

# Windle Revisited\*

A defendant is legally insane only if they did not know the nature of their act or that it was wrong.<sup>1</sup> What sense of ‘wrong’? *Legally* wrong, according to *Windle* (and confirmed by *Johnson*).<sup>2</sup> *Windle*’s ratio is frequently criticised for being too restrictive.<sup>3</sup> But less attention has been paid to the poor quality of the reasoning used to reach that ratio.

## 1. Windle

Mr Windle suffered shared psychosis and killed his wife as an act of mercy. Mr Johnson suffered paranoid schizophrenia and stabbed his neighbour after delusions of the neighbour’s wrongdoing. Neither defendant knew that their conduct was morally wrong, due to a disease of the mind. But neither were found insane. In *Windle*, Lord Goddard held that “in the McNaghten Rules ‘wrong’ means contrary to law.”<sup>4</sup> In *Johnson* the court added that “This statement of the law is unequivocal and has [not]... so far as we are aware, been doubted since then in this court.”<sup>5</sup> As both defendants knew their conduct was legally wrong, neither could use the insanity defence.

Lord Goddard offered two arguments to support the ‘legally wrong’ interpretation. First, he argued that courts *cannot* consider an alternative, ‘morally wrong’ reading:

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\* Published [2018] Crim LR 987.

<sup>1</sup> *McNaghten’s Case* (1843) X Clark & Finnelly 200; 8 ER 718 at 210.

<sup>2</sup> *Windle* [1952] 2 All E.R. 1; [1952] 2 Q.B. 826 at 833; *Johnson* [2008] Crim. L.R. 132; [2007] EWCA Crim 1978.

<sup>3</sup> R.D. Mackay, *Mental Condition Defences in the Criminal Law* (Oxford University Press, 1995), pp.105-106; Law Commission, *Criminal Liability: Insanity and Automatism* (Discussion Paper, 2013) at paras 1.50, 4.20-4.22, and 4.33.

<sup>4</sup> *Windle* [1952] 2 Q.B. 826 at 834.

<sup>5</sup> *Johnson* [2007] EWCA Crim 1978 at [22].

“Courts of law *can only* distinguish between that which is in accordance with law and that which is contrary to law... The law *cannot* embark on the question...whether some particular act was morally right or wrong. The test *must* be whether it is contrary to law.”<sup>6</sup>

This is a non-sequitur. Even if courts cannot consider questions of morality, it does not follow that they cannot consider *whether a defendant can consider* such questions. They are separate issues. Nor is the second question impossible: courts in Canada and Australia use precisely such a test.<sup>7</sup> Lord Goddard’s first argument is baseless.

Second, he argued that the ‘legally wrong’ interpretation was supported on the authorities. But his reasoning rested on a clear error. In an earlier case, *Rivett*, he referred to section 2 of the Trial of Lunatics Act 1883, which introduced the special verdict:

“Where... [a defendant] was insane, so as not to be responsible, according to law, for his actions at the time when the act was done...then...’ the jury may return a special verdict.”

Section 2 does not define insanity. The legal test of insanity before and after the 1883 Act remained the M’Naghten Rules. Thus, section 2 can be expanded to read: ‘insane, so as not to be responsible, according to [the] law [as set out in the M’Naghten rules]’. In other words, ‘insane, so as not to be responsible’ is a *conclusion* of the legal test of insanity, the M’Naghten Rules. Had the M’Naghten Rules defined ‘wrong’ as ‘morally wrong’, it would remain the case, per section 2, that insane defendants would be ‘not responsible, according to law’.

But Lord Goddard interpreted ‘insane’ and ‘so as not to be responsible, according to law’ as two separate tests, such that ‘it is responsibility and not merely insanity that is the true test’.<sup>8</sup> This interpretation was harmless enough in *Rivett*.<sup>9</sup> But in *Windle* Lord Goddard commented that

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<sup>6</sup> *Windle* [1952] 2 Q.B. 826 at 833 (emphases added).

<sup>7</sup> *Chanik* [1990] 3 SCR 303; *Stapleton* [1951] HCA 56. (Both jurisdictions rely on a standard of *social* morality).

<sup>8</sup> *Rivett* (1950) 34 Cr. App. R. 87 at 93.

<sup>9</sup> This was because Lord Goddard used ‘insanity’ to refer only to a defect of reason due to disease of the mind: “[T]he question is not merely was [the defendant] suffering from a defect

“As I endeavoured to point out in... *Rivett*... the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is ‘wrong,’ and by ‘wrong’ is meant contrary to law, he is responsible... I desire to emphasize again, as we sought to emphasize in...*Rivett*, that the test is ‘responsibility according to law’.”<sup>10</sup>

Nowhere in *Rivett* was it held that ‘wrong’ means ‘contrary to law’. Rather, it was emphasised that the test was ‘responsibility’. But that test of responsibility was simply the M’Naghten Rules. Those Rules did not specify the relevant sense of ‘wrong’. Lord Goddard seems to have borrowed the phrase ‘according to law’ from section 2 of the 1883 Act and transplanted it from its proper place as a *conclusion* that the M’Naghten Rules apply into a *premise* identifying what counts as ‘responsible’ within those rules. The ratio rests on an error.<sup>11</sup>

## 2. Codere

*Codere*<sup>12</sup> is sometimes cited as additional authority for the ‘legally wrong’ interpretation. But this involves a similar misinterpretation. *Codere*’s judgment quotes a (less cited) passage from M’Naghten:

“If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.”<sup>13</sup>

This clearly states two separate elements required to plead insanity: (1) D must know ‘he ought not to’ do the act, and (2) it must be contrary to law. The test is silent as to the relevant sense of ‘ought not’. But *Codere* continues:

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of reason due to disease of the mind, but whether that defect was such as to render him not responsible for his action” *Rivett* (1950) 34 Cr. App. R. 87 at 93. Obviously, as this is only the first limb of the M’Naghten rules, it’s true that this ‘insanity’ is insufficient to conclude that D is not responsible. The second limb is also required.

<sup>10</sup> *Windle* [1952] 2 QB 826 at 832-3 (emphases added).

<sup>11</sup> R.D. Mackay makes this point briefly in R.D. Mackay, “Righting the Wrong? – some observations on the second limb of the M’Naghten Rules” [2009] Crim. L.R. 80, 82.

<sup>12</sup> *Codere* (1916) 12 Cr App R 21.

<sup>13</sup> That D “was conscious...he ought not to” do an act is equivalent to the usual formulation that D “knew his act was wrong”.

“[A]pplying [the test]...in this case...once it is clear that the appellant knew that the act was wrong in law, then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was punishable by law.”

On one interpretation, this passage offers a *definition* of ‘ought not’, whereby

*That* D knows his act is legally wrong *means* it is wrong per the M’Naghten Rules

This, of course, is *Windle’s* ratio. But this definition is not a matter of ‘applying’ the M’Naghten test, for that test did not specify the meaning of ‘ought not’. It would only be so if *Codere* had erroneously conflated the two independent elements from the passage cited.

But there appears to be no such error. That’s because the passage above was probably not intended to *define* ‘ought not’. The ‘once...then...’ syntax implies not a definition but an *implicature*, i.e.

*If* D knows his act is legally wrong, *then* he knows it is wrong per the M’Naghten Rules

This implicature doesn’t identify the relevant sense of ‘wrong’. If anything, it suggests the *morally* wrong reading. That’s because the ‘legally wrong’ reading results in the mere tautology that ‘If D knows the action is legally wrong, then he must know it is *legally* wrong per the M’Naghten Rules.’ By contrast, the morally wrong reading is not tautologous, and is positively implied by *Codere’s* previous paragraph:

“In a case of this kind, namely, killing, it does not seem debateable that the appellant could have thought that the act was not *morally wrong*, judged by the ordinary standards, when the act is punishable by law, and is known by him to be punishable by law.”<sup>14</sup>

Admittedly, *Codere* held that a defendant who knew his conduct was *legally* wrong was *not* entitled to the insanity defence. But this conclusion wasn’t presented as a general legal proposition. It was restricted to ‘a case of this kind, namely, killing’. By implication, for *other* offences defendants might be aware the act was legally wrong and yet not know

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<sup>14</sup> *Codere* (1917) 12 Cr. App. R. 21 at 27 (emphasis added).

they ‘ought not’ to do it in the sense required by the Rules.<sup>15</sup> Rather, the claim is *evidential*: knowledge of legal wrongdoing *implies* knowledge of moral wrongdoing, which is the real test. (By analogy: in self-defence, that a belief in a threat is reasonable is evidence that it was honestly held, but its reasonableness is not strictly required).<sup>16</sup> The implication is not definitive, not even in cases of killing. True, *Codere* says the implication ‘does not seem debateable’. But it was in fact debated in *Windle*, a murder case.<sup>17</sup>

All of this is not to say that the ‘morally wrong’ reading is correct. *Windle* and *Johnson* supersede *Codere*. It is only to say that *Codere* offers no support to *Windle*’s ratio.

### 3. M’Naghten

Even if *Windle* and *Codere* offered little evidence that the ‘legally wrong’ interpretation was correct, it could still have been the correct decision on the authorities. *Codere* claimed that ‘looking at all the answers in M’Naghten’s case, it seems that if it is punishable by law it is an act which he ought not to do.’<sup>18</sup> And in *Rivett* Lord Goddard approvingly cited Lord Tindal’s jury direction in the original M’Naghten trial.<sup>19</sup>

Unfortunately, none of *Codere*, *Rivett*, or *Windle* cited passages from the M’Naghten Rules which supported the ‘legally wrong’ interpretation. That’s because there is no such support. As for Lord Tindal’s jury direction, it reads:

“You [must be]...satisfied that...the prisoner... had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and wrong thing. If he was not sensible at the time he committed that act, that

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<sup>15</sup> Further: “There may be minor cases before a court of summary jurisdiction where that view may be open to doubt, but in cases such as these the true view is what we have just said.” *Codere* (1917) 12 Cr. App. R. 21 at 28.

<sup>16</sup> Criminal Justice and Immigration Act 2008 s.76(3)-(4).

<sup>17</sup> Several other cases involve mercy killings spurred by psychotic delusions, including the famous US case of Andrea Yates (discussed by the Law Commission, *Criminal Liability: Insanity and Automatism* (Discussion Paper, 2013) at para 1.50) and the recent Canadian case *Campione* [2015] ONCA 67.

<sup>18</sup> *Codere* (1917) 12 Cr. App. R. 21 at 28.

<sup>19</sup> *Rivett* (1950) 34 Cr. App. R. 87 at 93-4.

it was a violation of the law of God or of man, undoubtedly he was not responsible for that act.”<sup>20</sup>

A “wicked and wrong thing” and “a violation of the law of God” hardly offer persuasive support for the ‘legally wrong’ interpretation.

This point has been made before. The Australian High Court considered the issue in *Stapleton*.<sup>21</sup> The judgment is roughly the length of *Codere*, *Rivett*, *Windle*, and *Johnson* combined. Contra *Codere*, the High Court claimed that “the context [of M’Naghten’s wrongness test] leaves no doubt that this expression is referring to the canons of right and wrong and not to the criminal law.”<sup>22</sup> Unlike in *Codere*, this broad assessment is supported by a detailed consideration of 18<sup>th</sup> and 19<sup>th</sup> century authorities.<sup>23</sup> Those cases typically referred to the defendant’s ability to discern or distinguish between “good and evil” or “right and wrong”. That was the direction in *Arnold*,<sup>24</sup> *Hadfield*,<sup>25</sup> and *Bellingham*,<sup>26</sup> among others. The Solicitor General in *Lord Ferrers’ trial* referred to “moral good and evil”.<sup>27</sup> *Hadfield* is particularly instructive: Hadfield attempted to assassinate George III to bring about his own execution. Like Windle, he must have known the act was legally wrong. Yet Hadfield was found insane. The High Court acknowledged some competing authorities implying the ‘legally wrong’ interpretation. But, on balance, the Court concluded that the ‘legally wrong’ interpretation was incorrect.<sup>28</sup>

Whatever the merits of the ‘legally wrong’ interpretation, it is not a natural interpretation of M’Naghten or other early authorities. Insofar as *Codere* and *Windle* presented it as such, this was a further error. While the Court in *Johnson* accepted that *Stapleton* was a ‘highly persuasive judgment’, it considered itself bound by *Windle* nonetheless.

#### 4. Legally *and* morally wrong?

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<sup>20</sup> *The Queen against Daniel M’Naughton* (1843) 4 St Tr 847 at 925.

<sup>21</sup> *Stapleton* [1951] HCA 56.

<sup>22</sup> *Stapleton* [1951] HCA 56 at [18].

<sup>23</sup> *Stapleton* [1951] HCA 56 at [18]-[26].

<sup>24</sup> *Arnold* (1724) 16 St Tr 695 at 764.

<sup>25</sup> *Hadfield* (1800) 27 St Tr 1281 at 1287, 1290.

<sup>26</sup> *Bellingham* (1812) 1 Collinson on Lunatics 636 at 671.

<sup>27</sup> *Lord Ferrers’ trial* (1760) 19 St Tr 885 at 947-948.

<sup>28</sup> *Stapleton* [1951] HCA 56 at [26].

*Windle* emphasises that *only* knowledge of legal wrong matters. Strictly construed, this means the insanity defence is available to defendants who *knew* their act was *morally* wrong (so long as they were ignorant that it was legally wrong). This seems indefensible. Such defendants are clearly culpable. But if the courts are bound by *Windle*, it seems they are bound by this lacuna too.

Several textbooks suggest otherwise. They suggest that defendants must be ignorant *both* of their act's illegality *and* its immorality. *Johnson* obliquely supports this view, in holding that "the strict position...remains as stated in *Windle* and in the [textbook] passages".<sup>29</sup> But if the courts are 'strictly' bound to follow *Windle*, there must be some additional authority to avoid the lacuna.

The textbooks interpret the M'Naghten Rules to do just this. Recall that the Rules ask whether '[D] did *not* know he was doing what was wrong'. According to one textbook:

"[T]he key to a proper understanding of this question is to recognise that the question is a negative one... If the accused *does* know *either* that his act is *morally* wrong... *or* that it is *legally* wrong then it cannot be said that he does not know he was doing what was wrong."<sup>30</sup>

Unfortunately, no such positive inference can be drawn from M'Naghten's negative phrasing. 'If A *didn't* B then C' tells us nothing about what follows if A *did* B. Obviously, the Rules specify the criteria for the insanity defence. If the accused knew his act was 'wrong', he does not get the defence. But the relevant *sense* of wrong is not revealed by the Rules' negative phrasing.

Another argument for the textbook interpretation was offered in a Canadian judgment, which noted that "the word 'wrong' [is used] without modification. Had Parliament intended it to mean a specific kind of wrong, one would have expected Parliament to have said so."<sup>31</sup> The same argument applies to the M'Naghten Rules. It follows that knowledge of *any* kind of wrong—whether legal or moral—is sufficient to deny the

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<sup>29</sup> *Johnson* [2007] EWCA Crim 1978 at [24]. The textbooks cited (at [17]-[18]) are *Archbold*, *Blackstone*, and *Smith and Hogan*.

<sup>30</sup> David Ormerod and David Perry (eds), *Blackstone's Criminal Practice* (Oxford University Press, 2018) at A3.33 (emphasis in original).

<sup>31</sup> *Chaulk* [1990] 3 SCR 303, per Per L'Heureux Dubé J and McLachlin J (dissenting).

defence. But this argument proves too much. Consider a defendant who damages property in the insane belief that it belongs to the mafia, and that doing so is morally and legally justified. They know that their conduct is considered wrong *by the mafia*. But this cannot be grounds to deny them the defence. The fact that they know their action is wrong *in at least one sense* cannot be sufficient. *Which* sense of wrong matters. And *Windle* held that *only* knowledge of legal wrong counts.

The textbook interpretation is certainly preferable. But it doesn't strictly follow from the M'Naghten Rules and contradicts *Windle*. If the courts are bound by *Windle*, the lacuna remains. While no such cases have been pleaded, it is another reminder of the inadequacy of *Windle's* reasoning that such a gap could have been left.

## 5. Conclusion

There have long been calls to rethink *Windle*. Both the courts' reticence and the complexity of the issues support legislative reform.<sup>32</sup> But acknowledging the poor quality of *Windle's* reasoning adds extra impetus to these calls.

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<sup>32</sup> See David Ormerod's comment on *Johnson* [2008] Crim. L.R. 132.