeks in a psychiatric hospital after the offence. After treatment with anti-psychotic drugs his condition improved to the extent that he was released into the community pending his trial.

The Trial

Mr. Swain was charged with assault, and assault causing bodily harm. At his trial, he chose not to rely on the defence of insanity. However, over his objection, the Crown was permitted to adduce evidence of insanity. As a result, he was found not guilty by reason of insanity and after an unsuccessful *Charter* challenge to section 542(2) of the *Criminal Code*, was ordered into custody to await the pleasure of the Lieutenant Governor. In the result, he spent approximately 15 months in custody pursuant to the provisions of the *Code* relating to insane acquitees. The Ontario Court of Appeal upheld the accused's acquittal.

Statutory Provision

> 542.(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge, or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner the court, judge or magistrate directs, until the pleasure of the lieutenant governor is known.

The Issues

The Primary issues dealt with by the Court were:

1. Whether it was consistent with the *Charter of Rights* to permit the Crown to raise evidence of insanity when the accused chooses not to raise the issue at the trial.
2. Whether the provisions of section 542(2) violate the *Charter*.

The Crown's Right to Raise Insanity

The rule permitting the Crown to adduce evidence of insanity is one that is governed by the common law and has been set out in cases such as *R. v. Simpson*[6] and *R. v. Saxell*[7]. This being the case, the Court confirmed that common law rules are subject to *Charter* scrutiny so long as they fall within section 32 of the *Charter*.

The rule was attacked primarily on the grounds that it violated section 7 of the *Charter*. Lamer C.J. for the majority (Sopinka and Cory JJ. concurring; Wilson, Gonthier and La Forest JJ. concurring wrote separate reasons but generally agreed with Lamer C.J.) held that fundamental justice included the notion of the adversarial system, and within that notion the fact that the accused person ought to have the right to control his or her own defence. Permitting the Crown to adduce evidence of insanity interferes with that right and is, as a result, a violation of section 7. This violation is compounded by the fact that the Crown's evidence would put the accused's credibility in issue, should he or she choose to rely on a different defence. As well, it could put the accused in the position of having to put forward inconsistent defences, for example, insanity and alibi.

Lamer C.J. went on to consider whether or not the common law rule could be justified by section 1. He characterized the objectives of the rule as: (1) to avoid the conviction of persons who are in fact insane but refuse to adduce evidence of that insanity; and (2) to protect the public from dangerous persons requiring hospitalization.

In his view, these objectives were of pressing and substantial concern and of sufficient importance to warrant overriding a constitutionally protected right or freedom. As well, there was a rational connection between the rule and the objective.

However, the rule was not one which did not interfere with the *Charter* right as little as possible. In cases involving statutory provisions, the Court will uphold the provision if it comes within a range of means that impair the *Charter* right as little as possible. However, the Court held that a common law rule must be the least intrusive means of attaining the objective in order to be justified under section 1. The present rule did not meet this test.

Rather than simply declaring the rule to be inoperative pursuant to section 52 of the *Charter*, the Court fashioned a new common law rule which it believed conformed to constitutional

standards. This rule would permit the Crown to adduce evidence of insanity in two separate circumstances. The first would be where the accused as part of his or her defence raises the issue of mental capacity at the time of the offence. The Crown could then bring in evidence of insanity and the finder of fact would have the alternative of bringing in a verdict of not guilty by reason of insanity. The second circumstance would permit the Crown or the defence to adduce such evidence after a finding has been made that the accused would be otherwise guilty of the offence. In effect the new rule calls for a two stage trial. The first stage will determine guilt or innocence without taking insanity into consideration. If the accused is acquitted, he or she is discharged and is free from any criminal sanctions. If the finder of fact finds that the offence is proved and the accused cannot benefit from any exculpatory defences raised, then either the Crown or the defence may raise insanity as an issue and the finder of fact must then determine if it has been established that he or she was insane at the time of the offence. This unique remedial device may effectively change the way in which trials are conducted in the rare case where either the Crown wishes to lead evidence of insanity or where the accused wishes to rely on another defence and use insanity as an alternative.

Section 542(2) of the Criminal Code

This provision requires a trial judge to order an insane acquittee to be held in custody pending a determination by the Lieutenant Governor as to what is to be done. This latter determination, which was not an issue in the case, can include detention, discharge on conditions or a complete discharge. The judge has no discretion and there is no provision for a hearing or any other forum in which the accused can make representations regarding his or her fate. This lack of hearing or other procedural safeguards caused the Court to hold that the provision was not in accordance with the principles of fundamental justice and thereby violated section 7 of the *Charter*. As well, since there is no discretion in the trial judge, and no standards set out to determine whether or not the accused ought to be detained, the section constituted an arbitrary detention and a violation of section 9 of the *Charter*.

Although the goal of protecting the public through the prevention of crime by detaining insane acquittees is an objective that is pressing and substantial, and the means used have a rational connection with that objective, the Court held that the minimal impairment requirement of section 1 was not met. Although some detention may be required, individuals should be detained no longer than necessary to determine their present dangerousness in order to meet the minimal impairment test. Since there is no time period set out in the legislation, it failed the test and, as a result, was in violation of the *Charter*.

Again, rather than declaring the section to be inoperative, the result of which would have been to release all insane acquittees until Parliament acted, the Court devised a specific remedy. Because of the dramatic effect of invalidity, it held that there would be a period of temporary validity for a period of six months. Any detention order could only be for a period of 30 days unless the Crown established that a period of up to 60 days was necessary. If there was no order by the Lieutenant Governor within this period, or if no time period is set out and no order is made within 30 days, the accused would be entitled to apply for *habeas corpus*. It must be remembered that only the initial period of detention is affected by this decision. The constitutional validity of the Lieutenant Governor's determination was not resolved in this case. At least on this issue, the ball is clearly in Parliament's court.

Comment

The remedies fashioned by the Court in this case blur the distinction between the judicial and the legislative function. On the Crown's right to raise the insanity issue, there is no provision in the *Criminal Code* which could be interpreted to allow a finder of fact to make intermediate findings of fact prior to determining guilt or innocence. A jury would have to be brought in and asked if the accused was guilty or not guilty absent any consideration of insanity. If it found the accused guilty, it would then have to hear new evidence and perhaps turn around and make a finding of not guilty by reason of insanity. This remedy in effect turns the criminal trial into two trials. All of this to permit the Crown to lead evidence of insanity and, in a case such as Swain's, achieve a period of detention longer than that which would have been imposed if he was found guilty of the offence. There is a good argument to be made that Parliament should be the institution mandating this result, and not the Court.

As well, by setting out a time period for the initial detention of the insane acquittee, the Court has taken on a purely legislative function. In effect, a person found not guilty by reason of insanity would never be set free immediately. Swain is a good example. After his initial detention under provincial legislation, he was on bail and in the community for a period of 18 months. The effect of the remedy would have such an individual who, having been released on bail and adjudged not to be a danger, then taken into custody and held for at least 30 days. It would seem that determining how, and under what circumstances, an individual's liberty is to be taken away would ordinarily be the function of Parliament. In this case, the Court took on that role.

It must be appreciated, however, that the Court is put into an untenable position. For, if it declared the provision inoperative and let the chips fall where they may, there is a possibility that dangerously ill individuals would be let into the community. If they simply stayed the operation of the judgement for a period of time, well individuals might be detained for an inordinate period of time without a final resolution of their situation. Perhaps the price of giving the courts the power to declare statutes inoperative is effectively to permit the courts to act as a temporary legislative body in order to ameliorate the deleterious effects of those decisions.

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Lamer C.J. that Parliament was aware of the constitutional concerns raised by indeterminate detention and clearly showed that section 542(2) did not impair an appellant's section 7 right to liberty to the least extent possible.

The Court pointed out that an automatic order was "no less arbitrary" if it was for a limited period of time where there were no set criteria for its imposition. Lamer C.J. noted, however, that this state of affairs may not be disproportionate to achieving the objective. It is the indeterminate nature of the detention which "tips the balance" and fails to satisfy the proportionality requirement stipulated in *Oakes*.

The Court ordered a temporary transitional period of 6 months for section 542(2) in order to prevent the release of all insanity acquittees, including those who might be a danger to the public. During the period of temporary validity any detention ordered pursuant to section 542(2) will normally be limited to 30 days, up to a maximum of 60 days where circumstances so warrant. If orders are made without such limits, an acquittee will have the writ of *habeas corpus* available after 30 days.

THE FEDERAL GOVERNMENT'S RESPONSE

On July 10, 1991 the Honourable Kim Campbell, Minister of Justice and Attorney General for Canada, released proposals in response to the Supreme Court decision in *Swain*. These proposals are, according to the Department of Justice, an attempt to "bring the criminal law's approach to the mentally disordered accused into line with the *Charter* and contemporary health-care practices."[7] The proposals have two objectives: (1) to ensure that individuals are not deprived of their *Charter* rights by being detained for a mental disorder without a fair hearing and regul ar review of their particular cases; and (2) to protect the public from dangerous mentally disordered persons who come into conflict with the law.

In order to protect the *Charter* rights of the mentally disordered accused, proposed amendments to the *Criminal Code* include:

- Section 16 defence of insanity be repealed. In its stead is a section 16 defence of "mental disorder" which exempts anyone from criminal responsibility for any act or omission committed while suffering from a mental disorder.
- Any assessment order issued by a court to assess the mental condition of the accused to determine whether the accused was suffering at the time of the alleged offence from a mental disorder is limited to 30 days, except for a 60 day limit where a court is satisfied that circumstances exist to warrant it.
- The verdict of not guilty by reason of insanity will be replaced with a verdict that the accused committed the act but is not criminally responsible on account of mental disorder. In such cases, the accused shall be deemed not to have been acquitted or found guilty of the offence.
- The review process is improved. Disposition hearings must be held by either the court or a review board within a certain time and are effective for a limited period. The accused is to be notified, and may attend and make submissions at a disposition hearing.
- When reaching a disposition order, a court or review board shall make a disposition that is the least onerous and least restrictive to the accused. Where the accused is not a threat to the public, the accused must be discharged absolutely, or discharged subject to conditions, or detained in custody in a hospital subject to conditions.
- Indeterminate custody is replaced with maximum detention periods, e.g., life for murder.

Measures to protect the public include:

- permitting indeterminate detention in cases where the accused has been found by a court to be "a dangerous mentally accused". (As per the current dangerous offender provisions.)

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1. *R.* v. *Swain*, [1991] S.C.J. No. 32 (S.C.C.).
2. Ford, "Will Criminally Insane Stalk Streets?" *Calgary Herald* (13 July 1991) A4.
3. *Mental Health Act*, R.S.O. 1980, c.262.
4. *Fleming* v. *Reid* (1990), O.R. (2d) 169 (Dist. Ct.).
5. R.S.O. 1980, c.262.
6. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
7. Canada Department of Justice, Press Release (10 July 1991).

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(Insanity and the Constitution, continued from page 102)

1. *R. v. Chaulk* (1991), 62 C.C.C. (3d) 193 (S.C.C.).
2. *R. v. Swain*, [1991] S.C.J. No. 32 (S.C.C).
3. [1977] 1 S.C.R. 673.
4. [1988] 2 S.C.R. 3.
5. [1986] 1 S.C.R. 103.
6. (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).
7. (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).

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