SOMNAMBULISTIC HOMICIDE: GHOSTS, SPIDERS, AND NORTH KOREANS.

By NORVAL MORRIS, LL.M. (Melb.), Ph.D. (London), Senior Lecturer in Law in the University of Melbourne.

The unreported case of *The King v. Cogdon*, heard in the Supreme Court of Victoria before Mr. Justice Smith in December, 1950, though clear as to its facts and unchallengeable in law, compels consideration of some of our basic premises of responsibility for criminal actions.

Mrs. Cogdon was charged with the murder of her only child, a daughter called Pat, aged nineteen. Pat had for some time been receiving psychiatric treatment for a relatively minor neurotic condition of which, in her psychiatrist's opinion, she was now cured. Despite this, Mrs. Cogdon continued to worry unduly about her. Describing the relationship between Pat and her mother, Mr. Cogdon testified: "I don't think a mother could have thought any more of her daughter. I think she absolutely adored her." On the conscious level, at least, there was no reason to doubt Mrs. Cogdon's deep attachment to her daughter.

To the charge of murdering Pat, Mrs. Cogdon pleaded not guilty. Her story, though somewhat bizarre, was not seriously challenged by the Crown, and led to her acquittal. She told how, on the night before her daughter's death, she had dreamt that their house was full of spiders and that these spiders were crawling all over Pat. In her sleep, Mrs. Cogdon left the bed she shared with her husband, went into Pat's room, and awakened to find herself violently brushing at Pat's face, presumably to remove the spiders. This woke Pat. Mrs. Cogdon told her she was just tucking her in. At the trial, she testified that she still believed, as she had been told, that the occupants of a nearby house bred spiders as a hobby, preparing nests for them behind the pictures on their walls. It was these spiders which in her dreams had invaded their home and attacked Pat. There had also been a previous dream in which ghosts had sat at the end of Mrs. Cogdon's bed and she had said to them, "Well, you have come to take Pattie." It does not seem fanciful to accept the psychological explanation of these spiders and ghosts as the projections of Mrs. Cogdon's subconscious hostility towards her daughter; a hostility which was itself rooted in Mrs. Cogdon's own early life and marital relationship.

The morning after the spider dream she told her doctor of it. He gave her a sedative and, because of the dream and certain previous difficulties she had reported, discussed the possibility of psychiatric treatment. That evening Mrs. Cogdon suggested to her husband that he attend his lodge meeting, and asked Pat to come with her to the cinema. After he had gone Pat looked through the paper, not unusually found no tolerable programme, and said that as she was going out the next evening she thought she would rather go to bed early. Later, while Pat was having a bath preparatory to retiring, Mrs. Cogdon went into her room, put a hot water bottle in the bed, turned back the bedclothes, and placed a glass of hot milk beside the bed ready for Pat. She then went to bed herself. There was some desultory conversation

between them about the war in Korea, and just before she put out her light Pat called out to her mother, " Mum, don't be so silly worrying there about the war, it's not on our front door step yet."

Mrs. Cogdon went to sleep. She dreamt that " the war was all around the house," that soldiers were in Pat's room, and that one soldier was on the bed attacking Pat. This was all of the dream she could later recapture. Her first " waking " memory was of running from Pat's room, out of the house to the home of her sister who lived next door. When her sister opened the front door Mrs. Cogdon fell into her arms, crying, " I think I've hurt Pattie."

In fact Mrs. Cogdon had, in her somnambulistic state, left her bed, fetched an axe from the woodheap, entered Pat's room, and struck her two accurate forceful blows on the head with the blade of the axe, thus killing her.

Mrs. Cogdon's story was supported by the evidence of her physician, a psychiatrist, and a psychologist. The burden of the evidence of all three, which was not contested by the prosecution, was that Mrs. Cogdon was suffering from a form of hysteria with an overlay of depression, and that she was of a personality in which such dissociated states as fugues, amnesias, and somnambulistic acts are to be expected. They agreed that she was not psychotic, and that if she had been awake at the time of the killing no defence could have been spelt out under the *M'Naughten Rules*. They hazarded no statement as to her motives, the idea of defence of the daughter being transparently insufficient. However, the psychologist and the psychiatrist concurred in hinting that the emotional motivation lay in an acute conflict situation in her relations with her own parents; that during marital life she suffered very great sexual frustration; and that she over-compensated for her own frustration by over-protection of her daughter. Her exaggerated solicitude for her daughter was a conscious expression of her subconscious emotional hostility to her, and the dream ghosts, spiders, and Korean soldiers were projections of that aggression. How manifold can be the possible motives for a " motiveless " killing!

At all events the jury believed Mrs. Cogdon's story, and regarded the presumption that the natural consequences of her acts were intended as being completely rebutted by her account of her mental state at the time of the killing, and by the unanimous support given to it by the medical and psychological evidence. She was acquitted. It must be stressed that insanity was not pleaded as a defence—she was acquitted because the act of killing itself was not, in law, regarded as her act at all.

This case illustrates the impossibility of applying the maxim *actus non facit reum nisi mens sit rea* as if it covered the field of criminal liability, as if it were possible satisfactorily to sever " act " from " intention." Here the mental element in the " *actus reus*," its voluntary quality, was lacking; or, put alternatively, the physical element in the " *mens rea*," the consciousness of action, was likewise lacking. This lack can be stated either way, and both are confusing as is shown by Kenny's treatment of this problem both under the head of the voluntary quality of the *actus reus*[1] and of the consciousness of action for purposes

1. *Outlines of Criminal Law*, 5th ed., p. 45.

of *mens rea*[2]. Indeed, Kenny uses this concept in yet a third way, citing[3] the Scots case of *H. M. Advocate v. Fraser*[4] in which a man dreamt he was struggling with a wild beast and killed his baby, to illustrate the rule as to insane delusions propounded under the *M'Naughten Rules*. In this he lapses into error, for surely if the defence of insanity were to apply Fraser could not be said to know the " nature and quality of his act," and thus complies with the *M'Naughten Rules* at an earlier stage than the application of the insane delusion test. On these facts, Fraser should have been acquitted without mentioning either insanity or insane delusions.

The better course is taken by J. W. C. Turner, who in his article on the " Mental Element in Crimes at Common Law[5]" adds to his statements of the requirements of *actus reus* and *mens rea* a third and independent requirement, namely, that " it must be proved that the conduct was voluntary,"[6] and when discussing this voluntary conduct as a prerequisite to criminal liability includes a somnambulistic action as involuntary and therefore exculpatory.

Thus, Mrs. Cogdon's action not being " voluntary," no question of criminal liability arose. But as was also shown in *R. v. Steane*[7] this concept of a " voluntary action " itself conceals many philosophical and psychological difficulties. Mrs. Cogdon escapes basically because of the state of her consciousness; not because she had no conscious intention or rational motive to kill, a state she shares with many convicted murderers. She was " asleep ": had she been " awake " her only defence would have been one of insanity. This defence might have succeeded, not because she fitted the *M'Naughten Rules*, in fact she did not, but because when a mother kills a daughter to whom she is apparently and consciously deeply attached the Bench and the jury will strive to squeeze her case into the psychologically rigid and narrow confines of the *M'Naughten Rules*.

But the difference between being " asleep " and " awake " is not absolute. Consciousness is not like a light, either off or on; it is a finely graded scale ranging from death to the extreme awareness of the artist. Indeed, with the electroencephalograph we can even chart certain variations of consciousness between people, and in one person at different times. Had Mrs. Cogdon been " awake," that is, just a little more conscious, a little more aware of her actions, then her act may have had to be regarded as " voluntary." The line is an extremely fine one, as is shown by the fact that in and during her dream Mrs. Cogdon was " aware " of the axe, her daughter and the soldiers. Not unexpectedly, she could not remember this part of the dream, for within us we struggle to repress such profoundly disturbing and shocking memory traces.

2. *Ibid.*, p. 42.
3. *Ibid.*, p. 61.
4. (1878) 4 Couper 70.
5. *Modern Approach to Criminal Law*, p. 195.
6. *Ibid.*, p. 199.
7. (1947) K.B. 997.
8. The defence of " insane delusion " might be suggested—to protect your daughter with an axe from an attacking soldier is clearly a justifiable homicide. However, as such an act would not be " wrong " either in law or in morality, the *M'Naughten Rules* would apply at an earlier stage—as indeed is always the case when the insane delusion test is suggested. But all this is based on a false hypothesis, for Mrs. Cogdon " awake " was not of a psychological pattern capable of having such a delusion—she would not have seen the Korean soldier.

Thus we all dream, but some, for various reasons, remember more than others. Nor would Mrs. Cogdon's position have been legally different even if she could have then recalled all the dream, including the killing. Her exculpation lay not in the state of her memory but in her inability to bring into consciousness her emotional motivations, and consequently her diminished awareness of the deed.

Why is it, then, that we so firmly reject " irresistible impulse " as a valid defence ? Admittedly it is difficult to establish, but so is the voluntary or involuntary quality of an act. One motivated by an " irresistible impulse " is " aware " and " conscious " of it, is " awake," and therefore his action is " voluntary," even if for him it is an impulse he can no more arrest than could Canute arrest the sea. That he can resist it the law affirms, or at least will punish him as if he could, and this despite the fact that modern psychology is inexplorably based on the belief that our actions are emotionally determined. Cheerfully we accept lack of consciousness of action as proof of its involuntary character, but indignantly reject lack of ability to control an action of which the actor is conscious as a proof of the same thing. Perhaps it is that we don't believe that there is an " irresistible impulse " (if indeed this term is not itself a truism to the logical determinist—every impulse not resisted being subjectively irresistible when considered in the setting of the personality of the actor and the environment of the act), but this disbelief is possibly only another way of stating that we have all experienced dreams, and semi-waking not-fully-conscious states when the alarm continues to ring in the morning, but have not experienced other sudden dissociated states of greatly reduced consciousness—we therefore deny their existence.

The contrast we have drawn between the legal responsibility for somnambulistic acts and for those the subject of irresistible impulses is not intended to support the adoption of the latter concept which, it is suggested, is both philosophically and in practice of little worth. What is intended is to illustrate the difficulties and anomalies into which the law has been led by setting up psychologically unreal tests to apply to what are unavoidably psychological problems.

Is it not strange that criminal liability should turn on this fine shading of consciousness, interpreted by juries (and some lawyers) largely ignorant of our developing psychological insights ? The importance of Mrs. Cogdon's case lies less in its result, for no one could seek to see the unfortunate woman yet further punished, than in the light it sheds on other cases across the neighbouring borderland where the defence of insanity, locked into early nineteenth century behaviouristic stocks, grapples with those who are psychologically of clearly diminished responsibility. Surely in such cases the test should turn on the degree of control available to the actor rather than his degree of consciousness of the act ; and the former is as readily assessable as the latter. Whilst the law refuses to consider unconscious motivations, and insists on talking in terms of cognition while psychology increasingly stresses volition, no satisfactory reconciliation of their concepts is possible. Only based on such a reconciliation can law and psychology together develop a working definition of what, it is submitted, is the most fruitful

concept for construing such problems as we have been discussing—that of diminished responsibility.

Finally, *The King v. Cogdon* stresses one defect in our selection of cases for reporting. Though it is a perfect illustration of an important and yet rarely considered general principle of criminal liability, it is not reported. If it had been less clear, if real conflict had developed, then possibly it would have found its way into the reports. This Gilbertian situation lends support to Professor Goodhart's suggested[9] registry of all judgments and directions, to buttress our present system of reporting. The life of teachers of law, as well as practitioners, is hard enough without denying them some official note of decisions of such importance.

9. (1939) 55 L.Q.R. 29.