to cross-examination by either side, and without any derogation from the right of either side to call its own expert witnesses.

6. We do not favour any amendment of the Criminal Lunatics Act, 1884, the provisions of which are both humane and necessary.

*Signed*
NATHAN RAW (*Chairman*).
G. M. ROBERTSON (*President*).
R. WORTH (*Hon. Gen. Sec.*).

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## THE BRITISH MEDICAL ASSOCIATION.

The Memorandum of Evidence which the Sub-Committee, on behalf of the Council of the Association, desires to lay before the Committee appointed by the Lord Chancellor is as follows:

### *Sub-section 4 of Section 2 of Criminal Lunatics Act*, 1884.

I. The Council, realising its very great importance, has given careful consideration to this matter, and has come to the conclusion that it cannot suggest any improvement in the method laid down in Sub-Section 4 of Section 2 of the Criminal Lunatics Act 1884, which reads as follows:

(4) In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners, and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane.

### *Legal Responsibility for Crime.*

II. The Council of the Association is of opinion that the following might be accepted by the Medical Profession as a fair definition of responsibility for crime:

An act may be a crime although the mind of the person who does it is affected by disease or defective power if such disease or defect does not in fact prevent him (*a*) from knowing and appreciating the nature and quality of his act or the circumstances in which it is done; or (*b*) from knowing and appreciating that this act is wrong; or (*c*) from controlling his own conduct unless the absence of the power of control is the direct and immediate consequence of his own default; but no act is a crime if the person who does it is at the time it is done



https://doi.org/10.1192/bjp.69.285.215 Published online by Cambridge University Press

prevented either by defective mental power or by any disease affecting the mind: (*a*) from either knowing or appreciating the nature and quality of his act or the circumstances in which it is done; or (*b*) from either knowing or appreciating that the act is wrong; or (*c*) from controlling his own conduct, unless the absence of the power of control is the direct and immediate consequence of his own default. (N.B.—"Wrong" may mean (*a*) morally wrong; (*b*) illegal.)

*Evidence as to Mental Condition of Accused Persons.*

III. The Council of the Association is of opinion that the following Standing Order issued by the Prison Commissioners, which is understood to apply to prisoners who have been committed for trial but not yet tried, should be embodied in the official Prison Rules:

302. (1) In the case of an untried prisoner, especially if charged with an offence of a grave nature, the Secretary of State desires that the prisoner's insanity shall, if possible, be publicly decided by the verdict of a jury, and that the prisoner shall, for this purpose, be left to stand his trial, unless there be strong reasons to the contrary.

(2) When immediate removal to an asylum is unnecessary, the Governor will merely forward the report of the Medical Officer to the Prison Commissioners, saying that it is not proposed to obtain the usual certificate of insanity, and will state the probable date of trial.

(3) When removal to an asylum appears to the Medical Officer to be, for special reasons, necessary, the usual certificate will be obtained and forwarded, as directed in Order 301. In filling up the certificate the probable date of the trial will be added to the particulars of commitment, and the report of the Medical Officer, setting out the nature of the insanity and the necessity for immediate removal, will be enclosed, together with a newspaper report of the Police Court proceedings. If this latter is not procurable a short report of the particulars of the prisoner's crime will be furnished.

(4) When a prisoner awaiting trial has been certified to be insane, or is believed by the Medical Officer to have been insane on reception, or when there is any doubt as to his mental condition, the Medical Officer will furnish a report in writing to that effect to the Governor, who will forward it to the Clerk of Assize or Clerk of the Peace, as the case may be. In all cases when there is any reason to suppose that questions are likely to arise in Court as to the mental state of the prisoner, the Medical Officer will attend to give evidence if required, whether he gets a subpœna or not.

IV. The Council of the Association suggests that, wherever a report from the prison Medical Officer as to the mental state of the prisoner is communicated to the Clerk of the Court, it should be the duty of the Clerk to furnish a copy of the report to Counsel or the solicitor acting for the prosecution and defence respectively.

*Position of Persons found "Guilty but Insane."*

V. The Council of the Association is of opinion that every person found "Guilty but Insane" should have the same right of appeal as is conferred by the Criminal Appeal Act on persons convicted on indictment; provided that if in any appeal brought by such person the Court should be of opinion that the verdict should be set aside

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so far as the finding of insanity is concerned, the Court should have the power to order a new trial.

*Persons found "Unfit to Plead."*

VI. The Council of the Association is of opinion that persons found "Unfit to Plead" by the verdict of a jury and ordered to be detained, should be entitled, whilst so detained, at any time on proper conditions to apply to a Judge of the High Court to order the re-trial of the issue as to fitness to plead. (It is understood that the rules by which such applications would be governed would need to be framed by the appropriate authority.)

*Medical Officers of Prisons.*

VII. The Council of the Association has given very careful consideration to the question of the status of Medical Officers of Prisons, and wishes particularly to emphasise that it is desirable that such Medical Officers should have had experience in the diagnosis and treatment of disorders and defects of the mind.

EVIDENCE BY SPECIAL SUB-COMMITTEE OF THE BRITISH MEDICAL ASSOCIATION.

VIII. The foregoing is in substantial agreement with the policy adopted by the British Medical Association in 1915.

The Special Sub-Committee of the Association is of opinion:

(1) That in the interest both of the community and of persons charged with or convicted of offences, it is desirable that, where there is reason to believe that the accused person suffers from mental defect or disease, machinery should be provided for the independent and impartial mental examination of the accused person.

(2) That the present method, by which medical evidence is presented by the Prosecution and the Defence in cases in which the accused is a person of means, is bewildering rather than helpful to Judge and Jury and liable to lead to miscarriage of justice; that a similar miscarriage of justice may result in the case of persons without means owing to the absence of facilities for expert psychological examination.

(3) That some such scheme as follows might be adopted: (*a*) That a Panel should be formed consisting of medical practitioners with expert knowledge and experience of psychological medicine and of recognised standing, and that any accused or convicted person in whose case there is reason to consider that mental defect or disease is present should be referred to such panel for examination. (*b*) That in the case of any such person charged with an offence which is

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punishable upon summary conviction such examination should be made by one or more members of the panel. That in the case of any such person charged with an offence which is punishable by death or a long period of penal servitude such examination should be made by not less than three members of the panel. (*c*) That the report of such examination should be furnished to Prosecution and Defence before the trial, and that at the trial evidence should be tendered in person by the expert or experts who examined the accused and should be considered by the Court in deciding the responsibility or otherwise of the accused.

*The British Medical Journal's* comments on these reports include the following remarks (*vide* March 31, 1923):

It is agreed that insanity is incapable of precise definition, but the question whether a person is or is not insane is a purely medical question. It may be very difficult to answer, and there may be differing medical opinions in this case as in others, but the whole matter is, we conceive, one of medical diagnosis. The questions as to whether an insane person should ever be punished by law for antisocial offences, and, if so, under what circumstances the penalty should be imposed, are not medical questions at all. They must be left to the legislature or to the courts. There are codes under which insanity, of and by itself, exempts the convicted prisoner from the prescribed penalty of his crime; but when this is not so the question of insanity is clearly not determinant. What the court has to determine in these cases is not the medical question of insanity, but the non-medical question of responsibility, whether the accused be insane or no. As a matter of fact there are cases in which the court has in effect declared responsibility by inflicting the full penalty even when there was medically no doubt as to insanity, and others in which the court has in effect declared irresponsibility by not inflicting the ordinary penalty when it would have been impossible for insanity to be medically certified.

This position is recognised in the first recommendation of the committee of the Medico-Psychological Association, which declares that "the responsibility of a prisoner should be left as a question of fact to be determined by the jury on the merits of the particular case." This being so, it might have been expected that the recommendation as to questions to be put to the jury would have been—(*a*) Did the prisoner commit the act alleged? (*b*) If he did was he at the time responsible? leaving them to be answered solely on the evidence as to all the relevant facts, "unhampered," as the body of the report says, "by any formula." The second recommendation of the committee, however, states that the second question should still be, "If he did, was he at the time insane?" and poses a third question to the jury in such form as in effect, so it seems to us, to establish a new criterion of responsibility—"that his crime was unrelated to his mental disorder."

Both committees are agreed that the M'Naghten rules should be abrogated, since the conception of unsoundness of mind implied in them is now obsolete. The British Medical Association Memorandum seems to imply, without saying it in so many words, that the question "Is he insane?" must still be asked of the jury, and puts forward as a substitute for the M'Naghten rules another formula which differs from those rules by adding a further criterion of irresponsibility—namely, that the accused "is prevented either by defective mental power or by disease affecting the mind . . . from controlling his own conduct, unless the absence of the power of control is the direct and immediate consequence of his own default." This is, nevertheless, suggested somewhat hesitatingly, as one which "might be accepted by the medical profession as fair."

It is certainly imperative that the rules as they now stand should be abrogated or ignored; it does not appear to be established that the jury ought to be asked to declare insanity; it may fairly be argued that what they have to determine is responsibility. If the question of insanity is omitted, then the essential thing

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is to have a proper body of medical evidence regarding all relevant medical and psychological facts upon which the jury may come to a decision in each case. If the question of insanity is still to be put to the jury, and if in that event it is considered legitimate to ask the medical profession to help by advising as to criteria of responsibility, it will probably be found less difficult in most cases to determine that mental disorder prevents the prisoner from controlling his own conduct than that his crime was unrelated to his mental disorder at all.

*The Scotsman* (*vide* March 17, 1923), in reporting the salient points of our Association's memorandum, says:

They suggest that in every such case the Judge should direct the jury to answer the following three questions: Did the prisoner commit the act alleged? If he did, was he at the time sane? If he was insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder? The first question will not occasion any special difficulty; it has to be answered by the jury in every criminal case, whether the mentality of the prisoner is in issue or not. The second and the third contain the crux. In their answer to both, but particularly the latter, the jury will be guided by the medical evidence. It is proposed—and this forms the most valuable suggestion—that a panel of accredited experts in lunacy should be appointed in all cases where insanity is pleaded by the defence, and that any of them could be called by the Court to give evidence, subject to cross-examination by either side and without derogation from the right of either side to call its own expert witnesses. If the third test is to be imposed, a layman is not in a position to draw the subtle distinction whether or not an insane person's act was related to his mental disorder. It is only the medical expert who can form "a coherent clinical picture" of the mental aspects of the case and can say whether the act was symptomatic of or consistent with the prisoner's condition. While the law has lagged behind modern developments of mental science, there is a feeling that some experts are inclined to extend the conception of insanity rather far—that, indeed, on their theories the sane are the exception instead of the rule. It will, therefore, be the task of the lawyers to consider whether they can go all the way with the medicos in their attitude. The difficulty that both judges and juries have generally to contend with in such instances is that doctors nowhere more notoriously differ than in their diagnosis of a person's mental or moral condition. There are many borderland cases, and, no matter what be the test, these will always occasion great anxiety to administrators of the criminal law. At the same time, it is widely recognised among lawyers themselves that the existing law is unsatisfactory, and there is much to be said for the view of the medical men that responsibility should be treated as an issue of fact, to be determined on its merits by the jury in each case, untrammelled by any hard-and-fast rules.

The following is an extract from the *Lancet* (April 7, 1923):

It is significant (referring to the report of the Committee of the Medico-Psychological Association of 1896) in connection with the then attitude of the psychiatric experts to note that the Atkin Committee had its origin in a sense of dissatisfaction with the state of the law, not on the ground of its undue severity, but rather from a feeling that its excessive laxity threatened the public safety.

It is thus the lawyers and not the doctors who in the present instance are the primary advocates of change. This fact does not appear to have been kept adequately in view in the proposals put forward in the two medical memoranda; and it is probable that legal critics may complain that neither of these documents offers any constructive suggestions, except in regard to the mode of presenting expert evidence, which go to meet the admitted difficulty of justice in dealing with offenders on the borderline between sanity and insanity. The absence in this connection from both memoranda of any reference to the principle of diminished responsibility, which is being adopted as a partial solution of this difficulty in other countries, weakens the statement of the medical position.

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[We have thought it wise to refrain at present from comments on the above, but later the whole matter will be critically examined in the pages of this Journal.—EDS.]

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