detailed questioning about the applicants' sexual preferences and practices and searches of their personal belongings which were described by the Court as "of an exceptionally intrusive character". Similarly, the Court emphasised the absolute nature of the ban (which took no account of the applicants' exemplary service records) and the difficulty the applicants encountered in transferring essentially military skills to the very different arena of civilian life after their discharges. Against these considerations one must set the fact that the applicants succeeded despite the broad margin of appreciation conceded to the U.K. by the Court on defence matters, and that the applicants entered the armed forces fully aware of the existence and terms of the policy.

IVAN HARE

INSANITY AND MENS REA

QUESTION: "D, who is mentally ill, believes that he is Jesus Christ. He breaks down P's front door and belabours him with a snooker cue, in the deluded belief that P is about to crucify him. Having been subdued by five police officers, D is eventually tried on indictment for aggravated burglary and affray. What is his criminal liability?"

Answer (from any first-year undergraduate): "It seems that because of his mental illness, D either did not appreciate the nature and quality of his acts, or did not understand that they were wrong. At the time in question he therefore seems to have been insane under the *M'Naghten* rules. Thus the jury should find a special verdict of 'not guilty by reason of insanity' as provided for by section 2(1) of the Trial of Lunatics Act 1883. This verdict will enable the judge to make one of the various orders open to him under section 5 of the Criminal Procedure (Insanity) Act 1964. The most likely disposal in this case will be a hospital order, possibly subject to restriction."

It is therefore astonishing to learn that when this very case did indeed end up in the Crown Court recently, the trial judge accepted the defence submission that the proper verdict was not the special verdict, but a simple acquittal—which produces the result that the accused goes free. The defence position was that the Crown is only entitled to a special verdict where it can show that, but for his insanity, the defendant would be guilty. And this, they said, means that in such a case the prosecution must prove that the defendant not only committed an *actus reus*, but also that he did so with

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mens rea. Where he lacks *mens rea*—even through insanity—he is entitled to an acquittal. This argument, which turns the previous learning on insanity upside down, the trial judge accepted reluctantly, because he thought he was bound to do so by the decision of the Court of Appeal in *Egan* [1998] 1 Cr.App.R.121.

Egan was not a case about the "special verdict" and insanity at the time of the alleged offence. It concerned what happens after the defendant is found "unfit to plead" because of his insanity at the time of trial. Under section 4A of the Criminal Procedure (Insanity) Act 1964, the next step after a finding of "unfit to plead" is a decision by a jury on whether the defendant "did the act or made the omission charged against him as the offence", and if the answer is "yes", the judge has then the same powers of dealing with the defendant as after a special verdict of "not guilty by reason of insanity". In *Egan*, the Court of Appeal had said that a finding that the defendant "did the act or made the omission charged against him as the offence" involves a finding of *mens rea* as well as *actus reus*. The judge who tried the *soi-disant* Jesus Christ assumed that *Egan* also applied to the special verdict of "not guilty by reason of insanity".

Unsurprisingly, the resulting acquittal in the Jesus Christ case was followed by an Attorney-General's reference to the Court of Appeal, whose decision is reported as *Attorney-General's Reference (No.3 of 1998)* in [1999] 2 Cr.App.R. 214. Still less surprisingly, the Court of Appeal condemned the trial judge's ruling. After a careful review of the history of the verdict of "not guilty by reason of insanity", it said that, in order to obtain a verdict of "not guilty by reason of insanity", the prosecution must prove "the ingredients which constitute the *actus reus* of the crime". If the Crown can do this, it "is not required to prove the *mens rea* of the crime alleged, and apart from insanity, the defendant's state of mind ceases to be relevant". The earlier decision in *Egan*, the Court said, was probably wrong even as regards the ingredients of a finding under section 4A of the Criminal Procedure (Insanity) Act, and even if it were right, it did not decide the point in relation to the special verdict of "not guilty by reason of insanity" under section 2(1) of the charmingly-named Trial of Lunatics Act 1883.

A few weeks later another Court of Appeal—this time with the Lord Chief Justice presiding—cast yet further doubt on *Egan*. In *Antoine* [1992] 2 Cr. App. R. 225 the point at issue was whether, once a defendant on a murder charge has been found "unfit to plead", he can then attempt to raise the defence of diminished responsibility. In other words, when the jury is deciding under section 4A of the Criminal Procedure (Insanity) Act whether the

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defendant "did the act or made the omission charged", can it be asked to say (in effect) "yes, he did the act charged, in that he killed the victim; but because of his state of diminished responsibility this was the *actus reus* of manslaughter, not murder"? The Court of Appeal ruled that no such invitation could be put to the jury. In the course of reaching this decision the Court once again considered *Egan*. It did not formally overrule it, because it felt that *Egan* was not concerned with the precise issue now before it: but it made it very plain that it thought that it was incorrect.

At one level the *Attorney-General's Reference (No. 3 of 1998)* is an unexciting decision, because it merely reaffirms that the law is as everyone had previously imagined. At a different level, however, it provokes two important reflections. The first is how easy it is for even the Crown Court to get a basic point of criminal law astonishingly wrong. The second reflection is how bizarre it is that, when this happens and causes a visibly dangerous defendant to be wrongly acquitted, the resulting proceedings in the Court of Appeal always leave the improperly obtained acquittal intact. As the law now stands, the most the Court of Appeal can do when hearing an Attorney-General's reference brought following an acquittal is to wring its judicial hands about the error in the court below, and express the hope that the same mistake will not be made again—however obviously wrong the acquittal was, and however dangerous the offender.

Some weeks ago, this rule of criminal procedure was called into question in a public lecture given by Lord Morris, the present Attorney-General. The fact that the defendant in the case the subject of this note "walked free"—with or without his snooker cue—adds strength to Lord Morris's argument that the Court of Appeal should sometimes have the power to set aside an acquittal.

J.R. SPENCER

NUISANCE, LOCAL AUTHORITIES AND NEIGHBOURS FROM HELL

ONE of the most difficult current problems for tort lawyers is the extent to which the normal rules of tort, developed over decades of litigation between private individuals, should apply in undiluted form to local and other public authorities. Most individuals have never seen a child drowning in a puddle or about to walk off a cliff, and would not hesitate to help them if they did, but public authorities, empowered by Parliament, are faced every day with the delicate and expensive task of protecting others from harm. It has

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