

## **HRS §704-400**

### **Physical or mental disease, disorder, or defect excluding penal responsibility.**

(1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct. [L 1972, c 9, pt of §1; gen ch 1993]

## **COMMENTARY ON §704-400**

### **I. Physical and Mental Diseases, Disorders, and Defects.**

Perhaps the most vexing problem in the penal law is determining when individuals shall not be held responsible for their conduct because at the time of the conduct they suffered from a disease, disorder, or defect which was related in some way to the conduct. The law has traditionally dealt with this problem in two more or less distinct areas.

As Chapter 702 has pointed out, a voluntary act or a voluntary omission is the sine qua non of penal liability. In dealing with cases involving physical disease, disorder, or defect, the courts have traditionally held that where such a condition precludes conduct from being voluntary, the defendant will not be held penally liable.

In the classic case of *Fain v. Commonwealth*,<sup>[1]</sup> the court recognized that a homicide committed during a state of somnambulism (sleepwalking) or somnolentia (sleep drunkenness) would preclude criminal liability because the defendant was unconscious and therefore the defendant's acts were involuntary. After citing numerous medico-legal treatises, the court said:

These authorities, corroborated as they are by common observation, are sufficient to prove that it is possible for one, either in sleep or between sleeping and waking, to commit homicide, either unconsciously or under influence of hallucination or illusion resulting from an abnormal condition of the physical system.<sup>[2]</sup>

Following *Fain*, courts have held that where the physical condition of the defendant precludes or impairs consciousness the acts of the defendant will be regarded as involuntary and, therefore, result in an acquittal. Thus, in cases involving various forms of epilepsy,<sup>[3]</sup> traumatic injury to the head,<sup>[4]</sup> sexual assault,<sup>[5]</sup> and somnambulism,<sup>[6]</sup> the courts have recognized an absolute defense to penal liability predicated on the defendant's unconscious, but highly animated, action.

On the other hand, if a person's disease, disorder or defect is "mental" (as opposed to "physical"), the issue of the person's "guilt" is said, in the language of the cases, to turn on the person's "responsibility" for the person's conduct. Historically, a defendant will be relieved of responsibility for the defendant's conduct if, at the time of the conduct, the defendant was "labouring under such a defect of reason, from a disease of the mind, as not to know the nature

and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." [7] This standard, known as the M'Naghten Rule or test, has been widely accepted in the United States. Persistent criticism of the rule has led to recent suggestions that it be modified to reflect current insights and terminology of modern psychiatry. [8] However, all recent suggestions have maintained the dichotomy between physical and mental diseases, disorders, and defects.

In this country, it originally was not of any pragmatic legal consequence whether the excusing condition was classified as "physical" or "mental"; the acquittal was absolute. In more recent years it has become common to qualify an acquittal based on the defendant's "mental" irresponsibility and to provide for commitment of the defendant thus acquitted to an appropriate medical institution. However, a defendant whose "physical" condition precludes voluntariness is still acquitted absolutely.

Medically, the classification of a defendant's (or a patient's) condition as either physical or mental, does not, in many cases, make sense. While it is true that there are many abnormalities of the mind or mental processes for which no biological basis can be found, many diseases, disorders, or defects which affect the behavior of a person have a multiple aetiology. [9]

Broadly speaking, two groups of factors influence the criminal actor in the latter cases: (1) the biological or organic factors, "the individual physical endowment of the criminal actor," the criminal actor's "bio-chemical, physiological, neurological, and anatomical peculiarities"; and (2) the social and psychological factors "emanating from relationships with individuals or groups in the external environment." [10]

[O]ne must keep in mind the basic principle of multiple aetiology. Organic factors are operating synergistically with social and psychological stresses in a particular constitution, all factors contributing in varying degrees to the genesis of the breakdown and to the presenting clinical picture. [11]

The centrality of the brain as a bodily organ means that many physical conditions "may be crucially involved in impaired or aberrant conduct." [12] This is so whether the condition relates to the functioning of the brain directly (e.g., epilepsy, cerebral tumor, head trauma, encephalitis, or arteriosclerosis) or indirectly through a symbiotic relationship of the brain with another organ or system (e.g., glandular disorders, metabolic dysfunctions, and circulatory breakdowns). [13] Moreover, "[t]he number of accused persons whose criminal conduct might be biologically conditioned is probably quite large since the number of physical disorders that are capable of producing criminal behavior is itself extensive." [14]

This brief foray into "hornbook psychiatry" [15] indicates that the propensity of the courts to label a single integrated medical problem as either "physical" or "mental" can only be justified if rational legal consequences turn on this categorizing process. An examination of the cases will indicate that such rational consequences do not, in fact, result from affixing these legalistic labels to defendants with medical problems that constitute conditions which excuse penal liability (or responsibility).

The rationale for providing for acquittal conditioned on commitment (or "hospitalization") in cases involving "mental" disease, disorder, or defect ("insanity") is that commitment is necessary to protect other members of society (and the acquitted defendant) from the consequences of repetition of the prohibited conduct. The rationale is no less applicable or persuasive in cases of "physical" conditions resulting in involuntary movements which threaten harm to others. These people too "may present a public health or safety problem, calling for therapy or even for custodial commitment. ..."[16] While it is true that mandatory commitment bears harshly on a person whose physical condition (or symptom thereof) may be nonrecurrent,[17] it bears no less harshly on the person whose mental condition (or symptom thereof) may be nonrecurrent-- although the frequency of the latter instance may be less than that of the former.

The answer does not lie in the black-and-white distinction posed by present law: an excusing mental condition means commitment; an excusing physical condition means an unqualified acquittal. The answer lies, as the Code suggests in later sections, in tailoring the disposition of a defendant, acquitted on the basis of disease, disorder, or defect, to the condition of the defendant and to the needs of society. Commitment need not be mandatory because the defendant's disease, defect, or disorder is labelled "mental," nor should it be precluded because the defendant's excusing condition is labelled "physical."

The unsatisfactory posture of the law has led many courts to dissimilar decisions in substantially similar cases. Thus, while epilepsy has been held to be distinctly different from "insanity" (a mental condition constituting an excuse from criminal responsibility) in some cases,[18] in other cases it has not.[19] Cases of somnambulism, which are usually said to constitute a physical condition precluding voluntariness,[20] have also been classified as "a species of insanity." [21] Moreover, within the same jurisdiction cases involving the same type of disease, disorder, or defect have at one time labelled the condition "mental" and at another time labeled it "physical." [22]

One real danger of the false dichotomy that the law presently draws between mental and physical excusing conditions is that in those cases where the condition of the defendant is not easily categorized as either "mental" or "physical," the defendant might be convicted because the net effect of the evidence is not sufficient to raise a reasonable doubt in the minds of the jury on the issue of voluntariness or on the issue of mental responsibility because of the inability of expert testimony to conform to the "either-or" proposition demanded by the law. Conviction may result in such cases notwithstanding substantial evidence that the defendant suffered from a condition which impaired the defendant's consciousness.[23]

Conversely, the unqualified acquittal, which the law has afforded defendants whose conduct resulted from physical conditions which rendered the action "involuntary," has led some judges to write strained opinions that can only be justified by the result sought to be achieved.

A series of British cases illustrates the dilemma which the state of the law forced upon the Courts. In *Regina v. Charlson*[24] the defendant was charged with assault for striking his son with a hammer. The defendant offered evidence that at the time of his acts he suffered from a cerebral tumor which impaired his consciousness, causing him to act in a state of automatism, and that he was not suffering from any mental illness. The trial judge instructed the jury:

Therefore... you have to ask yourselves whether the accused knowingly struck his son, or whether he was acting as an automaton without any knowledge or control over his acts.... [Y]ou may consider that he may not have known what he was doing at all, although perhaps he remembered it in a vague sort of a way. If you think it was purely automatic action for which he had no responsibility at all and over which he had no control then the proper verdict would be "not guilty." [25]

The defendant was acquitted.

In Regina v. Kemp [26] the defendant struck his wife with a hammer. He pleaded that he had committed the act in a state of impaired consciousness caused by arteriosclerosis. The medical testimony was in conflict as to whether the condition should be labelled "physical" or "mental." The court held that regardless of the medical testimony concerning the explanation or labelling of the defendant's condition, the description of the condition established that "the accused suffers from... a disease of the mind within the true meaning of the McNaghten [sic] Rules." [27]

The broad submission that was made to me on behalf of the accused was that this is a physical disease and not a mental disease; arteriosclerosis is a physical condition primarily and not a mental condition. But that argument does not go so far as to suggest that for the purpose of the law diseases that affect the mind can be divided into those that are physical in origin and those that are mental in origin. There is such a distinction medically. I think it is recognized by medical men that there are mental diseases which have an organic cause, there are disturbances of the mind which can be traced to some hardening of the arteries, to some degeneration of the brain cells or to some physical condition which accounts for mental derangement. It is also recognized that there are diseases functional in origin where it is not possible to point to any physical cause but simply to say that there has been a derangement of the functioning of the mind, such as melancholia, schizophrenia and many other of those diseases which are usually handled by psychiatrists. This medical distinction is not pressed as part of the argument for the accused in this case, and I think rightly. The distinction between the two categories is quite irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it but simply with the mental condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there.

Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the [M'Naghten] Rules. I shall therefore direct the jury that it matters not whether they accept the evidence of certain testifying doctors, but that on the whole of the medical evidence they ought to find that there is a disease of the mind within the meaning of the [M'Naghten] Rule. [28]

Pursuant to the instructions of the court, the defendant was found "guilty but insane." The full import of the decision is recognized only when it is realized that the defendant pleaded automatism, not insanity, and the court instructed a verdict of guilt based on insanity arising out of an arteriosclerotic condition.

In 1961 the House of Lords decided *Bratty v. Attorney-General for Northern Ireland*[29] which dealt with the relationship between the defenses of impaired consciousness and "insanity." The defendant, in that case, pleaded: (1) that at the time of the conduct he suffered from psychomotor epilepsy, that as a result thereof he acted in a state of automatism, and that his actions were therefore involuntary; (2) that his psychomotor epilepsy rendered his mental condition confused and impaired, and that because of this he could not form the requisite intent for murder; and (3) that he was guilty-but-insane (at the time the English equivalent of the American verdict of not guilty by reason of insanity) under the M'Naghten test. The trial judge rejected the first two pleas and refused to instruct on them, but submitted the issue of insanity to the jury. The jury rejected insanity and found the defendant guilty. At that time in England, unlike the law in many American jurisdictions, the defendant bore the burden of persuasion (by a preponderance of the evidence) on the issue of the defendant's insanity. The House of Lords upheld the trial judge, relying on the testimony given by doctors at the trial "that psychomotor epilepsy is a defect of reason due to disease of the mind." [30]

In *Bratty* the House of Lords assimilated the defense based on automatism into the defense of insanity where automatism is based on a "disease of the mind," i.e., where there is no evidentiary showing that the excusing condition is "physical" in nature. The Lord Chancellor said that

Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the McNaghten [sic] Rules, a rejection of the jury of this defense of insanity necessarily implies that they reject the possibility.[31]

In short, under the posture of the testimony, "there would need to be other evidence on which a jury could find non-insane automatism." [32]

Lord Denning took a somewhat different approach. In an opinion which rejects *Charlson* and accepts *Kemp*, he said:

The major mental diseases, which doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in *Charlson's* case, Barry J. seems to have assumed that other diseases such as epilepsy or cerebral tumor are not diseases of the mind, even when they manifest themselves in violence. I do not agree with this. It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in a hospital rather than be given an unqualified acquittal.[33]

It is obvious that Lord Denning's concern is not with language, but result. Lord Denning's primary concern is that a defendant whose condition (1) has caused violence which (2) may recur should be detained. If this requires that the defendant's condition be labelled as a "disease of the mind" for legal purposes, the language of judges is sufficiently flexible for the task. If it requires

that the defendant be found guilty but insane, so be it. The inability of a British defendant to meet a burden of persuasion on the issue of insanity (which now includes additional disorders) did not seem to bother the court--indeed, the Lord Chancellor was concerned lest the burden be avoided by a change in nomenclature.

The British experience has led to some anomalous results but at the same time provides some insights into a problem which can be resolved by appropriate legislation. It seems anomalous that conditions such as cerebral tumor or arteriosclerosis should be labelled "mental" or "diseases of the mind" and that defendants suffering from these conditions should be adjudged "insane" in order to achieve the custodial commitment deemed necessary. At the same time, the House of Lords seems eminently wise in attempting to point out the factors which properly call for commitment. (Whether the labelling process is necessary or logical is another matter.)

The Code seeks to avoid the arbitrary, meaningless and strained distinctions which have been made between excusing conditions which have been labelled "mental" and those which have been labelled "physical." Chapter 704 provides for a unified treatment of diseases, disorders, and defects which constitute an excusing condition. The same standards are provided for determining whether the condition of the accused will relieve the accused of responsibility for the accused's acts--it matters not that the condition is labelled "mental" or "physical" or both. At the same time, the Code, in subsequent sections of this chapter, provides for a flexible disposition of defendants acquitted on the basis of a disease, disorder, or defect which excludes responsibility and, therefore, liability. The disposition is tailored to the condition of the accused; if the condition demands custodial commitment, the same will be ordered notwithstanding the fact that the condition is primarily "physical" rather than "mental"; if the condition does not demand commitment and conditional release or discharge are appropriate, the same will be ordered notwithstanding the fact that the condition has been labelled "mental disease or disorder."

## **II. The Standards of Penal Responsibility.**

Preliminarily it must be pointed out that the penal law is not concerned with the physical or mental condition of a defendant at the time of the alleged penal conduct unless the defendant's condition impairs the defendant's capacity not to engage in the prohibited conduct. The interrelationship between choice and guilt has been succinctly stated by the Third Circuit in a case involving the defendant's mental condition.

The concept of mens rea, guilty mind, is based on the assumption that a person has a capacity to control his behavior and to choose between alternative courses of conduct. This assumption, though not unquestioned by theologians, philosophers and scientists, is necessary to the maintenance and administration of social controls. It is only through this assumption that society has found it possible to impose duties and create liabilities designed to safeguard persons and property....

... [T]he fact that a defendant was mentally diseased is not determinative of criminal responsibility in and of itself but is significant only insofar as it indicates the extent to

which the particular defendant lacked normal powers of control and choice at the time he committed the criminal conduct with which he is charged....[34]

As pointed out, the M'Naghten Rule, which is the traditional approach, provides that if a defendant did not know what the defendant was doing or did not know that what the defendant was doing was wrong, the defendant will not be held responsible for the defendant's acts.[35] A defendant who does not possess this minimum degree of rationality is said to be "legally insane." Without this minimum degree of cognitive capacity, choice, and therefore control, is clearly absent. Condemnation and punishment of such an individual would be unjust because the individual could not, by hypothesis, have employed reason to restrain the act: the individual did not and the individual could not know the facts essential to bring reason into play.[36] They are also futile because a "madman who believes that he is squeezing lemons when he chokes his wife or thinks that homicide is the command of God is plainly beyond reach of the restraining influence of law; he needs restraint but condemnation is entirely meaningless and ineffective." [37]

The M'Naghten Rule singles out only one factor as a test of responsibility: cognition--the ability of the defendant "to know" what the defendant was doing or "to know" the wrongfulness of the conduct. Fourteen states and the federal jurisdiction have recognized this as a defect in the M'Naghten formulation.[38] Many mental diseases, disorders, or defects may produce an incapacity for self-control without impairing cognition. Thus, these jurisdictions have supplemented the M'Naghten formulation with the "irresistible impulse" test.

Following the suggestion of these states and the Model Penal Code, this Code accepts the view that a defendant whose volitional capacity is impaired as a result of a disease, disorder, or defect should be relieved of penal liability just the same as a defendant whose cognitive capacity is so impaired.

The draft of the M.P.C. accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions, must take account of impairment of volitional capacity no less than impairment of cognition; and this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of M'Naghten. It also accepts the criticism of the "irresistible impulse" formulation as inept in so far as it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection.[39]

The formulation for the test of volitional capacity is put in terms of whether the defendant lacked substantial capacity to conform the defendant's conduct to the requirements of the law.

Lack of capacity is, of course, distinguishable from a disposition not to conform to the requirements of the law. "The application of the principle will call, of course, for a distinction between incapacity, upon the one hand, and mere indisposition on the other. Such a distinction is inevitable in the application of a standard addressed to impairment of volition." [40]

The defendant's lack of volitional capacity is the same rationale which has precluded penal liability in cases involving physical diseases, disorders, or defects. As pointed out in Part I of this commentary, the defendant's inability to exercise volition while in a state of somnambulism,

automatism, or epilepsy is the reason why the courts have found no basis for penal liability in such cases. Although it is true that the defendant's condition also probably precludes cognition, the courts have not dealt fully with this aspect of the question. Acquittals on the basis of involuntary action on the part of the defendant are unqualified (unless the disease, disorder, or defect is assimilated into "insanity"). Since, as pointed out, the reason for providing for a conditional or qualified acquittal in cases involving a mental disease, disorder, or defect is equally applicable to cases involving a physical condition impairing the defendant's volitional capacity (and possibly the defendant's cognitive capacity), there is no reason to provide different standards or different consequences for excusing conditions of the mind or the body or both. The Code provides for unified treatment of physical and mental conditions which impair cognition or volition or both.

A more subtle criticism of the M'Naghten test and the "irresistible impulse" test must be recognized and accepted. M'Naghten requires that the defendant must be completely without cognitive capacity--the defendant must not know the nature and quality of the defendant's act or that what the defendant is doing is wrong. The irresistible impulse test requires a complete lack of capacity for self-control. The legal requirement of total incapacity does not conform to the clinical experience of psychiatrists.[41] Many persons with a mental disease, disorder, or defect may have an extremely limited capacity for self-control or cognition, but their lack of capacity is rarely total.

The schizophrenic, for example, is disoriented from reality; the disorientation is extreme; but it is rarely total. Most psychotics will respond to a command of someone in authority within the mental hospital; they thus have some capacity to conform to a norm. But this is very different from the question of whether they have the capacity to conform to requirements that are not thus immediately symbolized by an attendant or policeman at the elbow. Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way.[42]

The Code does not demand total incapacity; it requires substantial incapacity. The word "substantial" is, of course, imprecise, but seeking precision in designating the degree of impairment that will preclude responsibility is as foolish as requiring total impairment. As the commentary to the Model Penal Code states: "To identify the degree of impairment with precision, is, of course, impossible both verbally and logically. The recommended formulation is content to rest upon the term 'substantial' to support the weight of judgment; if capacity is greatly impaired, that presumably should be sufficient." [43] An expert witness, called upon to assess a defendant's capacity at a prior time (which, of course, the witness probably did not observe), can hardly be asked for a more definitive statement even in the case of extreme conditions.

The Code has rejected the approach taken in *Durham v. United States*[44] which puts the test as follows: "an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect." The problem with the Durham test is twofold: (1) It leaves the ultimate decision of criminal responsibility to the expert medical witness without any limitation

or guide as to which kinds of cases the law seeks to exempt from condemnation and punishment. Once the expert witness has satisfied himself on the issue of causation and that the defendant's condition comes within the categories of "mental disease or mental defect," the defendant must be acquitted. (2) The question of causation or "product" is fraught with difficulties. "[T]he concept of the singleness of personality and unity of mental processes that psychiatry regards as fundamental"[45] makes it almost impossible to divorce the question of whether the defendant would have engaged in the prohibited conduct if the defendant had not been ill from the question of whether the defendant was, at the time of the conduct, in fact ill.

The formulation for the test of criminal responsibility set forth in subsection (1) is derived from the Model Penal Code. That formulation was adopted substantially by the Third[46] and Tenth [47] Circuits and in haec verba by the Second Circuit.[48] The Code has adopted substantially the Model Penal Code formulation. However, the words "physical" and "disorder" have been added. The addition of the word "physical" is explained in Part I of this commentary. The word "disorder" has been added in an attempt to insure that, regardless of any technical distinctions that may be made according to medical usage, all conditions which impair capacity according to the standard set forth in the formulation will be covered.

### **III. An Abnormality Manifested Only by Repeated Penal or Otherwise Anti-Social Conduct.**

Subsection (2) is designed to exclude from the category of "physical or mental disease, disorder, or defect" an abnormality manifested only by repeated penal or otherwise anti-social conduct. It is not intended that this clause be used to exclude any disease, disorder, or defect which is manifested by symptoms which include repeated penal or otherwise anti-social conduct.

There is considerable disagreement within the medical profession as to the proper definition of the words "psychopathy" and "sociopathy." At times they have been used to identify abnormalities which are manifested only by repeated penal conduct,[49] and at other times they have been used to identify serious mental disorders which are manifested by additional symptoms.[50] The Code cannot hope to resolve the issue of the proper definition of these words; because of this, it is not the intent of subsection (2) to stigmatize the use of the term per se. Rather, the Code points to the factors to be considered, not the label to be used.

We yield to the urge, thus far suppressed, to quote at length from the opinion of Judge Biggs in *United States v. Currens*:

It is readily apparent that... [the] objection to the inclusion of psychopaths among those entitled to raise the defense of insanity assumes a particular definition of psychopathy; viz., that the term psychopathy comprehends a person who is a habitual criminal but whose mind is functioning normally. Perhaps some laymen and, indeed some psychiatrists, do define the term that broadly; and insofar as the term psychopathy does merely indicate a pattern of recurrent criminal behavior we would certainly agree that it does not describe a disorder which can be considered insanity for purposes of a defense to a criminal action. But, we are aware of the fact that psychopathy, or

sociopathy, is a term which means different things to experts in the fields of psychiatry and psychology. Indeed, a confusing welter of literature has grown up about the term causing some authorities to give up its use in dismay, labelling it a "waste basket category." See, e.g., Partridge, C.E., Current Conceptions of Psychopathic Personality, 10 American Journal of Psychiatry, pp. 53-59 (1930).

We have examined much of this literature and have certainly found it no less dismaying than those authorities to which we have just referred. Our study has, however, revealed two very persuasive reasons why this court should not hold that evidence of psychopathy is insufficient, as a matter of law, to put sanity or mental illness in issue. First, it is clear that as the majority of experts use the term, a psychopath is very distinguishable from one who merely demonstrates recurrent criminal behavior.... Moreover, the American Psychiatric Association in 1952 when it published its Diagnostic and Statistical Manual, Mental Disorders (Mental Hospital Service), altered its nomenclature, p. 38, removing sociopathic personality disturbance and psychopathic personality disturbance from a non-disease category and placing them in the category of "Mental Disorders."

Thus, it can be seen that in many cases the adjective "psychopathic" will be applied by experts to persons who are very ill indeed. It would not be proper for this court in this case to deprive a large heterogeneous group of offenders of the defense of insanity by holding blindly and indiscriminately that a person described as psychopathic is always criminally responsible.

Our second reason for not holding that psychopaths are "sane" as a matter of law is based on the vagaries of the term itself. In each individual case all the pertinent symptoms of the accused should be put before the court and jury and the accused's criminal responsibility should be developed from the totality of his symptoms. A court of law is not an appropriate forum for a debate as to the meaning of abstract psychiatric classifications. The criminal law is not concerned with such classifications but with the fundamental issue of criminal responsibility. Testimony and argument should relate primarily to the subject of the criminal responsibility of the accused and specialized terminology should be used only where it is helpful in determining whether a particular defendant should be held to the standards of the criminal law.[51]

Subsection (2) accepts the language of the Model Penal Code,[52] but does not accept the construction or intent placed on the language by the Model Penal Code commentary. That commentary accepted the Royal Commission's view that psychopathy is an abnormality manifested only by repeated deviant conduct and stated that the language "is designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.'"[53] The language, but not the commentary, is fully consistent with the discussion by Judge Biggs set out above.[54]

Previous Hawaii law has not examined directly the question of physical disease, disorder or defect excluding penal responsibility and liability; however, a recent case suggests that an "unforeseeable sudden loss of consciousness" will deprive the defendant's conduct of

voluntariness and result in an unqualified acquittal for the defendant.[55] To the extent that this may be said to be the law of this State, the Code would modify this by providing for a qualified acquittal.

Previous Hawaii statutory law on lack of penal responsibility based on the defendant's mental condition was: "Any person acting under mental derangement, rendering him incompetent to discern the nature and criminality of an act done by him, shall not be subject to punishment therefor..."[56] This has been interpreted as the equivalent of the M'Naghten Rule in an opinion in which the court went out of its way to condemn the Rule.[57]

The most recent pronouncement of the court impliedly modifies earlier cases which restricted the statutory formulation to mental conditions resulting from biological or organic factors.[58] These prior restrictive decisions are at least as archaic as M'Naghten which the court now claims "should have been discarded with the horse and buggy." [59]

### **Law Journals and Reviews**

Comments and Questions About Mental Health Law in Hawaii. 13 HBJ No. 4 Winter 1978, pg. 13.

Extreme Emotion. 12 UH L. Rev. 39.

Extreme Mental or Emotional Disturbance (EMED). 23 UH L. Rev. 431.

### **Case Notes**

Effect of voluntary intoxication on impairment of capacity. 62 H. 17, 608 P.2d 408.

"Substantial capacity"; instruction thereon approved. 62 H. 531, 606 P.2d 920.

Court did not err in referring to this section's legal definition of a "mental illness" for purposes of determining an insanity acquittee's eligibility for release. 84 H. 269, 933 P.2d 606.

Defendant's drug-induced mental illness was not a defense to second degree murder under §707-701.5(1) as adoption of such a rule would be contrary to the statutory scheme and legislative intent of §702-230 and this section. 93 H. 224, 999 P.2d 230.

There was substantial evidence to support trial court's conclusion that defendant was penally responsible for defendant's conduct at the time defendant shot victim where doctors conducted a through examination of defendant, investigated defendant's mental status during the time before the shooting, and opined that defendant's delusional beliefs were not connected to the shooting and that defendant was not substantially impaired at the time of the shooting. 107 H. 469, 115 P. 3d 648.

Standard of review for motions for judgment of acquittal in insanity cases. 1 H. App. 1, 612 P. 2d 117.

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**§704-400 Commentary:**

1. 78 Ky. 183 (1897).
2. *Id.* at 188.
3. *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943); *People v. Magnus*, 98 Misc. 80, 155 N.Y. Supp. 1013 (1915).
4. *People v. Cox*, 67 Cal. App. 2d 166, 152 P.2d 362 (1944).
5. *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948).
6. In addition to *Fain v. Commonwealth*, *supra* note 1, see *People v. Methever*, 132 Cal. 326, 64 Pac. 481 (1901)(dictum).
7. *M'Naghten's Case*, 10 Clark & Finnelly 200, 210, 8 Eng. Rep. 718, 722 (1843).
8. See, e.g., *Durham v. United States*, 214 F.2d 862, 874-875 (1954), and M.P.C. §4.01.
9. Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 Colum. L. Rev. 645 (1963).
10. *Id.*
11. *Dewan & Spaulding, The Organic Psychoses: A Guide to Diagnosis* 8 (1958).
12. Fox, *op. cit.*
13. *Id.*
14. *Id.* at 647.
15. *Id.* at 648.
16. M.P.C., Tentative Draft No. 4, comments at 119 (1955).
17. *Id.* at 121.
18. *People v. Freeman*, *supra* note 3; *People v. Magnus*, *supra* note 3.
19. *People v. Furlong*, 187 N.Y. 198, 79 N.E. 978 (1907); *People v. Egnor*, 175 N.Y. 419, 67 N.E. 906 (1903).
20. *Fain v. Commonwealth*, *supra* note 1; *People v. Methever*, *supra* note 6 (dictum).
21. *Bradly v. State*, 277 S.W. 147 (Tex. Cr. App. 1925).
22. Compare *People v. Furlong*, *supra* note 19, and *People v. Egnor*, *supra* note 19, with *People v. Magnus*, *supra* note 3.
23. See *People v. Egnor*, *supra* note 19, and *Bratty v. Attorney- General for Northern Ireland*, (1961) 3 Weekly L.R. 965 (H.L.). In the former case there was conflicting testimony by medical experts, and defendant's evidence of epilepsy, which was offered to disprove responsibility under a M'Naghten test for insanity, did not prevail. In the latter case, where medical testimony had labelled psychomotor epilepsy as a "defect of reason due to a disease of the mind," the House of

Lords approved of the foreclosure by the trial judge of the issue of automatism based on the epilepsy, and, because the defendant could not carry the burden of proof on the issue of "insanity" (which English law then placed on defendants who raised that issue), the resulting unqualified conviction of the defendant.

24. [1955] 1 Weekly L.R. 317 (Chester Assizes).

25. *Id.* at 321-322.

26. 1957 1 Q.B. 399 (1956).

27. *Id.* at 406.

28. *Id.* at 408.

29. 1961 3 Weekly L.R. 965 (H.L.).

30. *Id.* at 983.

31. *Id.* at 973.

32. *Id.* at 975.

33. *Id.* at 981.

34. *United States v. Currens*, 290 F.2d 751, 733 (3d Cir. 1961).

35. See text accompanying note 7.

36. M.P.C., Tentative Draft No. 4, comments at 156 (1955).

37. *Id.*

38. *Id.* at 161.

39. *Id.* at 157.

40. *Id.* at 157-158.

41. See Guttmacher, *Principal Difficulties with the Present Criteria of Responsibility and Possible Alternatives*, in M.P.C., Tentative Draft No. 4, appendix to comments at 170 (1955).

42. M.P.C., Tentative Draft No. 4, comments at 158 (1955)(emphasis added).

43. *Id.* at 159.

44. 214 F.2d 862 (1954).

45. M.P.C., Tentative Draft No. 4, comments at 159 (1955).

46. *United States v. Currens*, *supra* note 34. In *Currens* the test is stated thus: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." *Id.* at 774. It seems clear that this formulation adequately accounts for impaired cognition. A defendant who lacks substantial capacity to appreciate the wrongfulness of the defendant's conduct also lacks, because of the defendant's impaired cognition, substantial capacity to conform the defendant's conduct to the requirements

of the law. Were it not for the fact that at a hearing on this chapter many local psychiatrists indicated that, in their opinion, the Currens formulation did not account for impaired cognition, the Reporter would have been extremely tempted to recommend the Currens formulation as achieving greater clarity in expression and simplicity in application.

47. *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964).

48. *United States v. Freeman*, 357 F.2d 606 (1966).

49. See Royal Commission on Capital Punishment, Report (1953).

50. Cleckley, *The Mask of Sanity* (1941) and White, *The Abnormal Personality* (1948).

51. 290 F.2d at 761-763.

52. M.P.C., §4.01(2).

53. M.P.C., Tentative Draft No. 4, comments at 160 (1955).

54. It is clear that Judge Biggs either had not read or was not referring to the Model Penal Code commentary when, in a footnote, after quoting from the complete language of M.P.C. §4.01, he said: "As we have indicated earlier in this opinion we agree fully with part '(2)' of the American Law Institute proposal set out above." 290 F.2d at 774n.

55. See *State v. Matsuda*, 50 Haw. 128, 432 P.2d 888 (1967).

56. H.R.S. §703-4.

57. *State v. Moeller*, 50 Haw. 110, 433 P.2d 136 (1967). The court however claimed that it was powerless to reinterpret the statutory language in the light of modern psychiatric knowledge, stating that "it is part of our statutory law and only the legislature can amend or repeal it."

58. Compare *State v. Moeller* supra note 57, with *State v. Foster*, 44 Haw. 403, 425, 354 P.2d 960, 972 (1960) ("In Hawaii emotional insanity, unassociated with a disease of the brain... is not an excuse for a crime."), and *Territory v. Alcosiba*, 36 Haw. 231, 238 (1942) ("... Insanity or mental derangement is rather the result or manifestation in the mind of a disease of the brain, and by disease is meant any underdevelopment, pathological condition, lesion or malfunctioning of the brain or any morbid change or deterioration in the organic functions thereof.").

59. *State v. Moeller*, supra note 57, quoting from *State v. Dhaemers*, 150 N.W.2d 61, 66 (Minn. 1967).