CONTINUING ON A THEME OF MURDER: NOT GUILTY BY REASON OF INSANITY

Justice Lowell Goddard*

This is a copy of the speech delivered by Justice Lowell Goddard to the Wellington Medico-Legal Society at the Wellington Club on Thursday 17 October 2002.

L'affaire Gavin Dash/David Gates, sert de trame à l'auteur, juge néo-zélandais, pour évoquer quelles sont dans le droit pénal néo-zélandais, les conditions de recevabilité d'un moyen de défense tiré de l'état d'aliénation mentale d'un prévenu ou d'un inculpé.

Elle rappelle que si la loi présume que toute personne est, par définition, saine d'esprit et doit être tenue pour responsable de ses actions tant que la preuve contraire n'est pas rapportée. Dans ce contexte, la charge de la preuve se trouve donc inversée, la défense devant établir que le prévenu ou l'inculpé était effectivement en état de démence (ou plus précisément qu'il y avait une probabilité plus importante que cela ait été le cas et pas l'inverse) au moment de la commission des faits reprochés.

I should probably begin by explaining why I have chosen to speak on a continuing theme of Murder tonight, with particular emphasis on the defence of insanity. I chose that topic primarily because of the interest that Ken Thompson's address at the last meeting engendered, and also because of certain comments that he made towards the end of his address, in relation to the verdict of not guilty by reason of insanity given in the recent Gavin Dash/David Gates murder trial. I personally found Ken's account of his 25 year involvement in murder trials, given from his perspective as a forensic pathologist, utterly fascinating. I was also interested in what Tony Marks had to say, from the perspective of a forensic psychiatrist, when he offered the vote of thanks to Ken at the end of his address. It was clear from Tony's remarks that he did not share Ken's view of the insanity verdict in the Gates trial. As you may recall, Ken had frankly observed that, in his opinion, David Gates probably was not insane at the time he killed Gavin Dash, because of the detail, number and deliberate nature of the steps he had taken to dispose of Gavin Dash's body

* Justice of the High Court of New Zealand.

afterwards and the length of time over which he had facilitated this. These actions, Ken thought, militated against an absence of reason at the critical time. Ken's view coincided with the Crown's theory of the case: that being, that Gates' very deliberate actions after the killing precluded a defence of insanity on the balance of probabilities. I will explain a little later exactly what the legal test for insanity requires by way of proof and comment on how this can often differ from current medical thinking. Suffice to say at this stage that the law presumes everyone to be sane and responsible for his actions until it is proved that he is not. The usual onus of proof is thus reversed in an insanity case, it falling on the defence to prove that an accused was insane at the time he killed. Put another way, it is for the defence to satisfy the jury that it is more probable than not that an accused was legally insane at the time he killed. The timing is critical: the insanity must be operative at the time he killed.

There was no issue in the Gates trial that Gates was suffering from schizophrenia at the time he killed Gavin Dash, and had been so suffering for a number of years. The trial focussed solely on the issue of insanity and a great deal of psychiatric evidence was given. Seven psychiatrists in total were called, including Tony Marks on behalf of the defence. The jury were told how Gates' mental health had gradually deteriorated from his late teenage years and that his family had grown increasingly alarmed about his condition. His mother gave evidence about her concern over his deteriorating mental state and her attempts to obtain professional help for him. It seems that an emergency callout team was involved at some stage prior to the killing. The issue at trial became, however, whether at the time of the killing David Gates, schizophrenia was operating on his mind to the extent that he was legally insane. The Crown's case was that he was not legally insane at the critical time: that, notwithstanding his schizophrenia, he knew at the time he killed Gavin Dash that it was both legally and morally wrong for him to kill Gavin Dash.

The defence case was that Gates had no such understanding and that whilst he may have known it was legally and morally wrong for other people to kill, he nevertheless believed that at the time he was justified in killing Gavin Dash because Gavin Dash was evil. That defence theory was ultimately accepted by the jury, at least on the balance of probabilities, and an acquittal duly entered by reason of insanity.

I read through Tony Marks' evidence last night and found it very interesting. Of reassurance to Tony might be the fact that the presiding trial Judge, Justice Neazor, told me on the telephone yesterday that he thought Gates was the "maddest looking person [he had] ever seen" and that there were a number of days on which Gates had been too ill to even attend the trial.

An interesting comparative example of a murder trial in which insanity was similarly raised by the defence but which, in striking contrast, resulted in a verdict of guilty of murder, was the trial of Anthony Lawrence Roma in 1991. You may not even remember the Roma case now, as so much seems to have happened since. But it was an interesting case and worth reminding ourselves about. On 14 April 1991, Roma entered the home of a family named Reaney, who lived on Napier Hill. He was totally unknown to the Reaney's at the time. He made his entry through the unlocked front

door sometime around 6am. Six members of the Reaney house were asleep in bed – Mr and Mrs Reaney, their two sons (aged 11 and 7 years) and their daughters (aged 12 years and 23 months). Roma had with him a steel axle stand which he had stolen from a car yard in nearby Tennyson Street. Once inside the house, he located and took a serrated knife from a drawer and also removed all of his clothes. He went upstairs and into the boys' bedroom. There he made a vicious attack on the two sleeping boys, inflicting terrible head injuries on both. He then went into Mr and Mrs Reaney's bedroom where they were sleeping with their baby daughter. Mr Reaney awoke and struggled with Roma, sustaining minor injuries from the knife. Mrs Reaney grabbed the baby and managed to escape from the room. As she was trying to telephone the Police Roma fled from the house, leaving the weapons but grabbing some of his clothing on the way. Just before he departed he was heard to chant a word or words in what sounded like the Maori language and he also adopted a stance reminiscent of a haka movement. Describing this stance the next day, the Police said "it could have easily been an offensive or defensive position, or the reflex actions of a deranged person". Tragically, the Reaney's 7 year old son died from his head injuries and their 11 year old son remained in a deep coma on life support for six weeks before gaining consciousness. Two days after the attack Roma was found running about on a farm near Waipukurau and was arrested. At the time of arrest, he was in a deer paddock, armed with a weapon and minus most of his clothing.

The publicity that followed in the wake of the Reaney homicide was intense, and speculation about the sanity of Roma was rife. Enquiries were made of Maori elders about the possibility of the killing being some sort of Maori ritual and that enquiry, understandably, raised ire. Prior to Roma's was arrest, there had also been much public comment that the person who had perpetrated such an inexplicable act of random and motiveless violence must have escaped from a mental institution. That comment was probably not surprising, given the nature of the attack and its seeming inexplicability to the average citizen. Certainly it could not on its face be regarded as the act of a "normal" person. And needless to say, upon Roma's arrest he was sent immediately for psychiatric examination.

In the build-up to trial, the media focus and publicity surrounding the case reached such proportions that an application had to be made to the Court for a change of venue; it being clear that Roma was unlikely to receive a dispassionate verdict from a jury comprising members of the Napier/Hastings/Havelock North community. The application for change of venue came before the late Justice Heron, who gave a ruling that I find remarkable for a number of reasons. One of its remarkable aspects is that, although it was written only as late as 1991, it constitutes an historical record. I would like to read part of that ruling to you.

After introducing the issue that was before the Court, Justice Heron said:

> … it seems that … the defence will primarily be a psychiatric one, based amongst other things, on the actions of the accused whilst in the house. … a clear indication that the jury will be required, inter alia, to consider a defence of not guilty on the grounds of insanity, has been given. It is said to be a form of

> episodic insanity. Certain bizarre conduct of the accused described by witnesses and the events themselves make the defence of insanity not surprising.
>
> That defence highlights the critical concern in this case. As High Court Judges who have sat on cases involving the defence of insanity will confirm, it is often very difficult for juries to bring themselves to make a finding of not guilty on the grounds of insanity. Whilst deliberations of juries are private, sufficient is revealed by questions asked as to the future consequences of a finding of insanity; [by the] long deliberations in such cases; [and by] verdicts which tend to run counter to convincing medical evidence which heavily favours such a verdict and [by] other pointers, [to] suggest [that] it is a defence [which is] not readily accepted by juries. As the ultimate decision on such a matter is the sole province of juries these observations are made without criticism or alarm. On the other hand, in the interests of justice it is axiomatic that all available defences must be properly considered by the jury on the evidence presented.
>
> There are two important factors about such a verdict, which it seems to me juries have difficulty in reconciling. The first is that they are required to find "not guilty" in a case of homicide where the circumstances will often be exercising considerable compulsion on them to reach a verdict which denounces the events they are considering. The second is the widespread perception that a person subject to the Mental Health Act … is less of a prisoner and suffers less of a penalty than a person who serves a term of imprisonment. Diagnosis of a recovery from mental illness and therefore possibility of release is often perceived as questionable and essentially conjectural. Release is also seen as occurring outside the requirements of the justice system. Likewise the very diagnosis of insanity, even by acknowledged experts with no bias to defence or prosecution, receives some scepticism based, at it often is, on the accounts given by the accused whose conduct overall is under examination in the trial. I do not think I have to examine the validity of the many perceptions; it is sufficient that they exist, as in my view they undoubtedly do.

The lengthy passage I have just read highlights very effectively some of the problems that can arise where a defence of not guilty on the grounds of insanity is raised. As I earlier said, in the event, Roma was convicted by the jury of murder and attempted murder, his defence of insanity clearly being rejected. This was somewhat surprising, and it must have surprised even the seasoned trial Judge, the then Chief Justice Sir Thomas Eichelbuam, who had summed up for an insanity verdict. It was surprising because it was contrary to the preponderance of the psychiatric evidence given at the trial. Five psychiatrists, called for the defence, had said that Roma was suffering from a chronic paranoid schizophrenic illness which dated back to 1982 (when he had first been diagnosed with this at Tokonui Hospital); that he had grossly impaired thinking and judgement; that he suffered from frequent delusions and hallucinations; and that he was probably legally insane at the time he committed the crime. There had also been psychiatric evidence given by three psychiatrists called on behalf of the Crown. Their evidence had tended towards a diagnosis of personality disorder, exacerbated by alcohol and drug consumption, as the operating factor at the critical time, rather than supporting the defence view that Roma's schizophrenia had been the

operating cause of his behaviour at the critical time. A further and significant feature of the Crown's psychiatric evidence was that the bizarre aspects of Roma's reported behaviour at the time of the killing and at the time of his arrest would be very unusual symptoms of schizophrenia. The Crown's evidence did not therefore support a verdict of insanity. As can be seen, the forensic contest that took place in Roma's trial bore similarities to the forensic contest that was to take place in the David Gates' trial 10 years later. Ironically however the David Gates' trial resulted in the opposite verdict. Clearly in the intervening passage of time, the climate of jury opinion had changed.

The guilty verdict in the Roma case was, I suggest, one in which the community spoke its mind in a number of telling ways - all of them foreshadowed in Justice Heron's pre-trial ruling. Certainly the verdict was contrary to the preponderance of the expert evidence. That sort of jury response does sometimes happen in criminal trials and it is not always confined to the situation of murder and the defence of insanity. It does not mean that such a verdict is wrong. It simply reflects the community's reaction to a particular situation, at a given point in history.

The comparative and contrasting aspects of the David Gates and Anthony Roma provides some background to the problems that can arise where a defence of insanity is raised to murder. It is not the divergence of expert psychiatric opinion of itself that is problematic; one does not expect a range of experts to always form unanimous opinions, anymore than one expects appeal Judges to always be unanimous in their decisions. The majority of problems arise because of the incompatibility of the legal test for insanity with contemporary psychiatric understanding.

The starting point for the modern defence of insanity was the decision of the House of Lords in 1843 in *Daniel M'Naghten's* case. M'Naghten was charged with murder, after shooting and killing a man named Edward Drummond, who he had mistaken for the then Prime Minister of England, Sir Robert Peel. M'Naghten was acquitted on the grounds of insanity, and the furore created by this led the House of Lords to inquire of the 15 common law judges as to the law governing such cases. In that context, what has become known as the M'Naghten Rules were devised. These essentially establish that a person is presumed by law to be sane unless:

> … at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature or quality of what he was doing or, if he did know it, that he did not know what he was doing was wrong.

The essential elements of the M'Naghten rules were first incorporated into New Zealand law as part of the Criminal Code of 1893. The current revision of that is now contained in section 23 Crimes Act 1961.

The relevant part of section 23 reads:

> 23. Insanity
> …
> (2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable—
> (a) Of understanding the nature and quality of the act or omission; or
> (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

As you can see the material difference between the M'Naghten Rules and section 23 is that the New Zealand Parliament has defined insanity in terms of an accused's *capacity* to understand the nature and quality of an act or omission or to know that it was morally wrong, whereas the M'Naghten Rules were concerned only with an accused's actual knowledge of those matters. In addition, section 23 includes "natural imbecility" as one of the factors that might bring an accused within the scope of the insanity defence. But otherwise section 23 is based on the McNaghten Rules and requires proof of either "natural imbecility" or "disease of the mind" to found a defence of insanity. These however are legal concepts rather than medical concepts and it is this difference which often creates the difficulties in practical application of section 23 to the available medical facts. In each case it is the task of the Judge to determine, as a question of law, whether a particular mental condition suffered by an accused does come within the definition of "natural imbecility" or "disease of the mind". The Court is not entitled to simply accept an objective medical opinion as to whether an accused was insane at the time or not.

The expression "natural imbecility" has been defined as subnormality or mental retardation and includes congenital defect as well as a disorder that develops later in life. In reality however, the defence of insanity is seldom based on the presence of natural imbecility.

When considering what constitutes a disease of the mind, the Court is concerned only with those disorders which affect the mind, that is to say, those disorders that affect the mental faculties of reasoning, memory or understanding. The law is not concerned with the cause of the condition, or whether it is permanent or temporary, or whether it is curable or incurable. It must, however, have been the operating cause at the time of the offence.

Most psychoses (for example, schizophrenia) fall within the definition of disease of the mind. These, as you are aware, commonly involve loss of appreciation of reality and may include hallucinations or delusions. On the other hand, most neuroses (i.e. anxiety states, obsessional states and hysteria) are excluded as diseases of the mind.

A physical disease, such as epilepsy or arteriosclerosis (restriction of flow of blood to the brain) or even, it has been suggested, a brain tumour, can be considered a disease of the mind in law, although it would probably not be so regarded by medical experts.

In *Bratty v A-G for Northern Ireland* [1963] AC 386, Lord Denning suggested that "any mental disorder which has manifested itself in violence and is prone to reoccur is a disease of the mind". While this statement perhaps appears an over simplification, it does demonstrate that the

development of the legal concept of "disease of the mind" may, at times, have had more to do with policy considerations, such as public safety, than with psychiatry.

"Disease of the mind" does not extend to include any temporary mental disorder that is simply caused by some factor external to the accused, such as concussion resulting from a blow to the head, self-induced intoxication caused by alcohol or drugs, an anaesthetic-induced mental state, or hypoglycaemia caused by prescribed insulin. An act committed while in any one of those states is regarded as *involuntary* for the purposes of criminal responsibility. On that basis it can give rise to a defence of automatism, which I will not go into in detail, except to say that the law recognises two categories of automatism: both sane and insane automatism - the former resulting from external factors such as I have just described, and the latter being dependent on evidence that an accused was suffering from a disease of the mind, that is, where his involuntary actions are referable to a mental or bodily disorder endemic to his physical or psychological makeup. This distinction between external factors causing a mental state and factors internal to an accused, is often problematic in practice. It can cause difficulty for the Judge and counsel in determining whether the correct defence is one of automatism or insanity. The distinction has also led to some anomalous situations; for instance, hypoglycaemia (low blood sugar caused by excessive insulin) may be subject to a defence of sane automatism because the cause of the disorder is not the diabetes itself but the result of use of insulin; whereas hyperglycaemia (elevated blood sugar caused by a failure to take insulin) has been attributed to an inherent defect (diabetes) which has not been corrected by insulin and is therefore considered to be within the realms of the insanity defence (compare *R v Quick* [1973] QB 910) and *R v Hennesey* [1989] 2 All ER 9).

Equally problematic in the trial context is the condition of sleepwalking or somnambulism. The English Courts have held that a case of violence during a sleepwalking episode could amount to insanity under the M'Naghten Rules, as there was medical evidence to the effect that the accused was suffering from a sleep disorder at the time and thus from an abnormality of brain function. By contrast, the Canadian Supreme Court found that sleepwalking is a common disorder which involves no neurological, psychiatric or other illness and is not treatable. Therefore it did not arise from a disease of the mind but rather, entitled an accused to a complete acquittal based on lack of criminal intent.

Turning briefly to some of the other insanity issues that surface with increasing regularity, diminished responsibility has never been recognised as a defence in New Zealand, even if caused by a disease of the mind, except, to an extent, in the special defence of infanticide, which I will not discuss tonight. Diminished responsibility and the concept of "irresistible impulse" have however surfaced in judicial debate over what might constitute a particular characteristic for the purposes of the partial defence of provocation. Likewise various syndromes, such as battered women's syndrome have also surfaced in the provocation debate and achieved some success. But refinement and development of the law of provocation is a gargantuan and nightmare task which has its own

particular problems. Briefly the present legal test is as summarised here *R v McGregor* [1962] NZLR 1069 (CA):

> The offender must be presumed to possess in general the power of self-control of an ordinary person, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him.

I would simply say that the law needs to proceed cautiously before expanding the accepted categories of particular characteristics, as it would be contrary to the public interest to reduce any expectation that reasonable self control will be exercised over such human conditions as ill-temper, irascibility, impulsiveness and violent feelings.

The greatest problem with the insanity defence in its current form (and this criticism is generic to all countries which have adopted the defence based on the M'Naghten formulation) is that the test has not essentially changed in over 150 years of application and thus has not kept pace with developments in medical thinking.

This has forced the Courts to adopt a pragmatic approach on occasions in order to deal with current medical thinking, but such pragmatism does not necessarily achieve consistent results and, at times, can appear to result in a nonsense. This leaves an uncomfortable feeling that justice is not always logically or even-handedly applied; particularly when a legal ruling appears to run contrary to a body of medical opinion.

A new and interesting challenge to the law of insanity as it currently stands, is referred to by Warren Brookbanks, an academic writing for the *New Zealand Law Journal*, in an article entitled *"The M'Naghten Rules: Time for a decent burial?* Warren Brookbanks has noted the incompatibility between the current legal threshold of "disease of the mind" based on the M'Naghten Rules, and the international human rights requirement of a mental disorder based on an "objective medical expertise" test. This issue comes into play when an accused is detained in a psychiatric hospital, following a verdict of not guilty by reason of insanity,. New Zealand has ratified the International Covenant of Civil and Political Rights ("ICCPR"), Article 9 of which relates to deprivation of liberty. This has been interpreted by the European Court of Human Rights as applying in the case of detention on the grounds of mental illness. For such detention not to be classified as arbitrary and in breach of the International Covenant of Civil and Political Rights, the Human Rights Court has held that it must be justified on the basis of medical-scientific evidence. A breach of Article 9(1) has been alleged by a New Zealand citizen who took a case before the Human Rights Committee (*A v New Zealand* UN doc CCPR/C/66/D/754/1997). That litigant claimed that his Article 9 rights had been breached because he had been held in a mental secure hospital in New Zealand under the Mental Health Act 1969 when he was not a mentally disordered person. In a partly dissenting opinion, which nevertheless agreed with the majority opinion, two of the Committee members said:

> The special nature of compulsory psychiatric treatment as a form of deprivation of liberty lies in the fact that the treatment is legitimate only as long as the medical criteria necessitating it exist. In order to avoid compulsory psychiatric treatment from becoming arbitrary detention prohibited by article 9, paragraph 1, there must be a system of mandatory and periodic review of the medico-legal grounds for continuing the detention.

It may be therefore that the incorporation of international norms into New Zealand domestic law will serve as the catalyst which brings the current legal concepts of insanity more consistently into line with advances in medical knowledge.

Lastly, I will touch on two matters which are frequently the subject of query. The first is the wording of the special verdict of insanity in New Zealand. The second is why a verdict of insanity must always go to a jury for determination, even in a case where there is overwhelming and unanimous medical evidence of insanity.

The "not guilty" component in the special verdict of "not guilty by reason of insanity" signifies the effective negating of any mental element of deliberate, knowing behaviour. Thus a finding of insanity recognises the inability of the accused to form a guilty mind. A person who lacks a guilty mind is not criminally responsible – therefore they are not guilty.

This form of verdict has not however been consistently nor universally applied. Originally, under the English Criminal Lunatics Act 1800, the verdict was one of "not guilty on the grounds of insanity". However it was changed in 1883 at the insistence of Queen Victoria, who was shot at by a man who was afterwards acquitted on the ground of insanity. The Queen asserted that he must have been guilty since she saw him fire the pistol herself. The verdict was therefore amended to one of "guilty but insane". It was amended back again to the present form in the 1960s.

In relatively recent times more than a dozen American states have enacted "guilty but mentally ill" provisions as an alternative to, though not in substitution for, a not guilty by reason of insanity verdict, some in response to the controversial acquittal in 1982 of John Hinkley, who shot at President Reagan.

Lastly, why does the law require a jury, rather than a Judge alone, to be the final arbiters when a defence of insanity is raised? I will simply answer this by quoting a short passage from a summing up I gave in a tragic infanticide case last year:

> It is appropriate that I say something to you about why a tragedy of this nature is brought before the courts as a criminal trial on indictment. It may be that, having listened to the evidence and particularly that of the psychiatrists, some of you have wondered whether it is humane to put a woman on trial for something for which she is more to be pitied than blamed. I therefore want to explain to you why it is appropriate that we have such trials and why we require a jury to deliver verdicts in relation to such matters.

In our society, and in similar societies, the sanctity of human life is held in the highest regard. The taking of the life of a human being by another human being is regarded as the gravest breach of the social contract by which we all live. That social contract is embodied in our written criminal law. Where there has been the taking of the life of one member of society by another member of society, which is not purely accidental, the facts must be fully probed and a decision reached as to whether the taking of that life was culpable or not culpable in law. Because of the importance of such decisions it is deemed appropriate that they be made by a randomly chosen group of twelve good persons, such as yourselves, representing the community and guided by expert advice on the law from a Judge. For the purpose of ensuring that all of the interests of justice are met in the name of the community, the process is openly conducted in a public forum and it is not deemed appropriate for decisions on such serious matters to be made by psychiatrists alone or by Judges alone. The situation in this case is properly a community issue.