Epilepsy and the Defence of Insanity – Time for Change?

By R D Mackay, Professor of Criminal Policy and Mental Health, De Montfort Law School, De Montfort University, Leicester and Dr. Markus Reuber, Senior Clinical Lecturer, Academic Neurology Unit, University of Sheffield

Summary of Research

In English criminal law, defending a person on the grounds of insanity is a practice dating back to 1843. Under this practice, a person is not seen as responsible for their actions if, at the time of committing the crime, they did not know either what they were doing or that it was wrong to do it – specifically due to “a defect of reason from disease of the mind”.

Clearly, this defence applies to the seriously mentally ill. What is less well known is that, in legal terms, it applies to a much wider spectrum of cases. The term even includes people who are living with epilepsy and allegedly commit an offence during, or immediately after, a seizure.

In this case, the crime would have been committed during an “epileptic automatism”. Previously, English courts of law have made it clear that these episodes qualify a defendant for a verdict of “not guilty by reason of insanity” (NGRI). Before 1992, all those subject to a verdict of NGRI were sent to a psychiatric hospital indefinitely. Because of this, it is understandable that the insanity plea was rarely used. However, after 1992 flexibility of disposal was introduced – meaning that hospitalisation was no longer compulsory. This change was long overdue but it did nothing to alter the inappropriate use of the term “insanity” in relation to people with epilepsy. Although it is clear that verdicts of legal insanity resulting from epileptic automatism are rare, they do occur.

This small research project – funded by Epilepsy Action – identified and reported on 13 such cases between the years 1975 and 2001. Five of the 13 cases (one murder charge, three grievous bodily harm assaults and one charge of arson) were all resolved before 1992. All of these cases resulted in mandatory hospitalisation. Only the remaining eight cases were resolved after the change in legislation – meaning that the judge could choose how to dispose of the defendant.

It is interesting that only one of those eight cases – a charge of attempted murder – resulted in indefinite hospitalisation. Of the remaining seven cases, none led to the hospitalisation of the defendant. This is significant. It shows that release into the community (rather than hospitalisation) was ruled appropriate in a majority of people
who were found NGRI 2 on account of epilepsy. This is despite the fact that some of the relevant charges – which included grievous bodily harm, assault and arson – were major offences. Conditions other than epilepsy were a factor in all 13 cases identified. However, that did not stop the judge from ruling in favour of release into the community. This is encouraging.

The Domestic Violence, Crime and Victims Act 2004 stated that the law on the disposal of defendants found NGRI changed again in 2004. People found NGRI may now ‘only be sent to a psychiatric hospital if they are found to have a mental disorder recognised within the Mental Health Act which and requiring in-patient treatment in a hospital.

This effectively means that hospitalisation is no longer an option for a defendant if they are found NGRI on the grounds of an epileptic automatism alone. This is definite progress given that, of course, epilepsy is not a form of mental disorder. However, the label “insanity” is still attached to all those found NGRI – regardless of what medical condition leads to this verdict.

The ‘insanity’ label is both deeply stigmatic and offensive, not only to people with epilepsy. As indicated above, the law still relies on a defence dating from 1843 – a defence now antiquated and outmoded. This research demonstrates that there is still a need for the law to rid itself of the term “insanity” in this context – potentially by adopting a new defence that no longer stigmatises those who use it.

The Law Commission of England and Wales – the body responsible for law reform – is currently considering what topics to include in its new reform programme. Surely the “insanity” defence (which has not been considered for reform since 1975) must be a strong candidate for this programme of change. To continue to use the label “insanity” to cover a wide variety of mental illnesses, neurological and medical conditions in the 21st Century seems nothing short of a disgrace.