

Institution: De Montfort University
Unit of Assessment: 20
Title of case study: Empirical and Legal Aspects of Mental Condition Defences and Unfitness to Plead
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Much has been written about mental condition defences such as insanity and diminished responsibility together with the cognate doctrine of unfitness to plead. However, most of this work has been doctrinal rather than empirical. This case study has developed a sustained and continuing understanding of how certain mental condition defences operate in practice, primarily through empirical analysis. R.D. Mackay's empirical studies of both the insanity defence and unfitness to plead and his studies of diminished responsibility, provocation and infanticide have been used by and have influenced law reform bodies, legislators, policy development and legal analysis.</p>
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>R.D. Mackay has been Professor of Criminal Policy and Mental Health at De Montfort University since 1993. His research in this area stems from his monograph entitled <i>Mental Condition Defences in the Criminal Law</i>, published in 1995 by Oxford University Press [1]. Since then, Mackay has shown through empirical and additional legal analysis how the existing law operates in reality.</p> <p>The research into the defence of insanity and the doctrine of unfitness to plead from 1993 onwards has investigated how both operate in practice together with the impact of statutory reform measures. By conducting a series of empirical studies into both, Mackay has explored how the legal tests are applied by psychiatrists, together with the impact of case disposals.</p> <p>In 1991, Parliament passed the Criminal Procedure (Insanity and Unfitness to Plead) Act, which directly addressed inadequacies exposed by Mackay in an early empirical study of both unfitness to plead and insanity, particularly in relation to the lack of disposal, flexibility and additionally, in respect of the former, the fact that there was no requirement on the prosecution to test its case against the unfit defendant. In order to explore the operation and impact of the 1991 Act, Mackay conducted further empirical studies into unfitness to plead and insanity funded by ESRC (1993-1997) and the Nuffield Foundation (2003-2013) respectively [2]. These studies, while showing a small increase in the use of both unfitness and insanity, also demonstrated that the legal tests remained problematical [3]. As a result of lobbying the Law Commission, both unfitness to plead and the defence of insanity form part of its 10th law reform programme. This resulted in Mackay being commissioned by the Law Commission in 2009 to conduct new empirical studies into both unfitness to plead and the defence of insanity to inform its thinking about reform.</p> <p>Mackay was earlier commissioned from 2003 to 2004 to conduct two more empirical studies by the Law Commission. These studies were in connection with the Commission's work on Partial Defences to Murder and concerned the pleas of provocation and diminished responsibility [4]. Both studies gave a detailed picture of how the law operated in practice. Later the Commission's brief was extended to a broader consideration of homicide. As part of its work, Mackay was commissioned in 2005 to 2006 to conduct an empirical study into Infanticide in order again to</p>

inform the Commission as to how this offence/defence was being used. This included a study of related diminished-responsibility manslaughters [5].

With regard to Mackay's more theoretical legal work, he was actively involved in litigation on the island of Jersey from 2001 to 2003 where he was commissioned to prepare written legal submissions in that jurisdiction's first cases dealing with insanity and unfitness to plead respectively. In both cases these submissions were considered by the Jersey Superior Court and led directly to the court formulating new tests for both the defence of insanity and unfitness to plead. Both tests now form part of Jersey law. In June 2013 Mackay gave papers at the Keele University Medico-legal Seminar on Automatism (a participant in which was the Criminal Law Commissioner Professor David Ormerod) and at the University of Glasgow School of Law's Gerald Gordon Seminar on Criminal Law.

3. References to the research (indicative maximum of five references)

1. Mackay RD, *Mental Condition Defences in the Criminal Law* Oxford University Press, 1995.
2. Mackay RD, Economic and Social Research Council, Research Funding to conduct a five year study into the Operation of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, £137,577, 1993-1997, Grant No R000233773: Mackay RD, The Nuffield Foundation, Unfitness to Plead, Insanity and Diminished Responsibility – An Empirical Study of Three Categories of Mentally Disordered Offender together with Provocation £149,230, 2003-2013.
3. Mackay RD, B.J. Mitchell and L. Howe) *Yet More Facts about the Insanity Defence* [2006] *Criminal Law Review* 399-411; *A continued upturn in unfitness to plead – More disability in relation to the trial under the 1991 Act* [2007] *Criminal Law Review* 530.
4. Mackay RD, *The Provocation Plea in Operation – An Empirical Study*, Appendix A of the Law Commission's Final Report on Partial Defences to Murder, 6 August 2004.
5. Mackay RD, *The Diminished Responsibility Plea in Operation – An Empirical Study*, Appendix B of the Law Commission's Final Report on Partial Defences to Murder, 6 August 2004.
6. Mackay RD, *Infanticide and Related Diminished Responsibility Manslaughters – An Empirical Study*, Appendix D of the Law Commission's Final Report on Murder, Manslaughter and Infanticide, 28 November 2006.

4. Details of the impact (indicative maximum 750 words)

The Law Commission's work on Partial Defences to Murder (2003-2006), which extensively referred to Mackay's commissioned empirical work, led to reform proposals for both diminished responsibility and provocation together with a recommendation that the substance of the Infanticide defence/offence be left unaltered. These reform proposals were then considered by the Ministry of Justice, which engaged in its own consultation exercise. As a direct result of his empirical work for the Law Commission, Mackay was invited by the Ministry of Justice in 2008 to participate in three policy meetings to discuss the revised reform proposals for provocation, diminished responsibility and infanticide (a). This in turn resulted in a post-consultation report to the consultation paper to which Mackay also contributed (b). In 2009, Parliament passed the Coroners and Justice Act, which enacts reformed pleas of diminished responsibility and 'loss of control' but leaves the substance of Infanticide intact. Mackay's work was sought by both the Law Commission and the

Ministry of Justice throughout this reform process.

Mackay has continued to expose the inadequacies of the current law of unfitness to plead and insanity and his work with the Law Commission led to discussions with them from 2008-2009 about including both unfitness to plead and the defence of insanity in their new reform programme. These discussions culminated in both topics being included in the Commission's 10th Programme of Law Reform published in June 2008, which refers to Mackay's work being used to assist the Commission in the reform process [c]. As a direct result, in 2009 Mackay was commissioned by the Law Commission to prepare new empirical studies on both unfitness and insanity. Both reports of the completed studies were submitted to the Commission. The one on unfitness to plead was published in 2010 in their Consultation Paper on that topic where it is drawn on extensively throughout [d]. In particular, the findings are heavily relied on by the Commission in the Consultation Paper's Impact Assessment [e]. On 10 April 2013, the Commission published its analysis of the responses it had received to its Consultation Paper on Unfitness to Plead, including those of Mackay, and confirming that a final report on the topic will be published in 2014 (f).

Mackay's report on the insanity defence was published in 2012 as part of the Commission's Scoping Paper on that topic where it and his additional research are extensively referred to [g]. In addition Mackay was invited to join the Law Commission's working parties on both unfitness to plead and insanity. The Law Commission has asked Mackay to update both of his empirical studies to further inform the Commission's law reform exercise. This research will continue into 2014-15.

On the 23 July 2013, the Law Commission published a discussion paper on "Criminal Liability: Insanity and Automatism". Mackay is referred to throughout, and his contribution is explicitly acknowledged in Paragraph 1.85 which states: "1.85 Professor Ronnie Mackay, a member of our Advisory Board, has described our provisional proposals for the reform of the insanity defence as "radical", and stated that in his view "a 'radical' change to the M'Naghten Rules is precisely what is needed". We agree." (j)

Mackay's broader legal research has led to the introduction of new legal tests in 2001 and 2003 for both unfitness to plead and insanity in Jersey law. Although the former has resulted in litigation in 2009 in the case of Attorney General (for Jersey) v Harding [16 Oct 2009] 2009 JRC 198, concern had been expressed about the lack of knowledge amongst Jersey legal and medical practitioners relating to these new tests (h). As a result, in February 2010 Mackay was invited as a keynote speaker at a conference in Jersey entitled "The Insanity Defences in the Criminal Law of Jersey", which was organised to disseminate and further explore the implications of the two new tests. Mackay has further disseminated his work by numerous speaking engagements to psychiatrists and lawyers explaining and exploring his empirical studies on mental condition defences, including the Forensic Group of the Royal College of Psychiatrists in Dublin and the Judicial Studies Board for Northern Ireland, both in 2010. In addition, Mackay was invited to give a presentation on his empirical research as part of the Law Commission's conference entitled "Fitness to Plead: Reforming the Law" in March 2009. On the international front, Mackay gave the 2010 Willis Cunningham Memorial Lecture entitled "Researching and Reforming Insanity in the Criminal Law" at Queen's University in Kingston, Ontario in Canada and in 2011 presented a seminar on the New Zealand Law Commission's Report on the Insanity Defence as a visiting scholar at Auckland University Law School in New Zealand. In May 2012, Mackay spoke about his research into the insanity defence as part of Radio Four's *All in the Mind* (i).

5. Sources to corroborate the impact (indicative maximum of 10 references)

- a. Murder, manslaughter and infanticide: proposals for reform of the law, a consultation produced by the Ministry of Justice, CP19/08. Published on 28 July 2008, para. 10 and Annex G (accessed 30/08/13).
<http://webarchive.nationalarchives.gov.uk/20110218135832/http://justice.gov.uk/consultations/docs/murder-manslaughter-infanticide-consultation.pdf>
- b. Murder, manslaughter and infanticide: proposals for reform of the law, Summary of responses and Government position, Ministry of Justice, CP(R) 19/08. Published 14 January 2009, paras. 5 and 8 and Annex A, B and C (accessed 30/08/13).
<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/murder-review-response.pdf>
- c. The 2009 Coroners and Justice act can be accessed via this link (accessed 08/08/13):
<http://www.legislation.gov.uk/ukpga/2009/25/contents>
- d. Law Commission, Tenth Programme of Law Reform, Law Com. No 311, HC 605, 10 June 2008, paras. 2.34-2.46 – this can also be accessed via this link accessed 08/08/13):
http://lawcommission.justice.gov.uk/docs/lc311_10th_Programme.pdf
- e. Law Commission Consultation Paper on Unfitness to Plead, Consultation Paper No 197, October 2010, para 1.32, and Appendix C (accessed 30/08/13).
http://lawcommission.justice.gov.uk/docs/cp197_Unfitness_to_Plead_consultation.pdf
- f. Law Commission Consultation Paper on Unfitness to Plead, Consultation Paper No 197, October 2010, at Appendix D (accessed 30/08/13).
http://lawcommission.justice.gov.uk/docs/cp197_Unfitness_to_Plead_consultation.pdf
- g. Law Commission, Unfitness to Plead: analysis of responses, 10 April 2013 (accessed 30/08/13) http://lawcommission.justice.gov.uk/docs/cp197_unfitness_to_plead_analysis-of-responses.pdf

Law Commission, Insanity and Automatism-Supplementary Material to the Scoping Paper, Appendix E and Insanity and Automatism: A Scoping Paper, 18 July 2012. (accessed 30/08/13) http://lawcommission.justice.gov.uk/docs/insanity_scoping_supplementary.pdf
- h. Fogarty C, Mackay R.D. *On Being Insane in Jersey: Again* [2009] The Jersey and Guernsey Law Review 322 (accessed 08/08/13)
http://www.jerseylaw.je/Publications/jerseylawreview/oct09/JLR0910_Fogarty.aspx
- i. All in the Mind (BBC Radio 4). 16 May 2012 (accessed 30/08/13)..
<http://www.bbc.co.uk/programmes/b01hjs1k>
- j. Law Commission, Criminal Liability: Insanity and Automatism, A Discussion Paper published 23 July 2013 (accessed 30/08/13).
http://lawcommission.justice.gov.uk/docs/insanity_discussion.pdf