Marquette Law Review

Volume 17
Issue 3 *April 1933*

Article 3

1933

Insanity in Criminal Cases in Wisconsin

Gregory Gramling

INSANITY IN CRIMINAL CASES IN WISCONSIN

GREGORY GRAMLING*

DURING the last quarter of a century, there has arisen a greatly increased public consciousness of law as a factor in living which may be either for good or for evil. It has been repeatedly said that this increased consciousness has resulted in an amazing disrespect for law. This is a generalization, however, which may be qualified by saying there is an amazing disrespect for *bad* law. The reasons which have caused this public awakening are many and varied; the controlling reason, though, is the remarkable complexity of our economic and social existence which has necessarily caused an equally complex legislative order; an ever-increasing paternalism in government in an attempt to regulate the diverse currents of modern life.

More curious than this awakening is its outward expression. Created and nourished upon regulatory legislation and common-law development of the legal aspect of economic problems, it finds its outlet in praise and criticism of the criminal rather than civil side of law.

This is true to such a wide-spread degree that it applies not only to laymen but to lawyers as well.

Dean Roscoe Pound of the Harvard Law School in a recent address before the Chicago Bar Association said, "First among the problems of the day is the administration of criminal justice. To make the substantive criminal law, criminal procedure, organization of the prosecuting machinery, organization and administrative methods of the tribunals, and organization and administration of penal treatment, all of them fashioned for rural America of one hundred years ago, effective for their purpose in urban, industrial America, is a huge task."

The purpose of this paper, then is not to show startling new developments in the field of medical jurisprudence. There is no attempt made to evaluate the criminal responsibility of the insane or partially insane. It is not the gesture of one giving to an anxious world a cure-all and panacea for all the ills which madness doth afflict upon it. It is rather, an attempt to show clearly the procedural and substantive law by which insanity in criminal cases in Wisconsin is disposed of; to make clear the popular misconception and confusion as to legal insanity.

In the consideration of legal insanity in criminal cases, it is necessary to glance briefly at the early English common law, since our modern rule is purely a common law development. Since the early criminal law, in its theory and practice, was built upon the idea of "an eye for

* Member of the Milwaukee Bar.

an eye and a tooth for a tooth," it is not surprising to see the following rule laid down in an early English case,[1] "to be exempt from responsibility, (because of insanity) a man must be totally deprived of his reason and memory, and doth not know what he is doing, no more than an infant, than a brute, than a wild beast."

Somewhat later, in the famous McNaghten's case,[2] the judges of the King's Bench laid down the rule that to establish a defense on the ground of insanity, it must be clearly proven that at the time of committing the offense, the party was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. This case relaxed somewhat the severity of the preceding cases, as typified by the illustration just given, and stands as a landmark in the law of insanity as a defense to crime even up to the present time. With the adoption of the English common law in the United States, this rule became incorporated in our law, and as a Florida court well says, "since the common law of England is in force in this state so far as there are no statutory enactments . . . . that the common law, which holds that if the accused was conscious that the act was one that he ought not to do, and if the act at the same time was contrary to the law of the land and he was punishable, must govern."[3] That this was generally the rule as to insanity in the United States is seen by some of the early cases,[4] although a few jurisdictions qualify the rule in a few minor essentials.[5] The "right and wrong" test as laid down in the McNaghten case applied to a chronic, permanent insanity; but the rule has not stopped there, but has been carried into the field of temporary, irresistable, insane impulses,[6] and applies equally as well to cases of moral and emotional insanity.[7] The rule is well expressed

[1] *Rex* v. *Arnold,* 16 How St. Tr. 695 (1724).

[2] 10 Clark & F. 200 (1846).

[3] *Davis* v. *State,* 44 Fla. 32, 32 So. 822 (1902).

[4] *State* v. *Knight,* 95 Me. 467, 50 A. 276, 55 L.R.A. 373 (1901); *People* v. *Smith,* 1 Mich. N.P. 81 (1870); *Knight* v. *State,* 58 Neb. 225, 78 N.W. 508 (1899); *Schultz* v. *State,* 65 Neb. 196, 91 N.W. 190 (1902); *People* v. *Barberi,* 12 N.Y. Cr. R. 89, 47 N.Y.S. 168 (1896); *Nelson* v. *State,* 43 Tex. Cr. R. 553, 67 S.W. 320 (1902); *Nors* v. *Territory,* 10 Okl. 714. 63 Pac. 960 (1901).

[5] *McDougal* v. *State,* 88 Ind. 24 (1882); *Blake* v. *State,* 121 Ind. 433, 23 N.E. 273 (1890).

[6] *People* v. *Hubert,* 119 Cal. 216, 51 Pac. 329 (1897); *Turner* v. *Territory,* 15 Okl. 557, 82 Pac. 650 (1905); *Davis* v. *State,* supra; *Sanders* v. *State,* 94 Ind. 147 (1883); *State* v. *Lyons,* 113 La. 959, 37 So. 890 (1904); *State* v. *Loper,* 148 Mo. 217, 49 S.W. 1007 (1899); *Cannon* v. *State,* 41 Tex. Cr. R. 467, 56 S.W. 351 (1900).

[7] *Goodman* v. *State,* 96 Ind. 550 (1884); *Bartner* v. *State,* 71 Neb. 747, 99 N.W. 669 (1904); *Commonwealth* v. *Wireback,* 190 Pa. St. 138, 42 A. 542 (1899).

by a California court which said that uncontrollable or irresistable impulse or emotional insanity, beginning on the eve of the criminal act, and ending with its consummation is no legal defense to the crime.[8] The rule as stated in the McNaghten case, and restated in the cases cited, is still law and being used in modern practice continually as the appended list of cases, all decided since 1920, will show.[9]

One of the first cases on this point in Wisconsin is the Wilner case.[10] Here there is apparently a deviation from the famous "right and wrong" test. The defendant was charged and convicted of murder; an appeal was taken and judgment reversed because of the refusal of the trial court, at the instance of counsel for the accused, to give the following instruction:

"Although sanity is presumed to be the normal state of the human mind, when insanity is once proven to exist, it is presumed to exist until the presumption is overcome by contrary or repelling evidence." The evidence in the case did not attempt to show a chronic, permanent loss of mind, but strongly tended to prove delusion connected with the fatal act and leading to it. The court, while declaring the refusal to give some such instruction as grounds for reversible error, declared further,

"but we apprehend the word (insanity) is broad enough to include every species of mental aberration, sickness of the mind . . . . Insane delusion is insanity, whether partial or general . . . . It is universally recognized that, except perhaps in cases of total loss of reason, insanity does not always exhibit itself in the language or acts of the insane."[11]

In a slightly later case in Wisconsin,[12] also a murder case, the Court pronounced as erroneous an instruction to the jury which would have taken the test still farther away from the McNaghten rule. The Circuit Court in this case instructed the jury that,

"if the evidence satisfies you that, at the time when he killed Dr. Hogle, the defendant was laboring under such a defect of reason from disease

[8] *People* v. *Trebileaux*, 149 Cal. 307, 86 Pac. 684 (1906).

[9] *Philbrook* v. *State*, 105 Neb. 120, 179 N.W. 398 (1920); *Roe* v. *State*, 17 Okl. Cr. R. 587, 191 Pac. 1048 (1920); *State* v. *Corrigan*, 94 N.J.L. 566, 111 A. 927 (1920); *Bowden* v. *State*, 151 Ga. 336, 106 S.E. 575 (1921); *Woodall* v. *State*, 149 Ark. 33, 231 S.W. 186 (1921); *People* v. *Geary*, 298 Ill. 236, 131 N.E. 652 (1921); *McElroy* v. *State*, 146 Tenn. 442, 242 S.W. 883 (1922); *State* v. *Thorndson*, 49 N.D. 348, 191 N.W. 628 (1922); *Collins* v. *State*, 88 Fla. 578, 102 So. 880 (1925); *Commonwealth* v. *Coralin*, 248 Pa. 311, 93 A. 1072 (1915); *Carnes* v. *State*, 101 Tex. Cr. R. 273, 275 S.W. 1002 (1925).

[10] *Wilner* v. *State*, 40 Wis. 304 (1876).

[11] Ibid., 40 Wis. 304 (1876).

[12] *Bennet* v. *State*, 57 Wis. 69, 14 N.W. 912 (1883).

of the mind as not to know the nature and quality of the act he was doing; if he did not know when he killed Dr. Hogle that it was wrong to kill him, or if his mind was incapable, by reason of mental disease to deliberate and premeditate the homicide, then you should find that he was insane. But on the other hand, if the evidence does not satisfy you that he was so laboring under a defect of reason as not to know the nature and quality of the act he was doing; if he did not know it was wrong to kill Dr. Hogle; if he had sufficient power of mind and will to deliberate and premeditate a design to effect the death of Dr. Hogle—then you should find that he was sane."

The Supreme Court in this case said:

"We are compelled to hold that these instructions unexplained were clearly erroneous. They set up as an absolute test of sanity the power to deliberate, premeditate and design. They make the presence of sufficient intelligence in the party accused to form a design to do a criminal act conclusive evidence that he is sane, and subject to punishment if he executes such design. The presence of intelligence is by no means an absolute test of sanity."[13]

Immediately after, in the opinion, comes this test:

"As was said . . . . intelligence is not the only criterion, for it often exists in the madman in a high degree, making him shrewd, watchful, and capable of determining his purposes and selecting the means of accomplishment. Want of intelligence, therefore, is not the only defect to moderate the degree of offense; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effects upon the subject, and the true responsibility of the action—a power necessary to control the impulse of the mind, and prevent the execution of the thought that possesses it."[14]

These two cases are followed by the Butler case[15] in which the trial judge instructed the jury,

"Or where, though conscious of the act, and able to distinguish between right and wrong, and knowing the act is wrong, yet his will, by which is meant the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."

The Supreme Court approving of this statement of the law, says, "The charge as given therefore seems to be a correct statement of the rule of law most favorable to the defendant . . . . "

---

[13] Ibid., 57 Wis. 69 at 86.

[14] *Ortwein* v. *Commonwealth,* 76 Pa. St. 421 (1874).

[15] *Butler* v. *State,* 102 Wis. 364, 78 N.W. 590 (1899).

[16] *Wilner* v. *State,* supra.

Thus, in the Wilner[16] case, it is stated that insane delusion is insanity, whether partial or general; in the Bennet[17] case the Court says that there must be not only an absence of power to determine properly the true nature and character of the act, but also the effects of the act, the true responsibility of the act, and power to control the impulse of the mind, while in the Butler[18] case we find in addition another element, the power of the will to overcome such impulse.

Very shortly after the Bennet case we find the Court coming back to the "right and wrong" rule and laying down as elementary that

"a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is doing—a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others and a violation of the dictates of duty. On the contrary, though he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act he will do wrong and receive punishment—such partial insanity is not sufficient to exempt him from responsibility for criminal acts."[19]

It is interesting to note that when this case was decided in 1902, a quarter of a century ago, counsel for the accused argued against the "definition of legal insanity which has been adopted in the State (and) is so far outgrown and so antiquated, in view of the progress in modern psychiatry, that another and more scientfic definition should be laid down * * *" It is an argument that is being used now, in the very same terms against the same test with as little success.

Two years after this test was laid down, the Court again states the rule as stated in the Butler case, that to constitute insanity there are two elements; either there must be an inability to distinguish between right and wrong, or if that ability is present, then there must be a total loss of will power, the governing power of the mind.[20]

Then shortly after this return to the rule in the Butler case, the Supreme Court approved an instruction which again restricted the rule to the strict "right and wrong" test. The trial judge instructed the jury that

---

[17] *Bennet* v. *State,* supra.
[18] *Butler* v. *State,* supra.
[19] *Eckert* v. *State,* 114 Wis. 160, 89 N.W. 826 (1902).
[20] *Lowe* v. *State,* 118 Wis. 641, 96 N.W. 417 (1903).

"if you find from the evidence that at the time of the alleged commission of the crime defendant was suffering from mental aberration or sickness of the mind produced by any cause, and by reason thereof his judgment, memory and reason were so perverted that he did not realize the nature and quality of the act he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason, not guilty."[21]

This rule was reaffirmed, and a lengthy discussion as to the true test is found in *Oborn* v. *State*.[22] Here the Court discusses, explains and distinguishes the previous cases on legal insanity in Wisconsin. The requested instruction that though the accused at the time of the homicide had sufficient mental capacity to enable him to know and appreciate the wrong of his act, yet he was legally insane, if, by impaired will power, resulting from an abnormal condition, he was unable to resist the impulse to do the deed, was condemned on the authority of the cases we have just discussed, even though in three of them at least, the loss of will or governing power is spoken of as one of the elements of legal insanity. The Court then proceeds to distinguish the Lowe, Butler and Eckert cases, stating that they followed the "most liberal rule" which recognizes the existence of legal insanity, notwithstanding capability to distinguish between right and wrong, and consciousness of the wrongfulness of the particular act. Repudiating this "most liberal rule" the Court says:

"This Court is not committed to the doctrine that one can successfully claim immunity from punishment for his wrongful act, consciously committed, with consciousness of its wrongful character, upon the grounds that, through an abnormal mental condition, he did the act under an uncontrollable impulse rendering him legally insane; one, at his peril of punishment, commits an act while capable of distinguishing between right and wrong and conscious of the nature of his act. He is legally bound, in such circumstances, to exercise such self-control as to preclude his escaping altogether from the consequences of his act on the plea of insanity, though his condition may affect the grade of the offense."

This is the leading case in Wisconsin on legal insanity, and seems to restrict the test of legal insanity strictly to the "right and wrong" theory; although, as will be seen from the last sentence of the preceding quotation, a partial impairment of the mental faculties or delusions, not amounting to such legal insanity as to preclude all responsibility, may be sufficient to change the degree or grade of the offense, and hence, the punishment for it. This rule was again followed in 1930

[21] *Schissler* v. *State*, 122 Wis. 365, 99 N.W. 593 (1904).
[22] 143 Wis. 249, 126 N.W. 737 (1910).

in Wisconsin[23] in which the Court refers specifically to McNaghten's Case, and cites the rule there laid down as:

" 'If the accused was conscious that the act was one which he ought not to do and if the act was at the time contrary to law and was punishable, he was legally sane.' Whether he knows that the act is contrary to law cuts no figure. He is punishable if he is conscious that the act is one which he ought not to do if the act was contrary to law."

A quotation from a late case[24] is interesting:

"On cross examination the doctor (Superintendent of the Central Hospital for the Insane) stated that he meant 'medical insanity' in saying the defendant was not insane. He was then asked if the defendant was 'legally sane or legally insane' and answered that he was 'only acquainted with cases of medical or organic insanity.' He gave his own definition of insanity, however, which was: an abnormal condition of the mind characterized by many definitions, the chief ones being not knowing the difference between right and wrong. This definition shows that the doctor, whether he knew it or not, applied the test of legal insanity, which is such perverted condition of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong."

The procedure in Wisconsin, in criminal cases, where insanity enters into the defense of the accused, rests upon statutory provisions.[25] One section deals with insanity at the time of the commission of the offense, while the other deals with insanity at the time of trial or conviction.

Where a plea of insanity at the time of committing the offense is made, such plea must be made at the time of arraignment, and entry of plea of not guilty, unless the Court shall order otherwise. Upon such plea the jury shall try such special issue of insanity and if the jury shall find that the accused person was insane or feeble minded, or that there is reasonable doubt of his sanity or mental responsibility at the time of the commission of the alleged offense, they shall find the accused not guilty because insane or feeble-minded. The presumption of the accused person's sanity and mental normality at the time of the commission of such alleged offense shall prevail and be sufficient proof, unless the evidence produced on such special issue shall create in the minds of the jury a reasonable doubt of the sanity or mental responsibility of the accused person at the time of the commission of such alleged offense. In the event the accused person shall be found not guilty because insane or not guilty because feeble-minded, the Court shall forthwith

[23] *Oehar* v. *State,* 202 Wis. 530, 232 N.W. 866 (1930).
[24] *Jessner* v. *State,* 202 Wis. 184, 231 N.W. 634 (1930).
[25] Sections 51.11, 357.11, 357.12, 357.13, Wis. Stats.

commit him to a hospital for the insane or an institution designated by the State Board of Control to be there detained and treated until he shall be discharged according to law. The person so found to be insane may have a re-examination of his sanity or mental condition, as provided in Section 51.11, but no such person so committed shall be discharged from detention unless the Magistrate or the jury upon whom devolves the duty to pass upon his sanity and mental condition shall in addition to finding him sane and mentally responsible, also find that he is not likely to have such a recurrence of insanity or mental irresponsibility as would result in acts which, but for insanity or mental irresponsibility, would constitute crimes.

Where, however, the question is one of insanity at the time of trial or after conviction and before commitment, the statute provides that if the Court be informed, in any manner, that such person probably is at the time of trial or after conviction and before commitment, insane or feeble-minded, and thereby incapacitated to act for himself, the Court shall, in a summary manner make inquisition thereof by a jury or otherwise as it deems most proper. If it shall be determined upon such inquisition that the person is insane or feeble-minded, his trial, sentence or commitment shall be indefinitely postponed and the Court shall order that he be confined in the Central State Hospital for the Insane or in an institution designated by the State Board of Control. Upon the recovery of such person from his insanity or feeble-mindedness, the said superintendent shall inform the Court in which such indictment or information is pending, of such recovery; the Court shall issue to the sheriff of the county a warrant requiring him to take such accused person into custody and hold him pending trial, sentence or commitment.

Any person committed to an institution under the provisions of this section shall be entitled to a rehearing as to such sanity as provided in Section 51.11. If such re-examination shall determine that the insanity or feeble-mindedness of such accused person is incurable, he shall be treated and disposed of as persons incurably insane or feeble-minded are required to be treated, but no such person shall be removed or discharged from such hospital or home except upon the order of the Court having jurisdiction over such person for trial, sentence or commitment.

Section 51.11 provides, except as otherwise provided in Section 51.22, that any person adjudged insane may on his own verified petition or that of his guardian, or some relative or friend, have a retrial or re-examination of the question of insanity before the judge of any court of record of the county in which such person resides or in which he was adjudged insane. Upon the filing of such verified petition, show-

ing the jurisdiction of the Court, and showing also the fact as to whether there is a general guardian and the hospital or asylum in which the alleged insane person is confined and its superintendent, the Court shall by order appoint two physicians, each of whom shall have been duly licensed to practice and shall have had at least two years' experience in the practice of their profession, or one year's experience in an insane hospital, and shall fix the time and place for their examination, and cause reasonable notice thereof to be given to the guardian of the person to be examined, if he has a guardian, and to the superintendent of the hospital or asylum in which he is detained, if he is detained. The physician so appointed shall examine and report to the Court whether in their opinion the person in whose behalf the petition is made is sane or insane. If such physicians report such person sane and the judge is satisfied that he is sane and no demand for a jury trial is made, the judge shall forthwith cause judgment to be entered to that effect and order the immediate discharge of such person. If, however, the Court shall direct, or the person examined or his guardian, or any of his friends or relatives, shall demand a jury trial, an order for such trial shall forthwith be entered, the procedure in which shall be the same as in trials by jury in justices' courts, and shall be in the presence of the alleged insane person, his counsel and immediate friends and the medical witnesses. If the jury find the supposed insane person is sane, their verdict shall so state, in which case the judge shall forthwith order his discharge. If the judge or jury find such person is insane, the judge shall order him returned to the hospital or asylum or place of detention of which he was an inmate.

Prior to 1931 it had been uniformly held in the Municipal Court of Milwaukee County, without exception, that in all cases where insanity at the time of trial or conviction is found, the superintendent of the hospital or asylum shall first be the one to determine whether or not a patient is restored to sanity, and if after such determination, such patient is found sane, he must be discharged upon the order of the trial court, and that no rehearing on the question of sanity shall be allowed or held until the court shall have received notice, from the superintendent of the hospital or asylum in which the person is confined, that the said person has recovered from such insanity.

This concept and practice in insanity matters was overturned in May of 1931[26] when our Supreme Court held that any person committed to an institution because insane at the time of trial or conviction may upon proper application as set forth in Section 51.11, have a re-examination by a jury as to the question of sanity. However, in the event that such jury find such person to be sane, such person shall not be

[26] *State ex rel. Ribansky* v. *Shaughnessy*, 205 Wis. 136, 236 N.W. 567 (1931).

removed or discharged except upon the order of the Court having jurisdiction of such person.

At present, then, we find a situation where, when a person is accused of crime, and the Court is informed in any manner that the said accused person may be insane, the Court may appoint physicians to examine the person and report their findings; if they find such person to be insane, the Court shall order such person to be committed. However, such person so committed, may, at any time after commitment, demand a jury trial as to the question of insanity, and the finding of the physicians is not binding upon the jury.

This brings a most curious paradox in its wake. A is brought to trial for the murder of B a week previously. At the time of trial A, or his attorneys, or some person, informs the Court that A is insane. The Court appoints a commission of psychiatrists to examine A, and they find A suffering from a form of insanity. The Court orders A committed to an institution. About a month later A brings a petition for re-examination as to his sanity. This re-examination is held, but the physicians appointed to examine A still find him to be insane. The jury, however, upon whom the testimony of the physicians is not binding, finds A to be sane. The information or indictment against A for murder is then brought to trial; A pleads not guilty because insane at the time of the commission of the offense. The very physicians, by whose testimony A was first committed, are necessarily required to again testify that A was insane at the time of the commission of the offense and A must be found not guilty.

We are informed that an examination of the records of the County Court of Milwaukee County in cases other than criminally insane, where re-hearings of the question of sanity have been had before juries, shows that juries have discharged 90 per cent of such petitioners as sane, despite the fact that in every one of these cases the testimony of the physicians stated that such persons were insane.

That the present law will throw back upon the community many dangerous criminals is undoubted, but whether this situation is worse than the denial of a fair hearing by a jury as to the question of sanity is a moot point.[27]

[27] See editorial, "Rehearings for Criminal Insane," Milwaukee Journal, April 2, 1933. Bill 254S "to change the law relative to rehearings for persons confined as criminally insane is now before the senate judiciary committee." The bill provides: "(1) that rehearings in all cases involving criminal insanity or feeble-mindedness be had only in the court of original jurisdiction, and (2) that no rehearing after the first be had unless the court were convinced that there was ground to suppose the patient's mental condition had improved since the previous hearing." The bill, as introduced, would, it seems, remedy the existing condition.