

Voluntariness – The Missing Link

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Winner of the Law Review Prize for 1988

A: Introduction

Blackout is one of the first refuges of a guilty conscience.¹

Automatism has sometimes been viewed with a certain amount of judicial suspicion. Nonetheless, it is now clearly accepted at law. What is less clear, however, is the basis upon which the doctrine operates. The inherent difficulties are evident in a recent High Court decision, *Dugdale v Strong*.²

That case will be taken as a starting point for a discussion of the basis of automatism. This requires an examination of the wider issues involved, issues which go to the root of the fundamental elements of criminal responsibility – actus reus, mens rea, and voluntariness.

Dugdale v Strong involved an appeal to the High Court by way of case stated. One of the questions for the opinion of the Court was whether "a state of automatism can amount to a defence to a charge of refusing to give a specimen of blood or to a charge of driving under the influence of alcohol." The state of automatism referred to was brought about by self-induced intoxication.³

Intoxicated automatism is merely one example of automatism and will be

¹ *Cooper v McKenna, Ex parte Cooper* [1960] Qd R 406, 419.

² Unreported, High Court, Auckland, February 1987, AP 177/86.

³ Although intoxication usually operates to negative mens rea, in rare cases the intoxication may be so far advanced as to amount to automatism, in which case the prohibited conduct cannot properly be attributed to the accused at all. In either case, it is not a defence that is alleged, so much as a lack of an offence – a failure by the prosecution to prove all the essential elements of the offence.

governed by the same principles as any other form of automatism.⁴ The intake of alcohol or drugs is relevant only in that it produces the state known as automatism, but it is this end state that is important and intoxication is only the *means* by which that state is reached.

Generally, it has been thought that automatism is a good defence to strict liability offences, since offences of strict, and indeed even absolute, liability still require proof of the *actus reus*, and automatism is usually viewed as going to the *actus reus* of an offence.⁵

However, in *Dugdale v Strong* the learned judge, Sinclair J, considered a number of cases, in particular *R v Cottle*,⁶ *Bratty v Attorney-General for Northern Ireland*⁷ and *R v Burr*,⁸ and concluded that "as a defence, automatism is available *and only available* in those cases in which *intent* is an ingredient."⁹ (Emphasis added.)

Consequently, automatism was seen as a defence to a charge of refusing to give a blood specimen, which requires intent, but it was not a defence to driving under the influence of alcohol, which has been held to be a public welfare regulatory offence,¹⁰ not requiring proof of *mens rea*.

B: The Basis of Automatism – Involuntariness vs Lack of Mens Rea

To determine the appropriateness of the *Dugdale v Strong* analysis, an examination of the general principles of automatism is required. As mentioned previously,¹¹ the first consideration is that, however convenient, it is rather misleading to refer to automatism as a "defence". Rather than adducing automatism as a defence once the prosecution has established all the elements of the crime charged, automatism is raised in order to show that the prosecution has failed to establish the requisite elements of the crime. As Barwick CJ put it, dealing with drunken automatism in *The Queen v O'Connor*:¹²

so far from constituting itself a matter of defence or excuse, [it] is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility.

⁴ *Stripp* (1979) Cr App R 318, 323.

⁵ However, some authorities disagree. The point is considered fully in section C, *infra*.

⁶ [1958] NZLR 999.

⁷ [1963] AC 386.

⁸ [1969] NZLR 736.

⁹ *Supra* at note 2, at 19.

¹⁰ This is the second category set out in *Civil Aviation Department v MacKenzie* [1983] NZLR 78. In strict liability offences "the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care." (*ibid*, 89) This was affirmed in *Millar v Ministry of Transport* (1986) 2 CRNZ 216 where Cooke P states that "the defendant has the burden of showing on the balance of probabilities that he . . . acted honestly and with all due diligence."

¹¹ *Supra* at note 3.

¹² (1980) 146 CLR 64, 71.

He then went on to affirm the principle in *Woolmington's* case¹³ that the prosecution must prove every element of the offence.¹⁴

What, then, are the essential elements missing when a plea of automatism is advanced? It seems that there are two grounds upon which automatism can operate to defeat the charge: firstly, lack of voluntary action and, secondly, lack of mens rea.

Sinclair J relies upon this second basis in *Dugdale v Strong*, quoting a passage in *R v Cottle* where Gresson P states "in any case in which *intent* is an essential ingredient, and it is alleged that it was absent because the accused had no consciousness of his action, there must be an acquittal."¹⁵ (Emphasis added.)

Gresson P also mentions that he is examining "how far an accused can exculpate himself on a plea that his mental condition negated intent . . ."¹⁶

This does seem to indicate that automatism was seen in that foundational case as operating to exclude mens rea.¹⁷ However, this approach overlooks further findings in *Cottle's* case, where automatism is defined as being "action without conscious volition"¹⁸ which will result in acquittal "unless the Crown, in discharge of its onus of proof, satisfies the jury that the accused did act *consciously* and with *volition*."¹⁹ (Emphasis added.)

This first requirement of "consciousness" appears to contemplate the need for the mind to be functioning so as to be able to form the necessary mens rea. The latter requirement of "volition" contemplates that the mind is further operating in control of the body, providing the essential element of voluntariness.

Gresson P also adds that "automatism is advanced by an accused as negating intent or as showing him to have acted without volition."²⁰

Similarly, in *Bratty v Attorney-General for Northern Ireland*, automatism is defined as "unconscious, involuntary action, and it is a defence because the mind does not go with what is being done,"²¹ a view which is cited with approval in *R v Burr*.²²

¹³ [1935] AC 462.

¹⁴ It should be noted, however, that the Courts have imposed a requirement that the accused must lay a sufficient evidential foundation for automatism. Once this evidential onus is discharged, the prosecution must disprove automatism beyond reasonable doubt. This evidential onus seems to have been imposed due to the ease of feigning automatism – see *Hill v Baxter* [1958] 1 QB 277. This point is explained further in section B.

¹⁵ *Supra* at note 6, at 1012-1013.

¹⁶ *Ibid*, at 1007.

¹⁷ Although *Cottle* was charged with an offence requiring proof of intent, so that it never became necessary to distinguish between his lack of mens rea and his lack of voluntary conduct.

¹⁸ *Supra*, at note 6, at 1007.

¹⁹ *Ibid*, 1013.

²⁰ *Ibid*, 1014.

²¹ *Supra* at note 7, at 401.

²² *Supra* at note 8, at 744.

It is submitted that automatism is best seen as a subclass of involuntariness,²³ and therefore governed by involuntariness principles. After all, the principal feature of involuntariness is that the conduct is not willed, the "mind does not go with what is being done." An epileptic²⁴ in the throes of a fit is an automaton, because the conduct is not willed, the bodily movements are not produced *voluntarily* – it is simply not relevant, nor even meaningful, to enquire into what may be passing through an epileptic's mind, in an effort to determine whether or not *mens rea* is present. It is the unwilled character of the actions which exculpates, not the lack of a guilty mind.

There are many possible incidents of involuntariness. Some were listed by Pearson J in *Hill v Baxter*, for example, where "the man is having an epileptic fit, so that he is unconscious", or "has been reduced to a state of coma and is completely unconscious", such a person may have been "stunned by a blow", or "attacked by a swarm of bees."²⁵ Similarly there is the classic textbook example where a person stabs another because the knife and his or her hand are forced by a third party.

These are all instances where the mind is not directing the body's movements, "there is no link between the body's actions and the working of the mind."²⁶ In short, they are all involuntary actions – in some cases the mind is conscious and operating, but unable to control the body;²⁷ in other cases the mind is unconscious. Thus the general doctrine of involuntariness can be divided into two subcategories:

- i. conscious involuntary actions, and
- ii. unconscious involuntary actions.

This second category is, for the sake of convenience, labelled "automatism".

It might be asked: if these actions are all involuntary and they all provide a complete defence, then why is there any need to distinguish cases where the mind is conscious from those where the mind is unconscious? The answer is that in the second category of unconscious involuntary actions, there is an evidential burden on the accused to adduce sufficient evidence of his automatism. The Courts have indicated²⁸ that unconsciousness is too easily feigned to

²³ Hence not all involuntary actions are automatistic, but all automatistic actions are necessarily involuntary.

²⁴ Although epilepsy may be treated as *insane* automatism, falling within s 23 of the Crimes Act 1961; see *Bratty* (supra, at note 7) and *Sullivan* [1983] 3 WLR 123.

²⁵ Supra, at note 14, at 286.

²⁶ Bugg "Intoxication and Liability: A Criminal Law Cocktail" (1984-87) 5 AULR 144, 150-151.

²⁷ For example, where a knife in someone's hand is forced by a malicious third party, where a person is pushed into another, where a car's brakes fail so that the driver inevitably goes through a red light, or where a person is attacked by a swarm of bees. Such cases are not to be confused with necessity (sometimes called normative involuntariness), as where a person intentionally trespasses into another's garden shed to avoid being attacked by a swarm of bees.

²⁸ *Bratty*, supra at note 7, at 405; *Hill v Baxter*, supra at note 14, at 282.

be accepted without some scrutiny. If the mind is conscious, however, it is easier to prove whether or not some additional factor – such as a swarm of bees or a malicious third party – intervened to make the act involuntary.

The point that automatism is nothing more than a particular example of the doctrine of involuntariness is made clear by Barwick CJ in a general discussion of involuntariness in *Ryan v The Queen*.²⁹ The learned judge considers *Bratty's* case in which "the involuntary quality . . . for the deed . . . was said to be due to psychomotor epilepsy and was described as automatism."

He points out, however, that the label is not important:³⁰

however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will is due to diverse causes . . . [it] is of course the absence of the will to act . . . rather than lack of knowledge or consciousness which . . . decides criminal liability. (Emphasis added.)

Thus it is involuntary acts which exculpate. This does not, with respect, seem to be fully appreciated in *Dugdale v Strong* when it is stated that automatism is only a defence in those cases in which intent is an ingredient. Of course, in that sub-category of involuntariness comprising *unconscious* involuntary acts ("automatism") it is likely that there will also be a lack of mens rea, since if the mind is unconscious it will be unable to form any intent. However, that is merely secondary. The primary basis upon which automatism operates is not lack of mens rea, but lack of voluntariness.

C: The Three Elements of an Offence

Although it is submitted that the focus in an automatism enquiry should be on the issue of voluntariness rather than intent, the conclusions reached in *Dugdale v Strong* might still be valid if voluntariness itself is seen as going to the mens rea of an offence, rather than the actus reus.

The reason why this classification makes a difference is that offences of strict liability are said not to require any mens rea, so that if voluntariness is part of the mens rea, a person might be convicted of a strict liability offence, even though his or her act was involuntary. If, however, voluntariness is part of the actus reus, even an absolute liability offence requires that the prosecution establish the actus reus beyond reasonable doubt, so involuntariness would be a good "defence".

It therefore becomes necessary to categorise voluntariness. On the one hand, voluntariness requires that the proscribed conduct be willed, and the exercise of the will is a mental function. On the other hand, voluntariness can be seen as being relevant to whether the proscribed act can properly be attributed to the defendant and this may not involve an examination of the defendant's mind at all. If a person's actions are uncontrolled, then what is

²⁹ (1967) 121 CLR 205.

³⁰ *Ibid.*, 214.

passing through that person's mind may be irrelevant.

In *R v Charlson*³¹ where a father struck his son and threw him out of a window for no apparent reason, the man's automatism was treated as a physical element on the basis that "his actions were purely automatic and his mind had no control over the movement of his limbs."³² (Emphasis added.)

In his textbook on criminal law, however, Adams takes the opposite approach and says:³³

the expression 'mens rea' will be used in what we believe to be its customary sense as embracing every mental element, including even the element of voluntariness . . . On this point we diverge with respect from the view expressed by Woodhouse J in *Kilbride v Lake* where he treated voluntariness as a mental element requiring to be established before embarking on any inquiry into mens rea. This involves a two-tiered analysis of the mental element . . . which can only lead to confusion.

It is submitted, however, that far less confusion is caused by treating the distinct issue of voluntariness separately, than by failing to distinguish it from the concept of mens rea.

In *Kilbride v Lake*,³⁴ Woodhouse J drew a clear and logical distinction between the concept of mens rea and the mental exercise of the will required for voluntariness:³⁵

"Naturally the condition that there must be freedom to take one course or another involves free and conscious exercise of the will . . . but this mental stimulus required to promote acts . . . is entirely different from the mental element contained in the concept of mens rea. The latter is the intention or knowledge behind or accompanying the exercise of the will, while the former is simply the spark without which the actus reus cannot be produced at all." (Emphasis added.)

It is submitted that this analysis is correct; the mere fact that voluntary action requires an exercise of the will does not make it part of the mens rea of an offence.

On the other hand, it is not strictly accurate to say that voluntariness is part of the actus reus either. Even though the accused may not have brought it about voluntarily, the prohibited conduct has still occurred. The actus reus was not produced by the exercise of the defendant's will, but it was produced. Thus Glanville Williams, considering the "defence" of automatism in relation to the charge of murder, says:³⁶

there is no need to base the acquittal upon the absence of an 'act'. Clearly the defendant *has* killed or wounded, it would be a perversion of language to say otherwise; but he is acquitted

³¹ [1955] 1 All ER 859. Much emphasis was also placed on the burden of proof in that case.

³² *Ibid*, 862.

³³ Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 352.

³⁴ [1962] NZLR 590. *Kilbride v Lake* has been criticised by some writers, eg. M Budd and A Lynch, "Voluntariness, Causation and Strict Liability" [1978] Crim LR 74 and approved by others, eg. R.S. Clark (ed) *Essays on Criminal Law in New Zealand* (1971). Nonetheless the case provides an excellent description of the distinction between voluntary conduct and mens rea.

³⁵ *Ibid*, 593.

³⁶ Glanville Williams, *Textbook of Criminal Law* (2nd ed 1983) 665.

for lack of a mental element.

In some cases dealing with traffic offences, such as *Queen v Spurge*³⁷ and *Hill v Baxter*, it has been said that "there may be cases where the . . . accused could not really be said to be driving at all."³⁸ This seems anomalous. Driving is occurring, and its occurrence is due to the physical presence of the driver, although the driver's mind may not be functioning at a high cognitive level. It would, however, be acceptable to say that someone is "not driving" if all we mean by that is that the accused is not voluntarily responsible for the act of driving, rather than using that expression to try to deny that the act of driving ever occurred.

The conclusion is that voluntariness is neither a part of the accused's *actus reus*, nor a part of the *mens rea*: rather, it is a third element, associated with both, but distinct. Voluntary action is "willed conduct"; the exercise of the *will* relates to the mind, the element of *conduct* relates to the act – voluntariness is the vital "link between . . . mind and . . . body"³⁹, the link which allows the *actus reus* to be ascribed to a particular defendant.

Thus most crimes can be seen as requiring three essential elements:

- i. the prohibited conduct, and
- ii. *willed* conduct, and
- iii. the appropriate *mens rea*.

It is artificial to group (i) and (ii) together and call it "*actus reus*", just as it is artificial to group (ii) and (iii) together and call it "*mens rea*". In fact, all three elements are required, consistent with the "two-tiered analysis" of *Kilbride v Lake*.

There is another crucial point arising out of this analysis. To satisfy the principles of concurrence, all three elements must co-exist in point of time. As Barwick CJ put it in *Queen v O'Connor*:⁴⁰

The concurrence of will and physical act and the concurrence of intent and physical act suffices to attract criminal liability.

In this quotation all three elements are clearly dealt with separately. This approach seems all the more logical when we consider that it is possible for an acquittal to be secured due to lack of willed conduct despite the proscribed conduct being committed, and being committed by an accused who actually *has mens rea*. The following might be given as examples.

(a) If A is driving to the house of her enemy B intent upon killing him, and on the way B steps out in front of A's car, giving her no opportunity whatsoever to avoid the collision, then A is not guilty of murder – even if, in the in-

³⁷ [1961] 2 All ER 688.

³⁸ *Hill v Baxter*, supra at note 14, at 283.

³⁹ Bugg, supra at note 26, at 153.

⁴⁰ Supra at note 12, at 72.

stant before she struck, she recognised the unwary pedestrian as B and was glad – provided that she was genuinely unable to avoid the collision, she is entitled to a complete acquittal, despite the prohibited conduct occurring, and despite her guilty mind.

(b) Similarly, if A is unwittingly pushed from a building and during his fall he realises that he is going to land on his enemy B, then provided he is not able to avoid this he is not guilty, regardless of what passes through his mind. Prohibited conduct occurs and A may have a guilty mind, but the conduct was not brought about voluntarily by A.

(c) The same analysis can be applied even to crimes of omission. Imagine a person tied to a chair who is charged with "failing to provide the necessities of life" by not feeding a baby under his care. Since there is no way that the person could physically comply with this duty, his conduct is not voluntary. The accused may actually have no intention of feeding the baby, even if he was not tied up. If this is the case, then even though the prohibited conduct has occurred, and the accused has an actual intention to neglect the duty, he still cannot be held liable for the offence, since the omission is incapable of being linked to his voluntary conduct.

These examples are all highly fanciful. While not expected to occur regularly in practice, they do serve to illustrate that voluntariness is best treated as a third factor independent of either *actus reus* or *mens rea* – it is "distinct from *mens rea*" being "the spark without which the *actus reus* cannot occur at all."⁴¹

Some might argue that it is purely academic whether voluntariness is treated as part of *actus reus*, part of *mens rea*, or as a distinct element on its own. There are at least four cases, however, where the classification is crucial:

- i. The English courts have held in *Majewski*⁴² that self-induced intoxication is no defence to a crime of basic, as distinct from specific, intent. This rule also covers self-induced intoxication resulting in automatism,⁴³ i.e. unconscious involuntary action. If involuntary action is seen as a separate essential element, then the type of *intent* required, basic or specific, should be irrelevant.
- ii. Can automatism only reduce murder to manslaughter, or does it secure a complete acquittal? In *R v Grice*⁴⁴ the question of whether automatism can amount to a defence to manslaughter was expressly left open. It was suggested, however, that the answer would depend upon

⁴¹ *Kilbride v Lake*, *supra* at note 34, at 592.

⁴² [1977] AC 443. *Majewski* has not been followed in New Zealand, however, and has been much criticised. See: *Steinberg v Police* (1983) 1 CRNZ 129; Glanville Williams, *Textbook of Criminal Law* (1983) (2nd ed) 680; Criminal Law Reform Committee *Report on Intoxication* (1984) 28.

⁴³ The operation of the rule is illustrated by *Lipman* [1970] 1 QB 152.

⁴⁴ [1975] 1 NZLR 760.

whether manslaughter requires any form of intent. Again, if voluntary conduct is a separate element in its own right, the question of intent is irrelevant.

- iii. In cases of strict and absolute liability, no mens rea is required. Does this also exclude the need for voluntariness? *Dugdale v Strong* might suggest that it does. The point will be considered fully in section D infra.
- iv. Does antecedent fault negate a "defence" of involuntariness? The answer depends upon the classification of involuntariness as a separate element. This point will be considered fully in section E infra.

D: Willed Conduct and Strict Liability

One of the most common areas in which voluntariness comes into its own as a separate element is in the realm of strict liability offences. As evidenced by *Dugdale v Strong*, it is very important to determine which of the three elements of an offence are required for an offence of strict liability.

Clearly the prohibited conduct must occur, or there has been no contravention of the appropriate regulation.

*MacKenzie and Millar*⁴⁵ make it equally clear that mens rea is not a requirement of a public welfare regulatory offence.

Finally, it is submitted that the element of voluntariness is as crucial as the requirement for an actus reus. In *O'Connor's* case, Barwick CJ states that "in all crime, including statutory offences, the act charged must have been done voluntarily, that is accompanied by the will to do it."⁴⁶ He says further:⁴⁷

It is clear, I think, that no common law offence is made out by proof of the actus reus alone. In the case of all such crimes, at least an actual intent to do the physical act involved in the crime charged must be established.

Similarly, in *Bratty's* case, Lord Denning remarks that "no act is punishable if it is done involuntarily."⁴⁸ Woodhouse J stated the position regarding strict liability offences when he said:⁴⁹

it must be equally elementary and a matter of common sense as well that where such an offence of strict liability is charged it will still be essential to *link* the defendant with the actus reus before he can be found guilty of the alleged offence, no matter how clear it may be that the prohibited event has actually occurred. (Emphasis added.)

This, it is submitted, must be the correct position. As was pointed out in *Lim Chin Aik v The Queen*, even in strict liability offences, the legislature

⁴⁵ Supra at note 10.

⁴⁶ Supra at note 12, at 80.

⁴⁷ Supra at note 12, at 79.

⁴⁸ Supra at note 7, at 409.

⁴⁹ *Tifaga v Department of Labour* [1980] 2 NZLR 235, 237.

cannot have intended to pounce upon "the luckless victim".⁵⁰ If a person's acts are involuntary, if by no exercise of the will could the actus reus have been prevented, then no purpose is served by making that person liable.⁵¹

The fact that voluntariness is an essential element of strict liability offences is demonstrated by the case of *Burns v Bidder*,⁵² where a driver whose brakes had failed inevitably did not accord precedence on a pedestrian crossing, but was found not guilty. Strong obiter statements in *Kay v Butterworth*,⁵³ *The Queen v Spurge*,⁵⁴ and *Hill v Baxter*⁵⁵ also indicate the need for willed conduct in a strict liability offence.

As stated previously automatism, including intoxicated automatism, is probably best seen as a subclass of involuntariness, which is distinct from both actus reus and mens rea. This third element is essential, even in offences of absolute liability, and the unavoidable conclusion is that automatism must be a "defence" to an offence of strict, or even absolute, liability.

Thus when it is stated in *Dugdale v Strong* that automatism is only a defence to offences where intent is an ingredient, it is, perhaps, not fully appreciated that automatism operates not merely to negate mens rea, but even more fundamentally to negate the exercise of the will, which is quite distinct from the mental element of mens rea.

E: Fault-Induced Involuntariness

Exactly when fault is relevant in criminal law is an important, but vexed, question. It is submitted that the answer can be understood properly only by treating the three elements of an offence separately.

By way of illustration of the basic difficulty, it has sometimes been suggested⁵⁶ that automatism induced by the actor's own fault is no defence. As automatism is merely one form of involuntariness, this would be part of a wider rule that self-actualising involuntariness is no defence.⁵⁷

The argument runs as follows: for an act to be truly involuntary, there must be no other course open to the accused (see *Kilbride v Lake*) – if the accused is able to prevent the act occurring, it is not truly involuntary. It follows that if

⁵⁰ [1963] AC 160, 175.

⁵¹ In some cases, where an act is done involuntarily, the accused will not even be causally responsible for it, as where a third party drives into the back of the accused's car at a traffic light, forcing it through a red light without any voluntary control on the part of the driver. *Kilbride v Lake*, supra at note 34, would be a good example.

⁵² [1967] 2 QB 227.

⁵³ (1945) 173 LT 191.

⁵⁴ [1961] 2 All ER 688.

⁵⁵ Supra at note 14.

⁵⁶ e.g. *Lipman* supra at note 43. *Lipman* is, however, unlikely to be followed in New Zealand, since it relies on the distinction between specific and basic intent, expressly rejected (obiter) in *Kamipeli* [1975] 2 NZLR 610.

⁵⁷ This rule would be wide enough to cover *Dugdale v Strong*, although it was not specifically mentioned in that case.

the involuntary state was brought about by the accused's own prior voluntary conduct, it cannot be said that there were no alternatives – the accused *did* have choices and could have prevented the act occurring by exercising them. Otherwise, an epileptic could drive with impunity, *knowing* that he or she is likely to have a seizure without warning, but secure in the knowledge that as soon as a fit does occur, he or she will be acting involuntarily in a state of automatism and therefore entitled to a complete acquittal.

Similarly, people could fall asleep at the wheel of a car, or drink themselves voluntarily into a state of automatism, and be free from liability. Thus in *Kay v Butterworth* a driver who fell asleep at the wheel was convicted of driving without due care and attention because he was at fault in not stopping when he felt drowsy. By contrast, however, "a person . . . who, through no fault of his own, becomes unconscious while driving, for example, by being struck by a stone, or by being taken ill, ought not to be liable at criminal law."⁵⁸

While this line of reasoning has much to recommend it from a policy point of view, it is submitted that it cannot be supported on strict legal principle. The argument overlooks the reason why involuntariness exculpates, namely because the conduct is not willed. However much at fault people may be in getting themselves into a state of automatism (or any other form of involuntariness), this does not make their conduct any the less unwilled at the relevant time.

Problems of *concurrency* are involved: the three separate elements must all coexist in time – there must be concurrent actus reus and mens rea and willed conduct.⁵⁹ An *antecedent* exercise of the will does not satisfy the requirements of concurrency.

In *O'Connor's* case, Barwick CJ writes that an intoxicated automaton will not be guilty "whether the state of intoxication is self-induced or the result of the activity of another. The concurrence of will and physical act and the concurrence of intent and physical act suffices to attract criminal liability."⁶⁰ He added later that:⁶¹

though blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional. For what is blameworthy there should be an appropriate criminal offence. But it is not for the judges to create an offence appropriate in the circumstances . . . It must be for the Parliament.

As this quotation suggests, a parallel may be drawn with the problem of intoxication. Legal principle demands, as was implied in *Kamipeli's* case,⁶² that: "A person may be at fault in becoming intoxicated but if that person does not have the requisite mens rea at the time of the actus reus, there can

⁵⁸ Supra at note 53, at 191; affirmed in *Hill v Baxter*, supra at note 14.

⁵⁹ See section C.

⁶⁰ Supra at note 12, at 72.

⁶¹ Ibid, 87.

⁶² Supra at note 56.

be no conviction."

A similar argument may be run with fault-induced involuntariness, as follows: "A person may be at fault in becoming an automaton but if the conduct is unwilling at the time of the actus reus, there can be no conviction."

This may not appeal to policy-makers but, jurisprudentially, to try to attach the antecedent fault to the actus reus is to stretch the principles of concurrence as was done in *Director of Public Prosecutions v Majewski*⁶³ and also in *Caldwell's*⁶⁴ case, both of which have been widely criticised for their treatment of legal principle.⁶⁵

Thus fault-induced automatism or involuntariness is as much a defence as any other kind of involuntariness. It might be argued that even if fault-induced involuntariness affords a defence generally, it does not do so in strict liability offences, which require reasonable care or "total absence of fault."⁶⁶ However, it seems clear that if the conduct in question is not willed, an essential element of the offence is missing: effectively there is no offence, so it never becomes necessary to examine the strict liability doctrine of total absence of fault, which operates as a defence and thus only comes into play after the offence is proved.

A better way to deal with the *Kay v Butterworth* situation, the driver who falls asleep at the wheel, is to say that the driver is not guilty of an offence at the time of the accident, when an automaton, but is guilty of careless or dangerous driving in the moments *before* falling asleep, when the driver realised that he or she was succumbing to drowsiness, but failed to stop.

This is expressed in *Hill v Baxter*.⁶⁷

there was an *earlier* time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously.

Thus a first-time epileptic would not be guilty, but someone who drives, knowing he or she is likely to have a fit at any moment, is guilty of careless, or even reckless, driving, akin to a person who drives knowing that the car has faulty brakes.

Of course, the result of this analysis is that a reckless epileptic would be guilty of an offence, even if a fit did not occur and the destination was reached safely. He or she would be guilty of driving carelessly, regardless of whether actual harm occurs.

A driver who falls asleep, then drives through a Give Way sign, would have a good defence to a charge of "failing to give way". He or she is guilty of

⁶³ *Supra* at note 42.

⁶⁴ [1982] AC 341.

⁶⁵ eg. Glanville Williams, *supra* at note 36, at 680: "*Majewski* runs roughshod over all doctrines of mens rea and actus reus."

⁶⁶ *Supra* at note 10, at 85 per Richardson J.

⁶⁷ *Supra* at note 14, at 286 per Pearson J.

careless or reckless driving before falling asleep, but is *charged* with "failing to give way" and at the time of driving through the Give Way sign such a person was an automaton.

The matter was well summed up in a commentary on *Tifaga's* case:⁶⁸

in true involuntary act situations . . . no conduct attracting liability has occurred at all – the focus is on the nature of the conduct alleged as grounding the charge, and fault on the part of the actor is, or should be, irrelevant.

F: Conclusion

Dugdale v Strong is an illustration of the difficulties involved in applying a doctrine without an analysis of the basic principles upon which it rests. The issues which arise out of the case cut right to the root of the criminal law.

The essence of this article has been to accord full recognition to involuntariness and the principles governing it. It is seldom appreciated that involuntariness may be divided into two subclasses: conscious involuntary action and unconscious involuntary action, known as "automatism".

Each of these subclasses will afford a complete defence, unless negated by the prosecution, although there is an evidential burden on the defendant in the case of automatism. Most importantly, voluntary action is an essential element of criminal responsibility in its own right. It is not merely a subclass of actus reus or mens rea – rather, it is the vital link between the two, without which the prohibited conduct cannot properly be attributed to a particular defendant at all.

It is submitted that the doctrine of voluntariness can only be correctly applied to such difficult areas as strict liability offences and antecedent fault cases, once it is recognised that there are, in fact, three elements of an offence.

⁶⁸ Neil Cameron [1981] Crim LJ 297, 300. Cameron contrasted this with "justification or excuse situations" where "such conduct has occurred but where, for reasons outside his own control, the actor should be excused." In those cases "the focus is almost exclusively on the question of fault."