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THE FUNCTIONAL APPROACH TO THE WISCONSIN TEST FOR INSANITY

FRANCIS X. KREMBS

THE popularly termed "right and wrong test," wherein the ability to differentiate between right and wrong as to a specific act constitutes the sole standard for determining the criminal responsibility of one allegedly insane, has as its genesis *M'Naghten's Case*¹ decided in England in the year 1843. The test so formulated succeeded in becoming the recognized majority rule in this country and, while not entirely immune to criticism, has so maintained its status even to the present day.²

¹ 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

² *Lauterio v. State*, 23 Ariz. 15, 201 Pac. 91 (1921); *People v. Coffman*, 24 Cal. 230 (1864); *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902); *Roberts v. State*, 3 Ga. 310 (1847); *People v. Walter*, 1 Idaho 386 (1871); *State v. Buck*, 205 Iowa 1028, 219 N.W. 17 (1928); *State v. Nixon*, 32 Kan. 205 (1884); *State v. Knight*, 95 Me. 467, 50 Atl. 276 (1901); *Spencer v. State*, 69 Md. 28, 13 Atl. 809 (1888); *State v. Scott*, 41 Minn. 365, 43 N.W. 62 (1889); *Cunningham v. State*, 56 Miss. 269 (1879); *State v. Redemeier*, 71 Mo. 173 (1879); *Wright v. People*, 4 Neb. 407 (1876); *State v. Lewis*, 20 Nev. 233 (1889); *State v. Spencer*, 21 N.J.L. 196 (1846); *Flanagan v. People*, 52 N.Y. 467 (1873); *State v. Brandon*, 53 N.C. 463 (1862); *State v. Barry*, 11 N.D. 428, 92 N.W. 89 (1903); *State v. Murray*, 11 Or. 413 (1884); *Commonwealth v. Schroeder*, 302 Pa. 1, 152 Atl. 835 (1931); *State v. Bunday*, 24 S.C. 439 (1885); *State v. Leehman*, 2 S.D. 171, 49 N.W. 3 (1891); *Stuart v. State*, 60 Tenn. 178 (1873); *Cannon v. State*, 41 Tex. Crim. Rep. 467, 56 S.W. 351 (1900); *People v. Calton*, 5 Utah 451 (1888); *State v. Craig*, 52 Wash. 66, 100 Pac. 167 (1909); *State v. Harrison*, 36 W.Va. 729, 15 S.E. 982 (1892); *Oborn v. State*, 143 Wis. 249, 127 N.W. 737 (1910); *Flanders v. State*, 24 Wyo. 81, 156 Pac. 39, 1121 (1916).

Yet the established law in the several jurisdictions applying this test has been labeled as archaic inasmuch as it evidences a marked reluctance on the part of the legislature and judiciary therein to advance along with medical science in coping with the general problem of the mentally infirm.³

There is sound authority to the fact that the aforementioned test is far too restricted in its scope to warrant application by modern judicial bodies, due to its failure to appreciate the motivating influences exerted by various delusions and impulses.⁴

But with all due deference, these opinions should not be too readily accepted as impeccable without having first afforded some thought to those factors which surround and influence the test in its application and function. For the test itself is something more than a mere formula to be viewed in an abstract and isolated sense entirely divorced from the several pertinent rules governing procedure in cases wherein the test is applicable.⁵ It is a component part of an intricate system and unless the proper consideration be tendered those elements, which are more or less augmentory in their nature, its practical effect will be lost sight of, resulting necessarily in a contorted conception thereof.

It is the contention herein that the various established principles of adjective law, which govern burden of proof and quantum of evidence, will often times go far in bearing an ameliorating effect upon the apparent severity of the recognized right and wrong test. And nowhere is this tenet so well exemplified or so adequately verified than in the law of Wisconsin relative to this general issue of insanity as

³ "The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged . . . The mere ability to distinguish between right and wrong is no longer the correct test in civil or criminal cases where the defense of insanity has been interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible influence" . . . Van Orsdel J., *Smith v. United States*, 36 F. (2d) 548, 549 (D.C. App. 1929).

⁴ " . . . it is too narrow a measure of irresponsibility, for it does not take account of disorders of the conative, effective life . . ." GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*. (1925) 428.

"There is not, and there never has been, a person who labors under partial delusion only, and is not in other respects insane." MERCIER, *CRIMINAL RESPONSIBILITY*. (1926) 198.

"With regard to this test I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature." REYNOLDS, *THE SCIENTIFIC VALUE OF THE LEGAL TESTS OF INSANITY*. (1872) 34.

⁵ "The practical effect of these maxims and the question whether substantial justice is done, depends . . . not entirely on the terms of the abstract propositions in which the test is laid down, but to a very large extent upon the spirit in which it is to be applied in practice, and first and foremost upon the principles of adjective law which determine the amount of evidence sufficient to establish the plea of insanity." OPPENHEIMER, *CRIMINAL RESPONSIBILITY OF LUNATICS*. (1909) 247.

a defense to a criminal act. Consequently the discussion of the subject matter here involved will, as a means of attaining clarity as well as simplicity, be so confined and limited.

The question, as to what constitutes the proper test to be submitted for the purpose of determining the presence or absence of that type of aberration sufficient to constitute insanity in the legal sense of the term, is no longer a mooted one in Wisconsin. For since 1910, when the supreme court of this state definitely repudiated the irresistible impulse theory, the right and wrong test has been unequivocally adopted as the sole test applicable by the courts functioning in this jurisdiction. In that year the case of *Oborn v. State*⁶ was decided and it was then and there determined that: "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 ground 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 his act on the plea of insanity. . . ."

After having abrogated the impulse theory, and consequently aligning itself under the majority rule, the court then proceeded to define the type of insanity of which it would take cognizance, as follows: "The term 'insanity' as used in the special plea in a criminal case, means such abnormal mental condition from any causes as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong, and unconscious at the time of the nature of the act he is committing, and that the commission of it will subject him to punishment."⁷ This endorsement of the right and wrong test as the sole standard, in accordance with which, criminal responsibility is to be determined, has succeeded in remaining unimpeached and is a correct statement of the Wisconsin law applicable at the present day.⁸

Although unquestionably correct, it must be borne in mind that the foregoing is an epitome of the law as it exists in Wisconsin only

⁶ 143 Wis. 249, 272, 127 N.W. 727 (1910).

⁷ *Oborn v. State*, 143 Wis. 249, 268, 120 N.W. 737 (1910).

This case marks a milestone in the jurisprudence of Wisconsin due to the fact that heretofore this particular phase of the law in this state was in a complex and incongruous state; and decisions pertinent thereto were not entirely free from ambiguity, with some of the earlier cases revealing a marked tendency towards favoring the irresistible impulse theory. See *Bennet v. State*, 57 Wis. 69, 14 N.W. 912 (1883); *Butler v. State*, 102 Wis. 364, 78 N.W. 590 (1899); *Lowe v. State*, 118 Wis. 641, 96 N.W. 417 (1903).

⁸ See *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930); *Oehler v. State*, 202 Wis. 530, 232 N.W. 836 (1930).

insofar as the recognized test itself is concerned. Consequently, before any opinion as to its feasibility or propriety can properly be formulated, the general topic herein considered must first be discussed from the procedural angle; and this in an effort to ascertain whether or not the contended controlling influences actually exist.

In Wisconsin whenever insanity is interposed as a defense to a criminal charge, the plea thereof must of necessity be entered at the time of the arraignment of the accused along with his plea to the merits.⁹ It was formerly the practice in this state to try the issue created by this special plea separately and before the other issues in the case.¹⁰ This separation of the issues was held no violation of the constitutional guarantee of the right of trial by jury,¹¹ and the two proceedings were treated as one trial.¹² Under the law as it then existed, a verdict adverse to the defendant would foreclose him from asserting his mental debility during the trial of the main issue¹³ and the defense would have no efficacy therein save to lessen the degree of the crime charged.¹⁴ But this is not in accord with modern practice governing the manner in which this special issue is to be dealt with and decided. No longer is this issue, created by the special plea of insanity, separately tried, for it is the express behest of the statute¹⁵ that: "When such a plea is interposed the special issue thereby made shall be tried and determined by the jury with the plea of not guilty."

So it is now the established procedure in the trial of a criminal case, wherein the defense of insanity has been interposed, to try the issue thereby created in conjunction with the issue of guilt or innocence; and therefore the evidence pertinent thereto is received along with all the other evidence in the case. But the type of evidence received under the issue of insanity is distinctive in that it finds expression only in the opinions voiced by expert witnesses, for "Since lay persons, without any special knowledge, could not be expected to draw intelligent conclusions from technical facts requiring expert training and long experience, opinion evidence has to be admitted in these particular cases"¹⁶

Yet it has been held in some cases that the opinion of a nonexpert witness pertinent to the question of insanity is admissible, especially

⁹ WIS. STAT. (1937) § 357.11 (1).

¹⁰ WIS. STAT. (1898) § 4697; construed in *Duthey v. State*, 131 Wis. 178, 111 N.W. 222 (1907).

¹¹ *Bennett v. State*, 57 Wis. 69, 14 N.W. 912 (1883).

¹² *Schissler v. State*, 122 Wis. 365, 99 N.W. 593 (1904).

¹³ *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901).

¹⁴ *Supra*, note 5.

¹⁵ WIS. STAT. (1937) § 357.11 (1).

¹⁶ GLUECK, *MENTAL DISORDERS AND THE CRIMINAL LAW*. (1925) 28.

in those instances wherein the witness has come in contact with the accused and has thus been afforded an opportunity to view his general conduct and note the existence of his various idiosyncracies.¹⁷

This evidence, of the expert opinion type, finds expression, not only in the testimony of the various witnesses called in behalf of the prosecution or the defense, but also in that of those authorities called in by the court itself for the purpose of obtaining unbiased opinions concerning the issue involved. For it is the usual, if not the universal practice of the presiding judge, when he deems expert opinion evidence desirable, to appoint disinterested experts for the purpose of having them examine the accused and to thereafter testify at the trial as to the opinions they have formulated.¹⁸ When these experts appear as witnesses the jury is informed of the manner in which they were appointed and the capacity in which they appear.¹⁹ The fact that these witnesses are appointees of the court does not vitiate the right of either the state or the defense to cross examine them as to their opinions,²⁰ nor does it preclude either of the parties from summoning experts to express their respective opinions in reference to the same subject.²¹

These persons, by whomsoever summoned, must of course be proven qualified to give testimony in an expert capacity by the party offering them, or their opinions will not be admitted. And it is for the trial court to determine absolutely whether the person offered possesses the required qualification.²² It has been repeatedly held by the Supreme Court of Wisconsin that a physician is not so qualified if the special knowledge he possesses of the subject of mental diseases was derived merely from a source purely academic; but in addition thereto he must have had actual personal experience in the subject matter of which he speaks.²³

¹⁷ *Yanke v. State*, 51 Wis. 464, 8 N.W. 276 (1881); *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901); *Duthey v. State*, 131 Wis. 178, 111 N.W. 222 (1907); 4 WIGMORE, EVIDENCE (2d ed. 1923) §§ 1924, 1933.

¹⁸ WIS. STAT. (1937) § 357.12 (1).

¹⁹ WIS. STAT. (1937) § 357.12 (1).

²⁰ WIS. STAT. (1937) § 357.12 (1).

²¹ WIS. STAT. (1937) § 357.12 (1).

²² 22 C.J. 962, 963.

²³ *Boyle v. State*, 57 Wis. 472, 15 N.W. 827 (1883); *Soquet v. State*, 72 Wis. 659, 40 N.W. 391 (1888); *Zoldoske v. State*, 82 Wis. 580, 52 N.W. 778 (1892); *Lowe v. State*, 118 Wis. 641, 96 N.W. 417 (1903); but see *Tenrup v. State*, 193 Wis. 482, 214 N.W. 356 (1927), where this doctrine seems to have been overruled, implicitly at least. In its decision of that case the court, at page 485, said: "That physicians are qualified as experts to give testimony in such cases is generally recognized in Wisconsin." It is interesting to note that nowhere in its opinion did the court make any reference whatsoever to actual personal experience on the part of the physician seeking to testify as an expert; nor was any previous Wisconsin case cited.

Having been proven to possess the required qualifications, the expert may then proceed to promulgate his opinion (based of course on proper questions) but only in so far as it relates to defendant's mental condition,²⁴ beyond that his opinion is not admissible in evidence.²⁵ The opinion so expressed may be based on the personal examination of the defendant made by the witness outside of court,²⁶ or on the testimony in the case if the expert has been present in court and has heard all the evidence presented. To the latter there exists a qualification in the contingency that the testimony in the case be voluminous and conflicting. This qualification was recognized by the supreme court in the case of *Bennett v. State*.²⁷ When deciding that case the court said: "If it be proper in any case to permit an expert who has heard the testimony of a particular witness or of all the witnesses to give his opinion upon such evidence, and there be any conflict of evidence, or any doubt as to what the evidence is he should be required to state fully his understanding as to what facts are established by such testimony. In such case the jury will be able to determine whether his opinion is based upon the evidence in the case as they understood it or otherwise."

However when the evidence is simple and undisputed, expelling all likelihood of confusion as to the facts proved, the expert may be permitted to state his opinion without a recapitulation of those facts. This proposition was stated by the court in *Cornell v. State*,²⁸ as follows: "Where the evidence given is not conflicting and not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness who has heard it all may be asked to predicate his opinion thereon, on the assumption of its truth, without rehearsing it in a hypothetical question . . ."

While recognizing that an expert may express his opinion in the foregoing manner, the courts of this state seem to consider answers to hypothetical questions, put to the expert while he is testifying, as more preferable in this regard. The supreme court has intimated as much in its decisions, as is evidenced by the following excerpt taken from *Bennett v. State*.²⁹ "We think the better rule is that the jury shall be clearly

²⁴ *Cole v. Clarke*, 3 Wis. 323 (1854); *Wright v. Hardy*, 22 Wis. 348 (1867); *Salvo v. Duncan*, 49 Wis. 151, 4 N.W. 1074 (1886); *Quinn v. Higgins*, 63 Wis. 664, 24 N.W. 482 (1885); *Gates v. Fleischer*, 67 Wis. 504, 30 N.W. 674 (1886); *Smalley v. Appleton*, 75 Wis. 18, 43 N.W. 826 (1889); *Stanwick v. Butler-Ryan Co.*, 93 Wis. 430, 67 N.W. 723 (1896).

²⁵ *Benedict v. Fond du Lac*, 44 Wis. 495 (1878); *Mallor v. Utica*, 48 Wis. 457, 4 N.W. 665 (1880); *Yanke v. State*, 51 Wis. 464, 8 N.W. 276 (1881); *Knoll v. State*, 55 Wis. 249, 12 N.W. 369 (1882); *Baker v. Madison*, 62 Wis. 137, 22 N.W. 583 (1885).

²⁶ 1 WIGMORE, EVIDENCE (2d ed. 1923) § 675.

²⁷ 57 Wis. 69, 14 N.W. 912 (1883). See also, *Cornell v. State*, 104 Wis. 527, 80 N.W. 745 (1899).

²⁸ 104 Wis. 527, 80 N.W. 745 (1899).

²⁹ 57 Wis. 69, 14 N.W. 912 (1883). See also *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N.W. 1124 (1897).

informed of the exact state of facts upon which the expert basis his opinion, and they certainly are not so informed when he gives his opinion upon his recollection and understanding of the whole evidence in this case, and this is especially so where the evidence is voluminous; is elicited from a large number of witnesses, and is not entirely harmonious and uncontradictory. The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion. This is, perhaps, best accomplished by limiting him to answering hypothetical questions . . . ”

The manner in which the opinions of the expert witnesses are elicited by counsel and so expressed and conveyed to the jury has proven to be a constant source of controversy, and the importance thereof can never be overemphasized, due to the possible contingency of the expert, by his opinion, invading the province of the jury. This possible invasion was appreciated by the court when deciding the case of *Bennett v. State*³⁰ and it was stated therein that: “To permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such opinion is based upon, is in effect taking the case from the jury and deciding it upon the understanding of the witness as to what facts the evidence in the case established.”

The same theory is incorporated in the following rule tersely expressed by Justice Marshall in *Maitland v. Gilbert Paper Co.*³¹ “Experts are not to decide issues of fact; hence all questions calling for opinion evidence must be so framed as not to pass upon the credibility of any of the evidence in the case, else it will usurp the province of the jury or the court.”

It must be appreciated that the evidence so gleaned from the testimony of these expert witnesses, while often times proving to be invaluable, is in no way conclusive in its effect upon the jury³² nor does it foreclose them from returning a verdict in variance therewith. The opinion of the expert is nothing more than a mere aid tendered to the jury for the purpose of assisting them in deciding the issue involved; for, according to Glueck:³³ “The jury’s opinion may not be the same as those of the experts, and the jury avails itself of the expert’s views solely as an aid in arriving at its own conclusion.” And as the opinion is considered only as a factor which is more or less auxiliary in its nature, the jury: “ . . . may still reject his (the expert’s) testimony and accept his opponent’s, and no legal powers, not even the

³⁰ 57 Wis. 69, 82, 14 N.W. 912 (1883).

³¹ 97 Wis. 476, 484, 72 N.W. 1124 (1897). See also, *Cornell v. State*, 104 Wis. 527, 80 N.W. 745 (1899).

³² *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910).

³³ GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 29.

judge's order, can compel them to accept the witness' statement against their will.³⁴ It follows as a natural consequence of that which has gone before that the weight borne by opinion evidence in general is in many instances negligible insofar as its persuasive characteristics are concerned.

Having dealt with the method and manner in which this evidence is presented, it is well now to consider the order of its presentation along with the recognized existing presumption and procedural rules as to burden of proof and quantum of evidence.

Until the issue centering around defendant's mental capacity is raised by evidence, put forth by the defense, the presumption³⁵ that defendant is sane and competent exists,³⁶ and so continues to exist, relieving the prosecution of the task of introducing evidence thereunder in the first instance.³⁷ This should not be erroneously construed, one should not be given to understand that the burden of proof³⁸ in establishing the proposition, that the accused actually suffers from a type of insanity recognized by law, is thereby placed upon the defense as was the situation at common law when the defense of insanity was viewed with much scepticism by the courts. "The English law in this relation took definite and final shape in the answers of the fifteen judges to the question propounded to them by the House of Lords in June 1843. 'The Jury', they said, 'ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be reasonable for his crimes until the contrary is proven to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason . . .'"³⁹

Wisconsin has, beyond a doubt, repudiated the theory so prevalent at common law, that insanity is strictly an affirmative defense which *ipso facto* must be established by the one asserting it.⁴⁰ For, as it was stated by the court, in its opinion reported in *Duthey v. State*:⁴¹ "While

³⁴ 1 WIGMORE, EVIDENCE (2d ed. 1923) § 673.

³⁵ Presumption, from a technical legal standpoint, means inferences which a reasonable person would as a rule draw from given circumstances. *Anderson v. Horlicks Malted Milk Co.*, 137 Wis. 569, 119 N.W. 342 (1909). See also *Welch v. Sackett*, 12 Wis. 244 (1860).

³⁶ WIS. STAT. (1935) § 357.11 (2).

³⁷ *Sorenson v. State*, 178 Wis. 197, 188 N.W. 622 (1922).

³⁸ "The general rule has been stated to be that 'the burden of proof' lies on the party who asserts the affirmative of the issue, or the question in dispute, according to the maxim *Ei incumbit probatio qui licit, non qui regat*." WHARTON, CRIMINAL EVIDENCE (9th ed. 1884) § 319. Or according to Wigmore, "the burden of proof, in this sense, means that the party liable to it will lose as a matter of judicial ruling if no evidence or no more evidence is given by him." 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2488.

³⁹ 1 WHARTON AND STILLES, MEDICAL JURISPRUDENCE (3d ed. 1873) 106.

⁴⁰ WHARTON, CRIMINAL EVIDENCE (9th ed. 1884) § 319.

⁴¹ 131 Wis. 178, 189, 111 N.W. 222 (1907).

the proposition is no longer debatable in Wisconsin that upon such an issue the presumption is in favor of sanity, and the jury are to so find unless evidence leaves them in reasonable doubt on the subject, yet it is by no means true that the defendant must produce that evidence nor produce evidence sufficient to raise a reasonable doubt."

The supreme court of this state has reasoned, and logically so, that as the accused's sanity is a part of the case of the prosecution the burden of proving it, in the sense of the risk of non-persuasion,⁴² is on the state; and the measure of persuasion which is required, as in the other issues of the case,⁴³ is persuasion beyond a reasonable doubt.⁴⁴ For if after considering all the evidence before them, there remains in the minds of the jurors a reasonable doubt of defendant's sanity, it is their duty to so acquit him.⁴⁵ This reasonable doubt as to defendant's sanity must be predicated, of course, on the condition of his mind as it was when he committed the act⁴⁶ yet, it is interesting to note, that the manner in which this condition was brought about is of no concern whatsoever to the jury.⁴⁷

So, while the presumption of sanity makes it imperative for the defendant to put forth proof in repulsion thereof, and therefore has thrown upon him the burden of coming forward with the evidence,⁴⁸ his proof puts the evidence in equipoise and it is then incumbent upon the state to prove the converse beyond a reasonable doubt.

The position that this presumption, spoken of, occupies in the trial of a case can well be considered doubtful, for although, as was mentioned heretofore, the supreme court of this state recognizes the existence of this presumption, it questions the propriety of communicating that fact to the jury. The attitude of the court in this respect found expression in the case of *Duthey v. State*:⁴⁹ "Indeed, the rule of law that there is a presumption of sanity goes little, if any, further than to constitute a rule of practise to the effect that, in the absence of any evidence bearing on the subject, there is no issue to be submitted to the jury. It is a rule important to the courts but communication of which to the jury is of doubtful propriety."

Be that as it may, the fact that the existence of this presumption is conveyed to the jury should be of no great significance to the defense, for the volume of evidence required to rebut it is light in comparison

⁴² 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2485.

⁴³ *Crilley v. State*, 20 Wis. 231 (1866).

⁴⁴ *Revoir v. State*, 82 Wis. 295, 52 N.W. 84 (1892); *Franklin v. State*, 92 Wis. 269, 66 N.W. 107 (1896); *Oehler v. State*, 202 Wis. 530, 232 N.W. 866 (1930).

⁴⁵ WIS. STAT. (1935) § 357.11 (1), (2).

⁴⁶ *Duthey v. State*, 131 Wis. 178, 111 N.W. 222 (1907).

⁴⁷ *Terrill v. State*, 74 Wis. 278, 42 N.W. 243 (1889).

⁴⁸ 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2488.

⁴⁹ 131 Wis. 178, 189, 111 N.W. 222 (1907).

to that demanded by the courts to overcome the several other existing presumptions which have become entrenched in our legal system.⁵⁰ This is undoubtedly true because the amount needs only be such as is sufficient to raise a reasonable doubt in the minds of the jury concerning the sanity of the accused at the time he committed the alleged crime, for according to the words of the statute,⁵¹ "The presumption of such accused person's sanity and mental normality, at the time of the commission of proof thereof shall prevail unless the evidence produced on such trial shall create in the minds of the jury a reasonable doubt of the sanity or mental responsibility of such accused person at the time of the commission of such alleged offense."

And this required reasonable doubt does not necessarily have to result or be created by the evidence which has been submitted as part of the defendant's case, but may just as readily arise from the evidence introduced by the prosecution, or even from the very circumstances of the act itself.⁵² The foregoing proposition being admitted, the conclusion that the difficulties which confront the defendant in establishing and maintaining his defense of insanity are comparatively slight, must necessarily follow. The fact that when he succeeds in injecting reasonable doubt into the issue of sanity he accomplishes his purpose and attains the end towards which he has striven, is far too obvious to stand contradiction. For if the defense succeeds in so doing, the verdict of the jury cannot be other than favorable to its contention.

Indubitably then, the very crux of this problem can be detected in the proposition that insanity in its last analysis is but a question of fact, and, like all other questions of fact, comes squarely within the province of the jury.⁵³ This was fully appreciated by the court when it decided the case of *Tendrup v. State*,⁵⁴ for Justice Crownhart in deliv-

⁵⁰ By way of illustration: To overcome the presumption of legitimacy, non access, impotency or imbecility must be shown by the clearest evidence. *Mink v. State*, 60 Wis. 583, 19 N.W. 445 (1884); *Watts v. Owens*, 62 Wis. 512, 22 N.W. 720 (1885); *Shuman v. Shuman*, 83 Wis. 250, 53 N.W. 455 (1892). The presumption of death after seven years absence is overcome only by proof that the absent person is alive. *Ewing v. Metropolitan Life Insurance Co.*, 191 Wis. 299, 210 N.W. 819 (1926); *Delaney v. Metropolitan Life Insurance Co.*, 216 Wis. 265, 257 N.W. 140 (1934). The presumption of innocence is overcome by proof of guilt beyond a reasonable doubt. *Crilley v. State*, 20 Wis. 231 (1866). There is a strong presumption against suicide and the burden rests upon the opposition to establish such fact. *Fehrer v. Midland Casualty Co.*, 179 Wis. 431, 190 N.W. 910 (1923); *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N.W. 276 (1913).

⁵¹ WIS. STAT. (1937) § 357.11 (2).

⁵² *Duthey v. State*, 131 Wis. 178, 111 N.W. 222 (1907).

⁵³ "The presence or absence of insanity is in all states a question of fact determinable by the jury, . . ." GLUECK, *MENTAL DISORDER AND THE CRIMINAL* L.W. (1925) 254.

"This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the court." *Parsons v. State*, 81 Ala. 577, 2 So. 854, 866 (1887).

⁵⁴ 193 Wis. 482, 214 N.W. 356 (1927).

ering the opinion said: "We think the question of defendant's sanity was clearly a jury question under the evidence presented"

It is obvious that the test alone does not constitute the sole standard by which the merits of the defense is to be weighed. The question, as to whether or not the defendant is of sufficiently sound mind in the eyes of the law so as to allow criminal responsibility to attach, finds analogy in the issue of guilt or innocence⁵⁵ inasmuch as both seek their solutions in the deliberations of the jury and the verdict they so find. This is due to the fact that the court leaves " . . . it to the jury to find whether, as a matter of fact, the accused, at the time of the homicide was sane" ⁵⁶

Of course the jury is not thereby left to wild speculation in formulating their opinion in reference to the issue. Quite the contrary, they are guided by the several pertinent charges of the court, wherein they are admonished, that: "They are required to apply certain tests or measures to the fact of insanity once they have found it to exist; and they are warned that insanity, as such, does not exempt from responsibility, but only that type and degree of insanity that satisfies one of the tests provided by law."⁵⁷ Or in the language of the Wisconsin Supreme Court,⁵⁸ the jury is to be instructed that: "It is for them to decide from all the evidence, under the test given for legal insanity, whether the accused was sane at the time of the homicide."

In addition to these charges, the court, when the issue of sanity is finally submitted to the jury, gives, *inter alia*, two salient instructions; one dealing with the manner in which mental responsibility is to be determined, and the other embracing the rules of procedure adhered to in this jurisdiction in reference to burden of proof and sufficiency of evidence. They are first made cognizant of the fact that the law in this state holds no brief for the irresistible impulse theory, by the charge of the court that it: " . . . 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 ground that, through an abnormal mental condition, he did the act under an uncontrollable impulse rendering him legally insane."⁵⁹

Then the court, having clarified this point in their minds, proceeds to acquaint them with the recognized test applicable to the issue by the following definition: "The term insanity as used in the special plea in

⁵⁵ "This question is purely within the province of the jury, who must answer it as they must any other matter of questionable fact." GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW. (1925) 309.

⁵⁶ Oborn v. State, 143 Wis. 249, 277, 126 N.W. 737 (1910).

⁵⁷ GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW. (1925) 254.

⁵⁸ Oborn v. State, 143 Wis. 249, 277, 126 N.W. 737 (1910).

⁵⁹ Oborn v. State, 143 Wis. 249, 272, 126 N.W. 737 (1910).

a criminal case, means such abnormal mental condition from any cause as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong, and so unconscious at the time of the nature of the act he is committing, and that the commission of it will subject him to punishment."⁶⁰

But in conjunction therewith the jury must be acquainted with the fact that a reasonable doubt existing in their minds as to defendant's sanity when he committed the alleged criminal act will work an acquittal, and this is the expressed behest of the statute.⁶¹ According to the supreme court the proper instruction on this subject is simply that if, "... after considering all the evidence before them, there remains in the minds of the jury any reasonable doubt of sanity, their duty is to find the accused insane."

So no matter how strict the actual test which is applied for the purpose of determining the presence or absence of legal insanity may be,⁶² or voluminous the evidence as put forth by the prosecution substantiating its contention in respect to the normalcy of the defendant's mind, there can be but one verdict in the event that there exists in the minds of the jury a reasonable doubt as to the capacity of the defendant to differentiate between right and wrong at the time he committed the alleged crime.⁶³

Thus the intrinsic restrictions apparent in the applicable test are alleviated by these principles which militate against the stilted concept upon which the test itself is predicated, and as a result thereof the accepted definition of insanity in this state will, in many instances, be made to embrace the self same types of mental infirmities⁶⁴ which it had originally purposely ignored by exclusion. Certainly a situation can quite readily be conceived of wherein the defense, due to testimony thereunder, finds footing in a type of insanity frowned upon by the test;⁶⁵ yet due to an existing reasonable doubt in the minds of the jury

⁶⁰ *Oborn v. State*, 143 Wis. 249, 268, 126 N.W. 737 (1910).

⁶¹ WIS. STAT. (1937) § 357.11 (1).

⁶² *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910).

⁶³ WIS. STAT. (1937) § 357.11 (1).

⁶⁴ Viz., hallucinations, illusions, delusions, homicidal mania, dipsomania, etc. For a full and complete treatise on this subject see: GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*. (1925) 274-390.

⁶⁵ That such testimony is admissible, in view of the Wisconsin rule, seems to be so universally conceded that one can well accept it as a postulate; for a diligent and exhaustive search of the authoritative sources in this state, amounted to naught. Yet this proposition is not totally devoid of judicial attestation. The case of *State v. Rumble* reported in 81 Kan. 16 (1909) (wherein the majority rule is adhered to, see *supra* p. 1) and noted in 25 L.R.A. (N.S.) 376, is to the effect that on an issue of insanity of the accused the fact that a number of instances of peculiar and unusual conduct on his part, to which a non-expert may testify, do not in themselves justify an inference of insanity, is no ground for excluding the witness' opinion on such conduct.

concerning the sanity of the defendant, a verdict is returned which in effect recognizes this specific mental disorder as a valid defense to a criminal charge in this state. It is appreciated, of course, that the doubt entertained by the jury as to defendant's mental capacity at the time the act was committed, must be one which is reasonable as contradistinguished to that which is purely whimsical; and so the supreme court in this state has held. Thus in *Emery v. State*⁶⁶ the court defined reasonable doubt as follows: "The reasonable doubt mentioned . . . means, as its name implies, a doubt existing in reason; and it must exist from the whole evidence fairly and rationally considered. Mere fanciful or speculative doubt,—in such as a skeptical mind may suggest in any case . . . ,—does not amount to 'reasonable doubt' within the meaning of the law."

Yet it is quite conceivable that reasonable doubt, in the proper sense of the term, as to the sanity of one who is governed by irresistible or homicidal impulses, can very readily spring up in the minds of the jury after they have heard the testimony of the experts called in behalf of the defense and have been afforded an opportunity to view the demeanor of the accused while he is present in the court room,⁶⁷ all instructions and charges given them by the court, defining the only type of insanity recognized by the law existing in this jurisdiction, to the contrary notwithstanding; for ". . . test or no test it is the jury's attitude that largely determines the outcome of insanity trials."⁶⁸ Or, as it was stated by the court when deciding the case of *Parsons v. State*:⁶⁹ "The result in practise, we repeat, is, that the courts charge one way, and the jury, following an alleged higher law of humanity, find another, in harmony with the evidence."

Little doubt then, that under such circumstances, the inevitable result of a verdict of this kind will find expression in a reactionary effect upon the established test itself which has heretofore been considered adamant in its rigidity. It is seemingly incredible, but nevertheless true, that merely because of the inability on the part of the state's counsel to cope with the burden of proof with which he was confronted during the trial, a jury's verdict is capable of augmenting the approved definition of legal insanity. The propriety, of a jury recognizing as valid a defense to a criminal charge which is based on a type of insanity not embraced within the test as established and applied in this juris-

⁶⁶ 92 Wis. 146, 151, 65 N.W. 848 (1896).

To the same effect see: *Anderson v. State*, 41 Wis. 430 (1877); *Emery v. State*, 101 Wis. 627, 78 N.W. 145 (1899); *Baker v. State*, 120 Wis. 135, 97 N.W. 566 (1903); 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2497.

⁶⁷ As to the propriety of the jury taking into consideration the conduct of the defendant, during the trial, while considering the issue of insanity, see: *State v. Von Kutzelban*, 136 Iowa 89, 113 N.W. 184 (1907).

⁶⁸ GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925) 135, n.

⁶⁹ 81 Ala. 577, 2 So. 854, 861 (1887).

diction cannot be questioned, if the evidence which has been introduced during the trial leaves them in reasonable doubt as to the normalcy of the defendant's mental condition. Because, as it has previously been pointed out, while it is true that the jury is not in any sense free to disregard the instruction of the court wherein the right and wrong test is set out as the sole test to be applied in respect to an accused allegedly insane, it is equally as true that the instruction, given subsequent thereto, as to their possible verdict in the event they are in reasonable doubt concerning the defendant's sanity, must likewise be respected and abided by.

There need be but a mere cursory investigation of the foregoing principles of the adjective law in order that one may attain a full appreciation of the powerful influence which is thereby exerted. And while it must be, not only conceded, but also honestly admitted that, the recognized test for insanity as applied in the courts of Wisconsin is both singularly severe and restricted, yet its severity is tempered and its scope extended by the supplementary properties inherent in those previously mentioned factors which surround and influence the test in its application. And as a result thereof the right and wrong test, insofar as it affects a specific case arising within this jurisdiction, will hardly be as harsh or adamant as it appears to be at first blush.

Consequently, if the test recognized in this state is considered in an abstract and purely theoretical sense, any effort which may be exerted in attempting to indulge in a criticism of its feasibility will amount to naught. For when considering the problem there involved, the practical aspect must be accentuated by bearing in mind that: the issue of insanity is an issue of fact to be determined by the jury; the prosecution has cast upon it the burden of proving the sanity of the accused; the proof thereof must be proof beyond a reasonable doubt and therefore the defense is established when doubt has been successfully injected into the case. That which has been found to be true in Wisconsin is, by analogy, equally as true in the several other states where this test is applied as the sole means of ascertaining the presence or absence of legal insanity. For in reference to no one jurisdiction can the assertion be positively made that the test is self sufficient and impassive, as contradistinguished to being volatile and sensitive to the influences of those forces that lie dormant in the principles of adjective law. Therefore, it is evident that success in coping with the situation does not lie in dabbling with these tests in an isolated sense, but rather in viewing them in what might well be termed their natural environment.