AUTOMATISM AND INSANITY

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Nothing better illustrates the disadvantages of a narrow definition of the term "disease of the mind" in the M'Naghten Rules than the recent discovery of the plea of automatism, a development remarkable only for its being delayed so long. Sir Owen Dixon, Chief Justice of the High Court of Australia, has argued cogently[1] that if the courts had refrained from weighing the words of the M'Naghten Rules "like diamonds" and construing such phrases as "disease of the mind" like any statute, the law of insanity at the present day would have been capable of embracing all unconscious involuntary behaviour.[2] Many difficulties, which will now be discussed, would thereby have been avoided. The present situation is the more regrettable when one remembers that in 1843 the M'Naghten Rules represented a considerable advance on the previous understanding of the law of insanity, well in accord with enlightened medical opinion of the day. How unfortunate it is that, with the notable exception of Stephen, J.,[3] the English judiciary since that time have paid more regard to the precise words of the Rules than to the relationship between law and medicine upon which they were founded.

THE DEFINITION OF AUTOMATISM

Automatism may be defined for the present purpose as involuntary action performed in a state of unconsciousness not amounting to insanity. As such, it is now clearly established that automatism may constitute an answer to a criminal charge distinct from, and with none of the incidents of, a defence of insanity.[4] The action must be unconscious to distinguish it from irresistible

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[1] "A Legacy of Hadfield, M'Naghten and Maclean" (1957) 31 *A.L.J.* 255.

[2] Unconscious involuntary behaviour is what the courts seem to understand by automatism. The clearest statement is given by Gresson, P. in *Cottle* (1958) N.Z.L.R. 999, 1007 and 1020. For England see *Hill* v. *Baxter* (1958) 1 Q.B. 277; for Australia, *Carter* (1959) V.R. 105; for Canada, *Minor* (1955) 112 C.C.C. 29 (disapproving *Kasperek* (1951) 101 C.C.C. 375); and for Northern Ireland, *Bratty* v. *A.G. for Northern Ireland* (1961) 3 W.L.R. 965, 968.

[3] See his view that the M'Naghten Rules, properly interpreted, included irresistible impulse: *History of the Criminal Law*, Vol. II, 167-168.

[4] *Charlson* (1955) 1 W.L.R. 317; *Minor* (1955) 112 C.C.C. 29; *Hill* v. *Baxter* (1958) 1 Q.B. 277; *Cottle* (1958) N.Z.L.R. 999; *Carter* (1959) V.R. 105; *Holmes* (1960) W.A.R. 122; *Cooper* v. *McKenna* (1960) Qd. R. 406.

impulse,[5] and involuntary to constitute an answer to the charge.[6] The preponderance of opinion in the common law jurisdiction is now in favour of the view that it is for the defence to carry the evidentiary burden of producing some evidence in support of a plea of automatism, but for the prosecution to carry the persuasive burden of disproving automatism beyond reasonable doubt.[7]

There is endless scope for disagreement about definitions in a field which, even nowadays, is so little understood as automatism. The view taken herein is that to speak of conscious automatism is merely confusing. Conscious behaviour analogous to automatism is either irresistible impulse, or, if hallucinations are involved, insanity. The argument may be illustrated by the unreported Victorian case of *Cogdon* in 1950.[8] Mrs. Cogdon, who had a record of bizarre dreams and of excessive worry about her daughter Pat, aged nineteen, one night dreamed that the Korean war was taking place "all round the house" and that a North Korean soldier was on Pat's bed attacking her. In a somnambulistic state[9] Mrs. Cogdon fetched an axe and struck at the imaginary soldier, killing her daughter. At the trial for murder, insanity was not pleaded. The medical evidence was all one way, establishing that Mrs. Cogdon was suffering from hysteria and depression and likely to fall into states of dissociation such as fugue, amnesia, and somnambulism. The defence was that her act was involuntary, and she was acquitted. It is obvious that had she imagined the circumstances described when awake, she would have been suffering from hallucinations, and therefore insane.

Quite apart from hallucinations, *Cogdon* throws into sharp relief the arbitrary nature of the exclusion of irresistible impulse from legal insanity. If Mrs. Cogdon had been awake instead of asleep, it is quite possible that her actions would have been attributed to an irresistible impulse. Criminal responsibility in her case, as in many others, turned on the question whether she was "asleep". Yet the state of being asleep is a very imprecise one. The difference between consciousness and unconsciousness, as any anæsthetist will confirm, is merely a matter of degree. Our customary antithesis between the two is a usage of linguistic convenience only. To regard it as accurately reflecting fact is philosophically distinctly naive realism. To make it the basis of a rule of criminal responsibility reflects mediaeval ignorance.

The facts in *Cogdon* are a perfect instance of a so-called motiveless killing. The doctors carefully refrained from essaying any statement of Mrs. Cogdon's

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[5] It is possible that this distinction will disappear in those jurisdictions where insanity is defined to include irresistible impulse. The point is discussed below.

[6] For modern statements of the ancient rule that the criminal act must have been voluntary see *Woolmington* v. *D.P.P.* (1935) A.C. 462, 482, and *Vickers* (1957) 2 Q.B. 664, 672. See also American Law Institute, *Model Penal Code, Tentative Draft No. 4*, Art. 2, s.2.0 (1) and (2). For recent academic discussions see *G. Williams, Criminal Law: The General Part* 10-21, and R. M. Perkins, *Criminal Law* 660-661. The old writers did not deal with involuntariness, apart from insanity, in any way relevant to automatism. Thus Hale's example in 1 *P.C.* 434 is of physical compulsion by another, and Hawkins' example in 1 *P.C.*, ch. 29, s.3, does not seem to involve an act by the rider of the horse at all. Prevezer (1958) *Crim. L. R.* 361, 365, classifies duress and coercion as forms of conscious involuntary action, but it is thought that this approach obscures the issue. The act performed under duress or coercion is normally voluntary, although the willingness to perform it may have been brought about by threats: see Stephen *History of Criminal Law*, Vol. 2, 102; J. Hall, *Principles of Criminal Law*, (2 ed.) 419, 421-425.

[7] See *Charlson, Minor, Hill* v. *Baxter, Cottle, Carter* cited above. See also *Wakefield* (1958) 75 W.N. (N.S.W.) 66; *Bentley* (1960) C.L.Y. 707; *Bratty* v. *A.-G. for Northern Ireland* (1961) 3 W.L.R. 965.

[8] Noted in (1951) 5 *Res Judicatae* 29.

[9] There is a reference to somnambulism by Stephen, J. in *Tolson* (1889) 23 Q.B.D. 168, 187. He envisaged acquittal *simpliciter*.

motives, although it is not unreasonable to suppose that if the question had been relevant, some powerful unconscious pressures might have been suggested. This possibility is supported by a hint given in the evidence of both a psychiatrist and a psychologist that Mrs. Cogdon was suffering from both an acute conflict situation with her own parents and great sexual frustration. It seems likely that she entertained a lively subconscious emotional hostility towards her daughter for which she was over-compensating at the conscious level by excessive solicitude for her daughter's well-being. North Korean soldiers, and other dreams, were a projection of the subconscious hostility. Among its other points of interest, the case shows how arbitrary it is to regard a person's actions as pointless or unmotivated merely because the impulse to action is not immediately obvious to the medical layman.[10]

It is remarkable that *Cogdon* has never been reported. The first reported case in which the term "automatism" was used in the sense in which it is now generally understood by lawyers seems to be *Harrison-Owen* in 1951,[11] but the case which really set the ball rolling was *Charlson* in 1955.[12] *Cogden* antedates them by a year and five years respectively. One might have thought that at the time it was decided *Cogdon* would have been seen to bear strongly on the basic rules of criminal responsibility. Yet it was not even reported. Even now, when the importance of automatism is apparent to everyone, no report is generally available.[13]

Before going on to the administration of the law, one further point may be made. Some of the difficulty the courts have experienced in dealing with automatism can no doubt be attributed to a reluctance to admit the possible existence of a middle ground between sanity and legal insanity. Where there is no means of dealing with an accused person who establishes automatism otherwise than by acquitting him, however dangerous he may seem to be,[14] this is a very real difficulty. Nevertheless, in some situations there is no reason of policy why such a middle state should not be recognised, and in Australia at least this has been done.[15]

In *Kolacz*[16] the accused had been convicted of manslaughter on a charge of murder. He appealed against conviction on the ground that at his trial "he was not able, owing to his mental condition, adequately to present his defence". It

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[10] Interesting from this point of view is the celebrated American "motiveless" killing by Leopold and Loeb in 1923. For an account of this case see A. Weinberg, *Attorney for the Damned* 16.

[11] (1951) 2 All E.R. 726. There is much earlier Scottish authority for the relevance of automatism to a criminal charge in *H.M. Advocate* v. *Ritchie* (1926) S.C. (J) 45, but the term actually used in that case was "dissociated personality". On a charge of causing death by reckless driving a state of dissociated personality not amounting to insanity was held to be an admissible defence. The jury returned a verdict of not guilty.

[12] (1955) 1 W.L.R. 317.

[13] There appear to be many other unreported cases on automatism. See those collected by Edwards in (1958) 21 *Mod. L.R.* 380, nn. 27, 28, and by Williams, *op. cit.*, 11, n. 4.

[14] As in *Charlson* (1955) 1 W.L.R. 317, where the accused was probably suffering from a cerebral tumour rendering him prone to sudden outbreaks of irrational violence. Some judges have balanced this consideration against the impropriety of locking up a sane man through treating automatism as insanity, suggesting that the outcome might depend on the likelihood of a recurrence of the automatism. For a clear statement see Sholl, J. in *Carter* (1959) V.R. 105, 109-110.

[15] An attempt was made recently in *Bratty* v. *A.-G. for Northern Ireland* (1961) 3 W.L.R. 965, to obtain a verdict of not guilty of murder on the ground that the accused, if not suffering from automatism, was nevertheless too confused and incapable of reasoning to form an intention to kill or cause grievous bodily harm. Both the trial judge and the Court of Criminal Appeal and the House of Lords firmly rejected the idea of such an intermediate stage between full responsibility and automatism (or insanity).

[16] (1950) V.L.R. 200.

appeared that Kolacz, who had had to speak through a Ukrainian interpreter, suffered at the time of his trial from a mental abnormality which was attributable to his experiences in a German concentration camp. This abnormality had made it quite impossible for counsel to get proper instructions, although he was of opinion that Kolacz had a reasonable defence of some kind. No evidence was tendered at the trial that the accused was unfit to plead, and the judge directed, with the consent of both counsel, that the trial proceed. Since conviction Kolacz had received treatment in the psychiatric clinic at Pentridge, the main prison of the State of Victoria, which had restored him to normality. As a consequence, proper instructions had now been obtained which confirmed counsel's earlier impression, and a new trial was sought. The question arising on the appeal before the Victorian Supreme Court was whether, since Kolacz had not previously been found unfit to plead, his mental condition during the trial should be taken into account.

It was held that it should be, and a new trial was ordered. Herring, C.J., delivering the unanimous judgment of the court,[17] cited the *dictum* of Lord Reading, C.J. in *Lee Kun*[18] that an accused person might be incapable of understanding the proceedings as required by law through insanity, deafness or dumbness, and continued:

> To these instances we think there should be added a state of mind less than insanity within the legal definition, where, for some reason the accused's mind is so disturbed that he is incapable of understanding and participating in the trial to the extent necessary for his own defence. Such cases must no doubt be very rare, but the circumstances revealed in this appeal are very special.[19]

The circumstances of that case were indeed very special, but the decision was none the less an enlightened one and indicated a welcome refusal to be bound by old concepts in a novel situation. As compared with insanity, and some of the discussions of automatism, the doctrine expressed in *Kolacz* is notable for the omission of any reference to the cause of the mental disturbance. A second point to be noticed is that the court was undoubtedly helped by its power to order a new trial. Had the choice been simply between dismissing the appeal and quashing the conviction, the decision would have been more difficult. This is yet another argument in favour of the superior courts of criminal appeal having power to order a new trial.

THE ADMINISTRATION OF THE LAW

One of the most striking results of the rise of automatism has been the simultaneous increase in the variety of offences to which it is now customary to set up a defence based on psychological disorder. Whereas a few years ago such defences were in practice confined to murder trials because in all other cases the accused feared the consequences of a finding of insanity even more than he feared the consequences of conviction, it is now almost exceptional to find an automatism case involving murder.[20] This is attributable to two factors:

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[17] Herring, C.J., Barry and Dean, JJ.

[18] (1916) 1 K.B. 337, 341.

[19] (1950) V.L.R. 200, 202. Some readers may be familiar with a Polish film produced a few years ago, and sub-titled in English "The Real End of the Great War," which gave a moving picture of the grim reality behind stories like this.

[20] Of the thirteen cases *Cogdon, Harrison-Owen, Charlson, Minor, Hill* v. *Baxter,*

The absence of legislation prescribing special treatment for an accused person acquitted on the ground of automatism, and the narrow modern legal interpretation of the phrase "disease of the mind".

Until 1800 there was no reason for the common law to distinguish between actions which were involuntary owing to insanity and actions which were involuntary for any other reason. In each case the result was the same: the accused was acquitted. But the distinction has been implicit in the law ever since the Criminal Lunatics Act, 1800 (Eng.), first required that an accused person acquitted on the ground of insanity should be kept in strict custody. Even so, until the discovery of automatism the distinction was of no practical importance, because all forms of involuntary action outside accident or physical compulsion were treated as insanity.[21] When *Charlson*[22] made clear in 1955 that it was possible to prove involuntariness through psychological disorder not amounting to a disease of the mind, the distinction between insanity and other mental disorders became of immediate and pressing social importance. The writer does not know what happened to Mr. Charlson, for whose plight nothing but sympathy can be felt. Nevertheless, it is difficult to accept with equanimity a state of the criminal law in which it is more than possible, it is proper, to set free someone who on his own showing is likely to be suffering from a condition which may make him repeat an irrational and savage attack on a child with whose welfare he is entrusted by law. Quite obviously there is a widespread need for legislation either amending the common law of insanity to include automatism, or setting up a special procedure for dealing with an accused person acquitted on the ground of automatism.[23] No doubt many people suffering from a condition occasioning automatism can be persuaded to accept treatment.[24] No doubt, also, a person may be certifiable who is not within the M'Naghten Rules. These possibilities reduce the danger; they do not eliminate it.

Since there is no sign that amending legislation is under consideration in the proper quarters, it is of interest to see if the impact of automatism has had any effect on the tendency to narrow the scope of insanity in the case-law. There are one or two hopeful signs. In the first place, although Sir Owen Dixon has not as yet had an opportunity to apply his views on the proper scope and function of the M'Naghten Rules to a case involving automatism,[25] it is reasonable to expect that both he and the other members of the High Court will continue

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Wakefield, Cottle, Carter, Foy, Holmes, Bentley, Cooper v. *McKenna, Bratty* v. *A.-G. for Northern Ireland*, only three were charges of murder. The others were made up of one motor manslaughter, three lesser offences against the person, two dangerous driving, and four offences against property. Two of the offences against the person, however, arose out of dangerous driving, so that property and traffic offences are in the majority. Since such offences form the bulk of the offences committed, this may be some evidence that the defence of automatism is on its way to becoming general in a manner that insanity is never likely to.

[21] Epilepsy furnishes a good example. See *Perry* (1919) 14 Cr. App. R. 48, and *Kessel*, (*ca* 1924) unreported, referred to in the judgement of North, J. in *Cottle* (1958) N.Z.L.R. 999, 1026. His Honour remarks that in that case "it occurred to no one . . . that the defence was other than a plea of temporary insanity," the accused on conviction being detained as a person of unsound mind even though there was no dispute that he was sane at the time of his trial (at 1027).

[22] (1955) 1 W.L.R. 317.

[23] In *H.M. Advocate* v. *Fraser* (1878) 4 Couper 70, a sleepwalking case, it was made a condition of discharge of the accused that he should not sleep in the same room with anyone else, but the legal power to impose this condition does not appear.

[24] Thus Mrs. Cogdon became a voluntary patient in a medical hospital after her acquittal.

[25] In *Coates* v. *R.* (1957) 31 A.L.J.R. 34, a defence of automatism was raised, but the application to the High Court for special leave to appeal did not involve any point relevant to automatism.

the efforts made in *Porter*,[26] *Sodeman*,[27] and *Brown*[28] to broaden the basis of the Rules as generally understood in order to bring them more into line with modern medical knowledge and the needs of society. It is significant that Dixon, C.J.'s remarks to the Tenth Legal Convention of the Law Council of Australia, which are consistent with the three cases mentioned, have already been judicially quoted with approval in three other cases.[29] They seem destined, in Australia at least, and possibly in New Zealand, to exert a continuing influence.

Secondly, it may be significant that *Kemp*[30] was decided after *Charlson*.[31] It will be recalled that in *Kemp*, Devlin, J. (as he then was) rejected an argument that to be a disease of the mind a mental disorder had to be purely psychological, not attributable to any physical condition, and held that arteriosclerosis

> 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 . . . a disease of the mind which comes within the meaning of the Rules.

It is reasonable to suppose that in arriving at this decision Devlin, J. was not unmindful of Mr. Charlson's suspected brain tumour.

The question, what states are likely to be regarded by the courts as automatism, is also important. The House of Lords has now held in *Bratty* v. *Attorney-General for Northern Ireland*[32] that automatism will amount to insanity if it satisfies the tests laid down by the M'Naghten Rules, but this rule does not furnish a guide to when the courts are likely in the present transitional stage of the law to regard any particular psychological condition as satisfying those tests. Epilepsy is a particularly uncertain case. In *Perry*[33] it was regarded as insanity, but more modern cases have treated it as a typical example of automatism.[34] In *Foy*,[35] following *Perry*, epilepsy was held again to be insanity, but this decision was clearly influenced by the court's desire to broaden the scope of insanity. In *Bratty* also epilepsy was treated as a form of insanity. It may be suggested that the courts should avail themselves of modern medical knowledge by distinguishing between epileptic fugues and epileptic conditions. Actions performed during epileptic fugue are clearly automatism. Actions performed during the twilight states which may precede or follow fugue are attributable to a disease of the mind.[36]

Actions performed under the effects of concussion from a blow on the head

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[26] (1933) 55 C.L.R. 182. For a detailed consideration of this and the two following cases see Norval Morris, "The Defence of Insanity in Australia" in *Essays in Criminal Science* (ed. Mueller), 273.

[27] (1936) 55 C.L.R. 192.

[28] (1955) A.L.R. 808 (H.C.); (1960) A.C. 432 (P.C.).

[29] *Cottle* (1958) N.Z.L.R. 999, 1027; *Connolly* (1959) W.N. (N.S.W.) 184, 195; *Foy* (1960) Qd. R. 225, 241 and 247. Sholl, J. in *Carter*, (1959) V.R. 105, 110, expressed disapproval of the "width" of Dixon, J.'s judgment in *Porter*, which is the same thing as disagreeing with his later views. Gresson, P. in *Cottle* contented himself with remarking (at 1007) that Dixon, C.J.'s address showed that there was a difference of opinion, but at 1009 he seemed to be against Dixon's view.

[30] (1957) 1 Q.B. 399.

[31] (1955) 1 W.L.R. 317.

[32] (1961) 3 W.L.R. 965. See also J. Ll. J. Edwards, "Automatism and Criminal Responsibility", (1958) 21 *Mod. L. R.* 375, 384-385.

[33] (1919) 14 Cr. App. R. 48. On epilepsy see the Report of the Royal Commission on Capital Punishment (*Cmd.* 8932), 133-135; (1960) 34 *New Zealand L.J.* 277.

[34] *Charlson* (1955) 1 W.L.R. 317, 320; *Hill* v. *Baxter* (1958) 1 Q.B. 277, 283 and 287; *Holmes* (1960) W.A.R. 122, 125. A contrary modern view, however, was expressed in *Cottle* (1958) N.Z.L.R. 999, by North, J.

[35] (1960) Qd. R. 225.

[36] See J. M. Macdonald, *Psychiatry and the Criminal*, ch. 8.

seem to be universally accepted as automatism,[37] and so do actions performed whilst the actor is unconscious from the effects of drugs,[38] sleep,[39] or unexplained causes (provided there is adequate evidence of unconsciousness).[40] A point emphasised by the celebrated example given by Humphreys, J. in *Kay* v. *Butterworth*[41] of attack by a swarm of bees is that a reflex action may well be unconscious and compulsive even though the actor is for other purposes fully conscious. This is merely a particular application of the general difficulty revealed by such cases as *Cogdon* of distinguishing between consciousness and unconsciousness.[42]

Hypnotism is an intriguing possibility.[43] It is thought that by analogy with the cases on drivers falling asleep,[44] much would depend on the circumstances under which the accused allowed himself to be hypnotised. There is convincing evidence that a normally healthy person cannot be hypnotised against his will.[45] On the other hand, if a person in good faith allows himself to be hypnotised, it does not necessarily follow that he should be responsible for something the hypnotist makes him do whilst under hypnosis. Quite apart from difficulties of proof, some pretty problems could arise if an action were performed in full consciousness, after hypnosis had ceased, as a result of suggestion during hypnosis. It might be thought that there is no distinction of substance between this case and that of the actor being still in an obvious state of hypnosis, but once consciousness is recovered his action seems to come under the irresistible impulse rule. This is, perhaps, not a serious problem in view of the great difficulty of producing convincing evidence, as opposed to the ease with which such a story could be invented.[46]

In any case in which automatism is pleaded, much will turn on the precise effect of the medical evidence. No clearer indication of this could be found than a comparison of *Charlson*[47] with *Kemp*.[48] In the former a cerebral tumour did not occasion a direction to the jury on insanity because insanity was not "given in evidence".[49] In the latter, arteriosclerosis was held to be a disease of the mind because insanity was "given in evidence". Yet both conditions involved organic interference with the brain. It is difficult to understand why arteriosclerosis can be said to affect the powers of "reasoning, understanding, and so on," when a cerebral tumour cannot. Moreover, it is not much easier to understand why the

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[37] *Kay* v. *Butterworth* (1945) 61 T.L.R. 452; *Minor* (1955) 112 C.C.C. 29; *Coates* v. *R.* (1957) 31 A.L.J.R. 34; *Re a Barrister* (1957) 31 A.L.J.R. 424; *Hill* v. *Baxter*, (1958) 1 Q.B. 277; *Wakefield* (1958) 75 W.N. (N.S.W.) 66; *Cooper* v. *McKenna* (1960) Qd. R. 406.

[38] *Bentley* (1960) C.L.Y. 707. This case concerned an overdose, *inter alia*, of insulin Strictly, insulin is a bodily secretion, not a drug, but it has been held that its effects in the criminal law are to be equated with those of a true drug. *Armstrong* v. *Clark* (1957) 2 Q.B. 391; *cf. H.M. Advocate* v. *Ritchie* (1926) S.C. (J.) 45, (carbon monoxide poisoning from exhaust gases suggested on reckless driving charge).

[39] *Cogdon* (1950) unreported; *Holmes* (1960) W.A.R. 122, 125; *Ritchie*, above; *Kay* v. *Butterworth* (1945) 61 T.L.R. 452; *Scarth* (1945) St. R. Qd. 38.

[40] *Hill* v. *Baxter* (1958) 1 Q.B. 277.

[41] (1945) 61 T.L.R. 122.

[42] Negligence is not automatism because inadvertent action is not necessarily involuntary action.

[43] Jackson, S.P.J. in *Holmes* (1960) W.A.R. 122, treated it as a form of automatism. For academic discussions compare G. Williams, *Criminal Law: The General Part* 12 with the American Law Institute's *Model Penal Code, Tentative Draft No. 4.*, Comment 122.

[44] *Ritchie, Kay* v. *Butterworth, Scarth,* cited *supra* n. 39.

[45] R. W. White *The Abnormal Personality* 203-208.

[46] An attempt to rely on post-hypnotic suggestion was made in America rcently, but failed for inadequacy of evidence: *People* v. *Marsh* (1959) 338 P. 2d. 495.

[47] (1955) 1 W.L.R. 317.

[48] (1957) 1 Q.B. 399.

[49] Trial of Lunatics, 1883 (Eng.), s.2.

Kemp reasoning cannot apply with equal force to concussion, drugs, or even sleep, for one's powers of reasoning and understanding are certainly likely to be affected in marked degree whilst under their influence. Such considerations as these underline the force of Sir Owen Dixon's approach to the question, and may yet lead to some notable modifications of the M'Naghten Rules, which, after all, have in themselves no binding authority. It is scarcely necessary to add that since automatism, like insanity, goes to the mental element in the *actus reus* as much as to *mens rea*, it is applicable to offences of strict responsibility as much as to any other offences.[50]

CRIMINAL CODE

In some Australian jurisdictions insanity is defined by statute to include irresistible impulse. Section 27 of the Queensland Code may be taken as an exemplar. That section, so far as relevant, runs as follows:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of . . . capacity to control his actions . . .

Logically there is no reason why this difference from the common law of insanity should affect automatism. Section 23 of the Code contains the more fundamental rule that no-one is criminally responsible for an act or omission which occurs "independently of the exercise of his will". A plea of automatism can therefore be put forward under s.23 without relying on s.27. As at common law, a successful plea of involuntariness requires an unqualified verdict of not guilty. On this view there would be no difference between the common law and the code jurisdictions as to automatism. However, the argument overlooks one or two points which may prove to be influential.

Section 27 avoids several difficulties under the M'Naghten Rules by appropriate changes in wording, the general effect being to enlarge the scope of insanity.[51] This enlargement is even more noticeable now than it was in 1899 when the final draft of the Queensland Code was settled, for the intervening period has witnessed a restriction rather than an expansion of insanity at common law. It is possible that the courts of the code states will take advantage of the drafting of their insanity sections to give them a wide enough interpretation to cover automatism in the way that Sir Owen Dixon maintains, rightly as it is here submitted,[52] should have been done at common law. If this course is taken, the scarcity of case-law on the codified defences will allow the courts a degree of room for manoeuvre denied to their common law counterparts. On the other hand, it may be that the somewhat uncritical sentiment in favour of uniformity of the law, which has already produced some unfortunate interpretations of the

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[50] *Hill* v. *Baxter* (1958) 1 Q.B. 277; *Carter* (1959) V.R. 105. A possible exception may occur in the *Larsonneur* (1933) 24 Cr. App. R. 74, "being found" type of case, where it is obviously possible for a person to be found whatever his physical or mental condition. For another example of this situation see the unreported Northern Ireland case of *Neumann*, referred to in (1956) 12 N.I.L.Q. 61 (reference from 21 *Mod. L.R.* 379, n. 22). The account given in 21 *Mod. L.R.* 379 n. 22, of the South Australian case of *O'Sullivan* v. *Fisher* (1954) S.A.S.R. 33, is incorrect.

[51] See Norval Morris, "The Defence of Insanity in Australia" in *Essays in Criminal Science* (ed., Mueller), 273, 274.

[52] For contrary views see *Cottle* (1958) N.Z.L.R. 999, 1009, *per* Gresson, P., and *Carter* (1959) V.R. 105, 109, *per* Sholl, J.

codes,[53] will influence the courts in the opposite direction.

So far only three cases involving automatism in code states have been reported, *Holmes*[54] in Western Australia, and *Foy*[55] and *Cooper* v. *McKenna*[56] in Queensland. There is no indication in *Holmes* that Dixon, C.J.'s words may have fallen on fertile ground. In that case a defence of automatism was put up and insanity expressly disclaimed. The trial judge directed the jury on both automatism under s.23 and insanity under s.27, distinguishing the two along the logical lines indicated above, but not going into the question whether under the Code there was any need to make the distinction. A verdict of not guilty on the ground of unsoundness of mind was returned.

Holmes is merely a report of a charge to the jury. *Foy*, however, is a decision of the Queensland Court of Criminal Appeal, in which three reserved judgments were delivered. As in *Holmes*, a defence of automatism was put forward and insanity expressly disclaimed. The case was principally concerned with the effect of this manoeuvre on the burden of proof, and in this connection it will be discussed in more detail below. The point of interest here is that all three members of the court perceived the possibility of keeping automatism within bounds by giving the insanity sections a wide scope, two of them referring to Sir Owen Dixon's remarks with approval.[57] Particularly significant as an indication of possible future development is Philp, J.'s conclusion that "The expression 'disease of the mind' (and 'mental disease' where used in our Code) . . . can certainly include any disorder or derangement of the understanding — any destruction of the will".[58] Another pointer in the same direction is the warning earlier in the judgment that although s.23 is of general application, yet it "must be read with other sections of the Code," i.e., with s.26 (presumption of sanity) and s.27. If these indications are to be relied on, we may see some interesting developments in the law of insanity which may in turn provide valuable guidance to intending legislators in the common law jurisdictions.

Cooper v. *McKenna* presented the now familiar spectacle of concussion being put forward as a defence to a dangerous driving charge, and confirmed the general rule that the accused undertakes no evidentiary burden of proof in any case other than insanity. However, the majority[59] held also that the case before them was not one of insanity, involuntary action through concussion not necessarily amounting to insanity. Since the court was differently constituted from the one which decided *Foy*,[60] it is difficult to say whether the view of the majority represents a drawing back from the wide view of insanity which was taken in *Foy*.

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[53] For three conspicuous examples see (1) the critique of the judicial disagreement on how to interpret the provocation sections of the Queensland Code in (1960) 33 *A.L.J.* 323, 355 by the present writer; (2) a note on the approach by the High Court to the Western Australian Code in the matter of accomplices in (1959) 3 *Q.L.J.* 410; and (3) an article by P. Brett in (1953) 27 *A.L.J.* 6 and 89, on the approach of the High Court to negligence under the Western Australian Code.

[54] (1960) W.A.R. 122.

[55] (1960) Qd. R. 225.

[56] (1960) Qd. R. 406.

[57] Philp, J. at 241, and Wanstall, J. at 247. *Cf.* Mansfield, C.J. at 233.

[58] At 243. The sense is better rendered by substituting a comma for the dash in the report. Philp, J. was not intending to equate derangement of the understanding with destruction of the will, but to refer to them as two different states amounting to insanity.

[59] Matthews and Stable, JJ., Wanstall, J. dissenting.

[60] Wanstall, J., the dissentient in *Cooper* v. *McKenna*, was the only judge who heard both cases. In the later case he seems to have resiled a little from the wide view of insanity he took in *Foy*: see (1960) Qd. R. 412-413.

BURDEN OF PROOF OF AUTOMATISM

In *Hill* v. *Baxter*[61] Devlin, J. remarked that, as "... automatism is akin to insanity in law there would be great practical advantage if the burden of proof was the same in both cases". One may respectfully agree with this comment without necessarily agreeing on where the burden of proof should lie. Devlin, J. was referring to the persuasive burden. It is clear from the earlier part of his judgment, and indeed from many other sources,[62] that the evidentiary burden of proving automatism rests on the accused, as one might expect. It also seems to be agreed now that no persuasive burden of proving automatism rests on the accused.[63] However, these rules would not of themselves dispose of a further difficulty which arises out of the close relationship between automatism and insanity, namely, how the burdens of proof upon prosecution and defence are to be disentangled when the accused seeks to set up a defence of automatism which may also, or alternatively, disclose insanity.

If the evidence is of this nature the accused may take one of two courses. He may either disclaim any reliance on insanity and ask the jury to choose between the verdicts of guilty and not guilty; or set up automatism and insanity in the alternative, leaving it to the jury to decide which view of the evidence, if either, is the proper one. Much has been done to clarify the law by the recent decision of the House of Lords in *Bratty* v. *Attorney-General for Northern Ireland*,[64] which became important because of an attempt by counsel for the accused to take the second of these two courses. It is instructive as a preliminary to consideration of this case, however, to refer again to the Queensland case of *Foy*,[65] which may perhaps be cited as an example of the first course, although the evidence of insanity was very weak.

Foy was charged with the wilful murder[66] of his wife, whom he had killed "by striking her about ten times on the head with a hatchet".[67] He had been an epileptic since the age of six, but there was no evidence that at the material time he was acting in or under the influence of a fit, except perhaps a fit of temper at being "nagged". It was therefore agreed that there was no basis for a defence of insanity, since, even if epilepsy is legally insanity,[68] it is not relevant to that defence unless the accused was actively suffering from a seizure, or the effects of a seizure, at the time of the act with which he is charged.[69] However, counsel for Foy took the precaution of requesting the trial judge not to direct the jury on insanity, a request which was granted. He then asked further that the jury be directed specifically that unless they were satisfied beyond reasonable doubt that Foy's act did not occur independently of the exercise of his will within the

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[61] (1958) 1 Q.B. 277, 285.

[62] See Lord Goddard's judgment in *Hill* v. *Baxter* and the cases *infra*.

[63] *Charlson* (1955) 1 W.L.R. 317; *Minor* (1955) 112 C.C.C. 29; *Wakefield* (1958) 75 W.N. (N.S.W.) 66; *Cottle* (1958) N.Z.L.R. 999; *Carter* (1959) V.R. 105; *Holmes* (1960) W.A.R. 122; *Cooper* v. *McKenna* (1960) Qd. R. 406; *Bratty* v. *A.-G. for Northern Ireland* (1961) 3 W.L.R. 965.

[64] (1961) 3 W.L.R. 965.

[65] (1960) Qd. R. 225. *Supra* n. 55.

[66] Code s. 301: "a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder."

[67] Philp, J. at 234.

[68] A point discussed above, nn. 33-36. There are conflicting judicial views.

[69] On this the Court accepted *Perry* (1919) 14 Cr. App. R. 48.

meaning of s.23 of the Code, they should return a verdict of not guilty. In other words, Foy wanted the jury to be expressly directed that his act must be proved by the prosecution to have been voluntary.

The advantage to Foy of putting his defence in this form was that it made the most of the burden of proof which rested on the prosecution. According to Foy, the evidence might be thought by the jury to show that, although not insane or in an epileptic fit when he acted, he was yet under the influence of a psychological condition which either rendered his act involuntary or prevented him from forming the necessary intent to kill.[70] Even if the evidence did not go that far, it might at least raise a reasonable doubt in the mind of the jury. If a defence of insanity had been attempted, then in addition to surmounting the obstacle that there was really no evidence to support it, Foy would also have been faced with the persuasive burden of proof on the balance of probability. In this context the weakness of the evidence of psychological unbalance would have been conspicuous. By making a virtue of necessity and disclaiming insanity, Foy sought to use such evidence as he had merely to cast doubt on the prosecution's case, a much easier task than proving anything, and a context in which the true weakness of his own case would have been less apparent to the jury. If, in addition, the trial judge could have been persuaded to draw the jury's attention to the need for a voluntary action, Foy's chances of acquittal would have been sensibly increased. However, the trial judge did not agree with this submission and refused to make such a direction. Foy was convicted of murder.

An appeal was taken on the ground that the trial judge erred in refusing to direct on voluntariness. The appeal was dismissed on the ground that Foy had not even satisfied the evidentiary burden which rested upon him, whichever way the case was presented. However, the Court of Criminal Appeal also came very close to saying that the persuasive burden of proving automatism rested on the accused whether he relied on s.23 or on s.27. What the court actually said was that whenever an accused person relied on involuntariness arising from "derangement of the mind",[71] he had to undertake the persuasive burden of proof. This says no more on the face of it than that when automatism amounts to insanity, the accused must prove insanity; but when one recalls the wide view of insanity favoured by the courts, this approach is tantamount to equating the burden of proof in the two cases.

The attitude taken in *Foy* to counsel's ingenious attempt to exploit the burden of proof rules was bound up with the court's general approach to the relationship between automatism and insanity. Nevertheless, the case illustrates in acute form the difficulties which can arise from the burden of proof rules. If the evidence for the defence had been less weak, the possibility of using a bad case of insanity to make a good case of reasonable doubt would have been less obvious. Whether one believes that the present rule that the accused must prove insanity is right or wrong, there can be no justification for leaving the law in a state in which the accused can gain a technical advantage merely by calling his behaviour automatism instead of insanity. The evidence is not as weak as it was in *Foy* in every case, and few indeed are the jurisdictions now in which it is open to the courts to solve the difficulty by assimilating automatism to in-

[70] Either for wilful murder under s.301, or for murder under s.302(2), which requires an intent to inflict grevious bodily harm.

[71] Mansfield, C.J. at 232.

sanity. It is the law in most parts of the Commonwealth that if the accused succeeds in discharging the evidentiary burden, the jury must be specifically directed on the need for a voluntary act. This cannot possibly detract from his chances of avoiding an insanity verdict, and in most cases probably increases them. Such a state of affairs is not necessarily in the interest either of the accused or of society.

These considerations render of particular interest the decision of the House of Lords in *Bratty* v. *Attorney-General for Northern Ireland*.[72] Bratty had killed an eighteen-year-old girl in a car by strangling her with one of her stockings after he had made "some sort of advance which was resisted".[73] Afterwards he removed the body from the car and left it by the side of the road, apparently without any attempt at concealment. When apprehended he admitted his actions and apologised. The only explanation he could give was that "a terrible feeling"[74] came over him. At the trial for murder, counsel for Bratty wished to leave three "separate and completely independent"[75] verdicts to the jury. The first was not guilty on the ground of automatism, it being suggested that at the relevant time Bratty was in a state of psychomotor epilepsy. The second was not guilty on the ground that, even if he was not in a state of automatism, he was nevertheless so confused and deficient in the power of reasoning as to be incapable of forming an intent to kill or to cause grievous bodily harm.[76] The third verdict, which counsel desired the jury to consider only if they rejected the first two, was guilty but insane. The trial judge refused to leave the first two of these defences to the jury and Bratty was convicted of murder. His appeals to the Court of Criminal Appeal and the House of Lords were in effect challenges to this refusal.

Before the House of Lords the points of law certified by the Court of Criminal Appeal as being of general public importance were,[77] "(1) whether, his plea of insanity having been rejected by the jury, it was open to the accused to rely upon a defence of automatism; and (2) if the answer to (1) be in the affirmative, whether, on the evidence, the defence of automatism should have been left to the jury". The appeal was dismissed. Their Lordships[78] distinguished between insane and non-insane automatism, or, in other words, between automatism which comes within the legal definition of insanity and automatism which does not. The former did not differ in legal effect from any other kind of insanity, and an attempt to establish insane automatism was in law a plea of insanity. It therefore followed that the persuasive burden of proof of automatism in such a case was on the defence, as in other cases of insanity. It also followed in their Lordships' opinions that it was not possible to treat the same set of facts as constituting insanity at one moment and non-insane automatism at another, according to the current needs of the defence. The evidence relevant to insanity and automatism in *Bratty* tended to prove insanity in the form of insane automatism, for it showed that the accused was suffering from a defect of reason. There was no evidence at all of non-insane automatism. It followed that the trial judge was under no duty to direct the jury in terms of non-insane automatism.

The effect of this decision on burden of proof difficulties is not hard to see. In those jurisdictions where *Bratty* has binding authority it will evidently be

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[72] (1961) 3 W.L.R. 965.
[73] *Id.* at 971. [74] *Id.* at 967. [75] *Id.* at 967.
[76] The rejection of this defence has already been mentioned, *supra*, n. 15.
[77] (1961) 3 W.L.R. 965, 969-970.
[78] Viscount Kilmuir, L.C., Lords Tucker, Denning, Morris and Hodson.

the duty of the trial judge to decide, first, if there is evidence of insanity. If so, proof of automatism under that head must be by the accused on the balance of probability. If there is evidence of non-insane automatism, then the defence carries no more than the evidentiary burden and the function of the evidence will be to cast a reasonable doubt upon the prosecution's case that the accused's act was voluntary. If the evidence leaves it uncertain whether the accused was suffering from insane or non-insane automatism, the jury should be directed on both defences and the burdens of proof distinguished.

Bratty seems to have made it clear that the hope expressed by Devlin, J. in *Hill* v. *Baxter* that the burden of proof of automatism might be assimilated to the burden of proof of insanity, is unlikely to be fulfilled unless the rule requiring the accused to undertake the persuasive burden of proving insanity is abolished. Once a distinction is drawn between insane and non-insane automatism, the need to instruct a jury on the delicate difference between balance of probability and reasonable doubt follows inevitably. Nevertheless, the decision is to be welcomed for its firm rejection of the idea that the defence is entitled to derive a fortuitous advantage by skilful exploitation of anomalies in the rules relating to burden of proof.

A question which did not arise in either *Foy* or *Bratty* is whether the court is entitled to direct the jury on insanity when the defence does not rely on it, or even opposes any mention of it. It is now clear that it is the duty of the court, regardless of the line taken by the defence, to direct the jury on insanity when the evidence put forward in support of a plea of automatism is reasonably capable of being interpreted as proving insanity.[79]

A point that does not seem to have been considered so far is whether it is also the duty of the court to direct the jury on the need for a voluntary act if, exceptionally, the accused relies on insanity and the court thinks that the evidence is reasonably capable of being interpreted as proving automatism. On principle the jury ought to be directed on any defence disclosed by the evidence, and there is no reason to suppose that automatism is an exception. However, it must be admitted that the courts are unlikely to go out of their way to classify evidence as falling short of insanity but raising a reasonable doubt as to voluntariness, unless the defence takes this line. If, as in *Foy*, the defence is unsupported by evidence, it is always open to the court to direct the jury as a matter of law that there is no evidence upon which to find automatism. Fortunately, therefore, the possibility of successful burden of proof manoeuvres by the accused is much diminished by the very proper assumption by the courts of a duty to direct on the evidence rather than merely on the defence.[80] Nevertheless, it is submitted as highly desirable that the persuasive burdens of proof of automatism and insanity should be assimilated, preferably by removing all persuasive burdens from the accused.[81]

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[79] (1958) 1 Q.B. 277, 285. *Supra*, n. 61.

[80] Expressly so held in *Cottle* and *Holmes* above. See also *Kemp* (1957) 1 Q.B. 399; *Bratty* v. *A.-G. for Northern Ireland* (1961) 3 W.L.R. 965, 980, *per* Lord Denning.

[81] Another factor which in practice reduces the efficiency of an indifferently substantiated story of automatism is the scepticism of both judge and jury. It is known to the writer that counsel for Mrs. Cogdon, no doubt elated at his success in her case, put forward a similar plea in a case not long afterwards in which a grazier had cut his wife's throat, maintaining that he had done so in the belief that she was a sheep. Counsel went once too often to the well, however, for the court showed no disposition to believe this story. There was a long history of bad relations between husband and wife, which had no connection with her looking like a sheep (if she did). See also Gresson, P. in *Cottle* (1958) N.Z.L.R. 999, 1015.