Though there is much to commend the decision, a word of comment is in order. The judicial process has resolved the problem of whether there should be liability for trespass in the absence of intent or negligence by leaving the innocent party, who has suffered a loss due to a lawful act on the part of another innocent party, entirely without redress. Is there a more acceptable solution?

It is not within the scope of this note to discuss the incidence and apportionment of losses. There is, however, a trend towards compensation for all losses suffered in the course of peaceful pursuits. The common law rule regarding contributory negligence left the plaintiff with no right of recovery; this problem was solved by legislation which enabled the Courts to apportion the loss and award damages accordingly. The positions of negligent and innocent parties are not alike, but perhaps it would not be unprofitable to consider the possibility of some legislative approach to the problem of losses suffered by innocent parties and occasioned by innocent parties.

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REX v WINDLE 1952 2 A.E.R.

Criminal Law – Insanity – Lack of knowledge that act causing death was "wrong" – Belief that act, while legally wrong, was morally right.

The defense of insanity in a murder trial, for about the last one hundred years, has been guided by the rule laid down in **McNaughten's case.** (1) The rule is, "Every man is presumed to be sane, and to possess a sufficient degree of reason, to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party 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."

In the present case, the accused relied solely upon the defense of insanity. He was convicted before Devlin J. of murdering his wife by administering to her one hundred aspirin tablets. Devlin J. held that there was no case of insanity to be put to the jury, and the accused was found guilty. The case was appealed. The accused was a man of weak character who was involved in an unhappy marriage with a woman eighteen years his senior. She always talked of suicide as an escape from her sickness. The accused became obsessed with this idea and discussed it with his fellow workers. Just before the crime was committed, one of the workmen, in a jocular vein, suggested that the accused "give her a dozen aspirin". He then gave her the fatal dose. Subsequently he told the police that he supposed that he would be hanged for it.

1 1843, (10 Cl. and Fin. 200).

Goddard C. J. delivered the House of Lords judgment. The appeal was based solely on the meaning of the word "wrong" as set out in the McNaughten rule (supra). Doctors produced both by the Crown and the accused agreed that the accused knew that he was doing an illegal act. At this point, Devlin J. had refused to allow the jury to decide upon the accused's insanity, since knowledge of his act, as being an illegal act. was sufficient to overthrow the defense of insanity. The accused probably believed that he was doing an act morally right in relieving his wife from her earthly suffering. The evidence of communicated insanity, known as **"folie a deux"** which arises from constant attendance on a person of unsound mind was vague. The defense stated that the McNaughten rule included "morally wrong" to be sufficient to exonerate the accused.

A court of law can only distinguish between that which is in accordance with law and that which is contrary to law. Many acts are contrary to both God and man; e.g. "Thou shalt not kill", and "Thou shalt not steal". But, "Thou shalt not commit adultery," so far as criminal law is concerned, is not contrary to law of man, though contrary to the law of God. (Perhaps Lord Justice Goddard's example is not too appropriate here in New Brunswick.)

Rex v Rivett (2) supports the finding in this case by saying the test of insanity included, " . . . trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act or ommission was done . . . " The meaning implies that the wrong must be a legal wrong.

Rex v Kierstead (3) is one of the few appeal cases in the province of New Brunswick dealing with the defense of insanity. Barry J. found the accused guilty of murdering his wife. White J. affirmed this judgment holding that the accused merely suffered from insane delusions, and that the heavy duty of establishing the defense of insanity beyond a reasonable doubt was not discharged. The accused obviously knew that what he did was wrong. "Wrong" is not employed in the strict sense of the present case. Although arriving at the same conclusion, this case would have been simplified, if it had the present case as a precedent. McNaughten's rule has been universally applied to insanity cases, whether it be concerned with delusions, disease of the mind, or insanity itself.

The accused realized that his act was illegal, and the rule was therefore satisfied. Devlin J. was correct in withdrawing the question of insanity from the jury. From the evidence, it could not be left to the jury to give a verdict of insanity instead of guilty.

Devlin J. in the first instance and Goddard C. J. in the House of Lords, by their respective judgments in this case, have reduced the generality of the McNaughten case to a more specific rule.

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2 1950 34 Cr. App. Rep. 87
3 1918. 45 N. B. R. 553.