AUTOMATISM AND THE DRUNKEN SAILOR: FOUR PRACTICAL PROBLEMS

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A seventeen year old seaman spent one afternoon last year drinking heavily in a city hotel. He returned to his ship, and for an hour or so afterwards his actions were quite unaccountable. After collecting a pigshooting rifle and a knife from the ship he set out across the wharves, where he encountered a group of watersiders. While some distance away from them, he fired once, wounding one of the group in the hand. He then rushed towards them and was overpowered and disarmed in the scuffle which followed. At the wharf police station soon after, he explained that he was "expected to kill two people. They were members of the waterfront union . . . ." He remembered collecting the gun and firing at the group of men. The following day, when he was brought before the magistrate, he could recall little if anything of the entire affair.

Two alternative charges[1] were laid against him, the first of wounding the watersider with intent to do him grievous bodily harm, the second of wounding him by acting with "reckless disregard for the safety of others". The defence was one of automatism. The course of the trial[2] is of great interest because of the psychiatric evidence of two expert witnesses, one of whom had earlier made a special study of automatism and submitted a paper on the topic to the Auckland Medico-Legal Society.[3] This evidence showed that it may have become necessary to review the fundamental conceptions upon which the so-called "defence of automatism" is based.

This defence is now well-established in Commonwealth countries.[4] Medically, the various types of automatism have been described as "physical disorders of the brain which may result in a transient state of mental confusion and have as a prominent and common factor the feature of amnesia or absence of memory for the events during the state of mental confusion".[5] They are to be distinguished from mere amnesia, which occurs, for instance, in cases of hysterical fugue,[6] where the subject is fully conscious when doing the act in question but later cannot recall doing it; and also from a "disease of the mind", where in most cases, according to Dr Glasgow, "we are still unable to demonstrate any physical abnormality of the brain", although he admits that further scientific investigation might establish it.[7]

The purpose of this article is to show that, as the law at present stands, the advocate, and still more the judge, must solve difficult and important questions of law before they can present a case of automatism to the jury. The case of the drunken sailor was perhaps the first in which the medical evidence penetrated into the true nature and effects of the state of automatism. It will therefore be helpful to use the case to illustrate how these questions arise, and how inadequate is the authoritative guidance which is given to the trial judge in solving them.

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I. AUTOMATISM AS A "STATE OF UNCONSCIOUSNESS"

In *R.* v. *Cottle*[8], Gresson P. defined automatism as "a temporary eclipse of consciousness which nevertheless leaves the person so affected able to exercise bodily movements". He later added that he himself preferred to explain it as "simply as action with no consciousness of doing what was being done".[9] This definition has been described as defective because it omits to mention that a person in a state of automatism has no volition[10]; the critic preferred Lord Kilmuir's description of "unconscious *involuntary* action"[11]. Such a refinement may be unnecessary, because, as one witness pointed out in *Hale's* case[12],

> . . . intent connotes conscious thinking about what one is doing, and because consciousness is affected in automatism, it follows that intent must be affected.

The really important assumption the courts have hitherto made about automatism, therefore, is that a person in such a state is *unconscious* of the acts he performs.[13]

This assumption was challenged in *Hale's* case. His automatism was said to have lasted from the time he left the hotel until after his interview with the police. But in that time he did many things which indicated that he must have been aware of what was going on about him. He took a taxi to the wharf; climbed aboard the ship and got off again; saw the watersiders at some distance from him and fired at them ;and, most importantly, gave a coherent, if irrational, account to the police of his activities. Nevertheless the doctors were prepared to say that the automatism continued throughout that time. Dr Glasgow defined automatism as "a definite physical upset of the brain . . . which may impair the proper working of the brain in this way"[14]. Dr Bennett thought that it would be quite normal for a person in a state of automatism to be able to "guard himself against ordinary common physical danger"[15] for instance, as might arise when he wished to cross a street. It is plain that both doctors found evidence not of complete lack of consciousness, but only of impaired consciousness, or even, possibly, nothing more than disordered motivation. Nevertheless, the physical disorder within the brain resulted in the case being classed for medical purposes as one of automatism.

This raises the question whether a jury can find that the doctors have correctly diagnosed automatism, but that nevertheless the effect of it was not sufficiently great to render the accused criminally irresponible. A mild disturbance might not impair the consciousness more than would a few too many drinks, or mere fatigue. Courts in other jurisdictions have recognised this fact.

> When a human being loses consciousness as the result of a diseased condition of his nervous system there is no distinct line over which the mind leaps from the sunlit fields of clear consciousness to the dark canyons of unconsciousness. Surely, there must be, in the case of an epileptic, a period of penumbra when the will is in a state of total or partial paralysis .Under proper guidance the jury should have been permitted to determine whether the defendant was suffering a state of clouded understanding or obstructed will as the result of epilepsy . . .[16]

It is submitted that our own Courts must now meet this issue fairly and squarely, and realise that it is insufficient to leave the matter to the jury as "automatism—yea or nay?" They must decide what the "proper guidance" that they give to the jury is going to be.

The form of the direction given in such cases will be an extremely difficult one to settle. In other countries, the same kind of problem

has arisen in relation to insanity[17], and is only excluded from that field in British Commonwealth countries by the rigour of the McNaghten rules.[18] The major difficulty is, how are the courts to describe to the jury the degree of impaired consciousness which is sufficient to warrant an acquittal?

It appears to be insufficient for a judge to explain the standard in terms of "volition" or "intent". Firstly those expressions are based on philosophical or legal presuppositions, not medical ones.[19] Therefore it is improper to ask the medical witnesses whether they think that the accused's acts were "divorced from his volition", because to answer this question they must make a philosophical judgment which is beyond their competence. Secondly, to tell the jury that they must find the "intent required" or that the accused was a "thinking conscious man",[20] or "acted voluntarily", is merely to skirt around the main issue.

An obvious alternative is to disregard automatism entirely whenever it is apparent that the accused retained some degree of consciousness. This would be consistent with the early decision of the Court of Criminal Appeal in *R.* v. *Perry*[21] where the state of psychomoter epilepsy was alleged by the defence. The accused had some recall of what was happening while the fit lasted, but later had a complete amnesia. Only an insanity direction was given to the jury.[22] But this has two disadvantages. Firstly, many states of automatism are not brought about by "disease of the mind", and for that reason would not qualify under the McNaghten rules; secondly, the rules relate more to disordered *cognition* than to disordered *motivation*.[23] For instance, cases of uncontrollable impulse" have often been held not to fall within the rules[24] because the accused knew what he was doing and knew it was wrong. Therefore if an accused person put forward a defence of automatism but it was proved he had some degree of consciousness he would receive short shrift under the McNaghten rules.

A better solution would be to extend the test of insanity developed in the Australian Courts to cases of automatism. This test was described by Dixon J. in *R.* v. *Porter*,[25]

> Could this man be said to know . . . whether his act was wrongful if through a defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong. If through the disordered condition of his mind he could not reason about the matter with a moderate degree of sense and composure it may be said he could not know what he was doing was wrong.

It has been approved in New Zealand, both under the McNaghten rules[26] and the new s.23 Crimes Act 1961.[27] There would be little difficulty in persuading a jury that a person suffering from automatism to any substantial degree would not have the capacity to make a moral judgment "with a moderate degree of sense and composure". The modifications to the existing law which would be necessary are (a) that any disturbance of the brain would have to be regarded as a disease of the mind (in which case, the present consequences of the insanity verdict would have to be modified[28]); and (b) that a substantially disordered *motivation* should be treated as tantamount to failure to "think rationally" of the reasons which make the act wrong.

A further problem, which also demonstrates the fallacy of thinking that the simple test is whether "automatism" is proved or not, arises where the accused faces various charges, each requiring proof of differing degrees of intent. Hale was charged with one offence involving "intent

to commit grievous bodily harm", and the other involving "reckless" action. It seems not unlikely that an accused's mind could be too disordered to form a definite intent to wound a particular person, and yet at the same time he might realise that what he was doing could cause harm. Where an accused is charged with an offence which has a disordered mental condition especially in mind, such as driving while under the influence of drink or drugs, then his intent to commit the actual crime becomes irrelevant, the sole question for the jury being whether his condition was the result of his own choosing[29]. Great care must be taken by the trial judge to distinguish the "degrees of intent" required in particular charges, if he is going to direct the jury properly.

The difficulties which have been considered in this part of the article have arisen because the most modern medical evidence shows that present law is based upon an incorrect conception of what automatism really involves. They demonstrate once again that reform of the law concerning mental irresponsibility is long overdue.

II. LAYING THE FOUNDATION OF THE DEFENCE

It was stated by North J. in *R.* v. *Cottle*[30] that "it is not open to the defence to rely upon a plea of automatism unless a proper foundation is laid". Viscount Kilmuir in *Bratty's*[31] case stressed this principle and explained it this way

> . . . the defence must be able to point to some evidence, whether it emanates from their own or the Crown's witnesses, from which the jury could reasonably infer that the accused acted in a state of automatism.

These broad statements of principle leave unsettled whether there are any specific rules concerning the method by which the foundation of the defence is to be laid.[32] One would have thought that each case would be a matter of individual decision; but certain obiter statements of Lord Denning in *Bratty's* case indicate that such rules do exist. If they had been recognized by the learned judge in *Hale's* case, they might have had an important influence upon its outcome.

Two causes of Hale's alleged automatism were advanced by the defence. One was that the accused, while fooling around with a fat woman at the hotel, had fallen and knocked his head. The evidence of this was very sketchy, consisting only of a barman's assertion that he had seen Hale fall over, and that later he went and stood away from the bar with "his hand upon his head".[33] Hale himself could not remember the incident, and there was no medical evidence of bruises. The second cause was the amount the accused had to drink. Both of these called for careful consideration.

(a) *The alleged blow on the head.*

Must an accused, in order to lay the foundation of the defence of automatism, allege and prove its precise cause? Lord Denning seems to think that the courts, in order to ensure that unmeritorious claims do not go to a jury, should insist upon this being done.[34]

> In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say 'I had a blackout': for blackout, as Stable J. said in *Cooper v. McKenna*[35], 'is one of the first

by which seems to be meant an infirmity disorder or disease either of the body or of the brain.[65] The distinction is dictated by statutory provisions[66] which direct that where a person is acquitted of a crime on the grounds of his insanity, the jury must give the verdict of "not guilty on account of insanity." Where such a verdict is given, the accused is detained in a mental institution until the authorities see fit to release him.

The propriety of treating an insane automaton as criminally demented, and a sane automaton as perfectly harmless can be strongly questioned.[67] It is not, however, the present concern of this article, which is more directed towards the more practical difficulties of applying the law as it now stands. The difficulty which is encountered here is that the burden of proof is regarded differently depending upon whether the automatism alleged is sane or insane. To an illogical distinction are illogically attached highly important principles of criminal procedure.

In the case of sane automatism the authorities have settled that the ultimate burden of proof lies upon the Crown,[68] once the defence has laid the foundation of its case. The proper direction to the jury would therefore be, that they should not convict unless they are satisfied beyond reasonable doubt that the accused acted voluntarily.[69] The reason is that, since *Woolmington's* case,[70] the final proof of all matters of intent has rested with the Crown.

With the defence of insane automatism, however, there is a divergence of authority in the Commonwealth. Three important decisions on automatism[71] have indicated that when automatism is raised as a defence, and it appears that the accused may fall within the McNaghten rules, then the issue of insanity must be put to the jury even though the defence has not raised it as such. This is a result of compulsion by statute.[72] Some commentators[76] appear to take a different view, basing themselves upon earlier authority[74] and the absurdity of the prosecution asking for what is in effect a verdict of not guilty.[75] If their view is correct, then it would follow an accused can choose whether his defence goes to the jury as one of insanity or as one of insane automatism, and by taking the latter course avoid what the McNaghten rules have to say about proof of insanity; but this possibility was rejected by all the members of the House of Lords in *Bratty's* case[76] Because of this, the commentators' view does not seem to be correct.

It is assumed, therefore, that where it appears to the court that the defence is in substance one of insanity, this must be put to the jury, in addition to any comments the judge may have about automatism .But does this mean that insane automatism is to be treated in all respects as insanity? In particular, does the onus of proof (on the balance of probabilities) fall upon the *accused* once his defence is seen to be one of insane automatism? The House of Lords held that it does. In the words of Lord Morris,[77]

> The submission on behalf of the appellant that the medical evidence could support a plea of automatism so that the jury might have had reasonable doubt whether the actions of the appellant which caused the death were conscious and voluntary involved in effect a repetition of the plea of insanity while endeavouring to avoid the well established rules as to how insanity must be established.

To the writer's knowledge, no-one has yet pointed out that in coming to this conclusion the House of Lords directly contradicted what was said by the New Zealand Court of Appeal in *R.* v. *Cottle.*[78]

All members of the Court there stated that the fundamental nature of the defence of automatism was not changed by the fact that the judge was required to give additional directions upon the "qualified" verdict. Therefore the ultimate burden of proof remained with the Crown, whether or not the automatism could be categorized as insane.[79] It followed that where the jury was not convinced on the balance of probabilities that the accused had sustained his defence of insane automatism, the verdict of not guilty on the grounds of insanity could not be given. Nevertheless, they might still not be satisfied beyond reasonable doubt that the accused was criminally responsible. The proper verdict would then be one of absolute acquittal.[80] In the view of the Court of Appeal, therefore, in this unusual situation an unqualified verdict of acquittal could be given even though the foundation laid by the defence is solely one of insane automatism.

Even before *Bratty's* case, the New Zealand court's reasoning seemed somewhat shaky. Throughout their judgments, the members appeared to assume that the legal definition of insanity was the same whether the court was applying s.43 of the Crimes Act 1908[81] (which restated the McNaghten rules) or s.31 of the Mental Health Act 1911 (which governed the form and effect of the qualified verdict). How then could insane automatism fall within that definition for the purposes of s.31, and yet outside it for the purposes of s.43(1), which said that "everyone shall be presumed sane at the time of doing or committing any act until the contrary is proved"? No doubt the final result reached by the Court of Appeal, that the burden of proof was the same for all types of automatism, was eminently desirable, but it was difficult to sustain in point of law. It is submitted that the House of Lords in *Bratty's* case came to the only correct conclusion.

This distinction between sane and insane automatism may create difficulties in practice, however. It is no new comment to say that, while it is the judge's function to direct the jury on what is meant in law by "disease of the mind",[82] in fact there is very little guidance on how this term is to be defined.[83] The only express attempt is that of Lord Denning, who, developing some thoughts of Devlin J.[84], said in *Bratty's* case,[85]

> "It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate, it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

As Dr Cross points out,[86] this may be "a cure worse than the ill it was intended to remedy". The present methods of dealing with those who are found not guilty on the grounds of insanity make it a matter of very grave concern whether such a verdict should be given in respect of a man who has been mentally normal except for one unfortunate occasion over which he had no control. At any rate, Lord Denning's comments were *obiter dicta* upon a matter to which the other members of the House did not refer. They are by no means conclusive when the whole matter is so much in dispute.

The major problem which remains to be discussed is that of automatism having a combined cause. The medical witnesses in *Hale's* case were prepared to say that a combination of two causes might bring about automatism when each operating singly would not. Dr Glasgow in his article instances *R.* v. *Moana*[87], where an accused had violently attacked his wife with a knife, and was charged with

attempted murder. It was found that some five months previously he had suffered a fall causing a knock on the head. This had no effect until he drank a small amount of beer on the night of the alleged offence. Then, because of the combined effect of the blow and the alcohol, he suffered a state of automatism. In *Hale's* case itself, a similar concatenation of causes was alleged.

What happens when one of the combined causes is accidental, but the other is a "disease of the mind"? For instance, in *Cottle's* case[88] the defence alleged psychomoter epilepsy induced by excessive consumption of alcohol. The accused's liability to epileptic fits was clearly a "disease of the mind", but in this particular occasion the fit might not have occurred without the assistance of the toxic properties of alcohol. Neither cause could really be regarded as paramount, nor would it be fair to tell the jury they must choose between them.

If one were to apply Lord Dennings' test to the "combined cause", variable results might be obtained. Where the allegedly accidental cause is the intake of alcohol, the courts would be predisposed to insane automatism, it being well known that for many people alcohol is either an addiction or an inevitable social necessity. Where the accidental cause is completely unforseeable, such as the toxic effect of a beesting, the court might lean towards sane automatism, even where a liability to epilepsy was also proved.

An acute problem arises where the automatism is alleged to be primarily due to alcohol. If a man indulges in excessive drinking which results in automatism, this in itself shows that the man is more likely in future to react in this way than are other people, because such cases, according to the medical witnesses in *Hale's* case, are quite rare. This by itself has never been suggested as a reason for labelling the automatism as insane (unless, perhaps, the accused was an alcoholic). If, however, a doctor discovers some definite flaw in the physical state of the accused's brain, such a result would be almost inevitable. Where is the line to be drawn? And would it make any difference if the accused promised that he would never drink again?

In these situations, the court is weighing the safety of the public against the accused's rights as a 99% normal citizen. Are the considerations they must take into account appropriate to a form whose main concern is the establishing of criminal guilt? Moreover, are they criteria which are appropriate when the question is, to what degree must that guilt be proved? The courts will become increasingly aware of the arbitrary nature of the present rules on the burden of proof of automatism, and the lack of concrete guidance on how they should be applied.

CONCLUSION

This article has been concerned to examine the practical applications of the strict legal doctrines associated with the defence of automatism. With all of the four main problems considered, the authorities are sketchy, imprecise, and, in many cases, misleading. It is the trial judge who must suffer as a consequence, especially in New Zealand, where judges (unlike advocates) are expected to acquire competence in all branches of litigation.

Even if the judge masters the legal issues involved in these problems the jury may be given a lengthy, complicated and technical direction,

especially in relation to the burden of proof. In *Hale's* case, the jury acquitted the accused, but added a rider to the effect that in future he should be careful about liquor. The present writer, with respect, has no doubt that this was the right thing to do with the drunken sailor. But on its face value, the verdict seems to say, "he didn't do it, but he mustn't do it again". Could there be any more compelling testimony to the unsatisfactory and anachronistic state of the present law?

1 Under s.188(1) and (2) Crimes Act 1961.
2 *R.* v. *Hale,* Supreme Court, Auckland, 21st-25th February 1966, before Moller J. and jury. I am indebted to counsel for the defence, who made the trial transcript available to me.
3 G. L. Glasgow, "The Anatomy of Automatism", (1965) 64 N.Z. Medical Journal 491.
4 *R.* v. *Cottle* [1958] N.Z.L.R. 999; *Bratty* v. *A. G. of Northern Ireland* [1961] 3 W.L.R. 965; For the earlier decisions see J. LL. Edwards, "Automatism and Criminal Responsibility", (1958) 21 Mod. L.R. 375; and for more recent developments. "Automatism and Social Defense", (1966) 8 Crim. L.Q. 258. See also Sir Owen Dixon in (1957) 31 Aust. L.J. 255; Glanville Williams, Criminal Law (2nd ed. 1961), 477, 482. Australian decisions include Re A. Barrister (1957) 31 A.L.J. 424, 431; *R.* v. *Wakefield* (1958) 75 W.N. (N.S.W.) 66; *Cooper* v. *McKenna, exp. Cooper* [1960] Qd.L.R. 406.
5 Glasgow, (supra) at 492.
6 *Ibid.,* 495 .On the legal effect of amnesia, see *R.* v. *Podola* [1960] 1 Q.B. 325.
7 *Ibid.,* 494. The courts make a different distinction, that is, between "sane" automatism and automatism caused by "disease of the mind", q.v. (infra) Section IV.
8 (supra) at 1007. cf. 1026, *per* North J.; 1030, per Cleary J.
9 At 1020.
10 See Edwards, (1966) 8 Crim. L.Q. 258, 271.
11 *Bratty's* case supra at 973.
12 Dr Bennett, Notes of Evidence 73.
13 That there is no "legal" definition of automatism is made clear by the Divisional Court in *Watmore* v. *Jenkins* [1962] 2 Q.B. 572, 586. "It is salutary to recall that [automatism] is no more than a modern catch-phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person."
14 Notes of Evidence, 82.
15 *Ibid.,* 77-78.
16 *People* v. *Freeman* (1943) 61 Cal. App. 2d. 110, 117; 142 P 2d. 435, 439 (Californian District Court of Appeals), quoted by Fox, "Physical Disorder, Consciousness and Criminal Liability", (1963) 63 Col.L.R. 645, 659.
17 For a recent comparative law study, see Helen Silving, "Mental Incapacity in the Criminal Law", (1961) 2 Current Law and Social Problems, 3.
18 q.v. (infra) Section IV.
19 R. L. Stone, "Logical Translations and the Law", (1965) 49 Minn. L.R. 447 recognizes this but advances the further view that medical terms can be translated into legal expressions. I do not agree, since one cannot "translate" one 'concept' into "another"—only a concept in one language to the same concept in a different language—and the difference in terminology here denotes a difference in concept.
20 Expressions taken from Moller J's direction in *Hale's* case
21 (1919) 14 Cr.App.R. 48, 51.
22 cf. *R.* v. *Chetwind,* The Times Nov. 4 1912, per Scrutton J., who spoke in a derogatory way of "double consciousness".
23 See *Sodeman* v. *R.* (1936) 55 C.L.R. 192 at 205, per Latham C.J.

[24] *Kenny's Outlines of Criminal Law* (18th ed. 1962), 86; *Russell on Crime* (12th ed. 1964) 116-117; *R.* v. *True* (1922) 127 L.T. 561; *R.* v. *Kopsch* (1925) 19 Crim. App. Rep. 50; *R.* v. *Flavell* (1926) 19 Cr. App Rep. 141; *Sodcman* v. *R.* [1936] 2 All E.R. 1138. In New Zealand, the new s.23 of the Crimes Act 1961 does not appear to have any effect on this practice.

[25] (1933) 55 C.L.R. 182, 189-90; *Sodeman* v. *R.* (1936) 55 C.L.R. 192, 215; *Stapleton* v. R(1952) 86 C.L.R. 358. It is based upon *R.* v. *Davis* (1881) 14 Cox. C. C. 563.

[26] *Murdoch* v. *British Israel Federation* [1942] N.Z.L.R. 600 at 630-631 per Myers C.J.; at 640, per Ostler J.

[27] *R.* v. *Macmillan* (unreported) Court of Appeal, 10 March 1966, p. 3.

[28] On which see Cross, "Reflections on Bratty's case (1962) 78 L.Q.R. 236, 238-9.

[29] As in *H.M. Advocate* v. *Ritchie* [1926] S.C. (J.) 45; *Kay* v. *Butterworth* (1945) 61 T.L.R. 452; *R.* v. *King* (1962) 35 D.L.R. (2d.) 386. Cf. *Hill* v. *Baxter* [1958] 1 Q.B. 277 at 282, per Lord Goddard L.C.J.; at 286, per Pearson J.

[30] (supra) at 1025; *cf. Hill* v. *Baxter* [1958] 1 Q.B. 277.

[31] (supra) at 976.

[32] See generally on this Cross, *Law of Evidence* (N.Z. edn. 1963), 70 *et seq.;* and upon *Bratty's* case, (1962) 78 L.Q.R. 236. The test is usually expressed, that the evidence must be such from which the jury "could reasonably infer" automatism. But the more logical form is that employed by Lord Justice General Normand in *Kennedy* v. *H.M. Advocate* [1944] S.C.(J.) 171 at 177, "evidence upon which two reasonable views may be held", because the accused need only raise a reasonable doubt.

[33] Notes of Evidence, p.71.

[34] (supra) at 982-3.

[35] [1960] Qd.L.R. 419.

[36] [1958] 1 Q.B. 277.

[37] (1965) 64 "N.Z. Medical Journal" 491 at 492.

[38] (supra) at 982.

[39] (supra).

[40] At 1007 and 1021-2, per Gresson P.; at 1026, per North J; but see at 1030 and 1033-4, per Cleary J. Also in *R.* v. *H.* (1962) 1 S.A. 197; [1962] C.L.Y. 42 it was treated as a separate defence.

[41] Drunken automatism was treated as insanity in *R.* v. *Garrigan* [1937] D.L.R. 344, and *R.* v. *Smith* [1949] Q.S.R. 124 (the latter under express statutory provisions).

[42] (1965) 64 N.Z. Medical Journal 491 at 492.

[43] *D.P.P.* v. *Beard* [1920] A.C. 479 at 501-2, per Lord Birkenhead L. C. The distinction taken by Lord Denning in *A.G. for Northern Ireland* v. *Gallagher* [1961] 3 W.L.R. 619 at 640, between an offence which involves a "specific intent" and one which does not, is difficult to maintain logically; see Williams, *op. cit.* 569; *Kenny's Outlines of Criminal Law* (18th ed. 1962), 57-61. *Russell on Crime* (12th ed. 1964) 80-86. In *R.* v. *Mathieson* (1906) 25 N.Z.L.R. 879, and *R.* v. *Hrynyk* [1949] 2 D.L.R. 394 at 398, it was recognized that drunkenness can be so advanced that an accused has no criminal responsibiilty at all.

[44] See *Kennedy* v. *H.M. Advocate* (1944) S.C.(J.) 171 at 177, for "laying the foundation" of the defence of drunkenness.

[45] For a recent illuminating account of the Californian Court's approach to the problem, see Diaden and Gasparich, "Psychiatric Evidence and Full Disclosure in the Criminal Trial", (1964) 52 Cal.L.R. 543.

[46] Notes of Evidence, pp. 76, 83-4.

[47] *Phipson on Evidence* (10th ed. 1963), 478. The other English texts which are less forthright are Cross, *Law of Evidence* (N.Z. ed. 1963), 394 *et seq; Archbold's Criminal Practice and Pleading* (35th ed. 1962), 526; *Best on Evidence* (12th ed. 1922) 434 *et seq.;* in all of these, the problem is not mentioned.

[48] *Wright* v. *Tatham* (1838) 5 Cl. & F. 670 at 690, per Coleridge J; *In Re Dyce Sombre* (1849) 1 Mac. & G. 116 at 119, per Lord Cottenham L.C.: *Ramsdale* v. *Ramsdale* (1945) 173 L.T. 393 at 395 per Lord Merriman P.; *R.* v. *Stanton,* The Times, Sep. 26 1877; *The Gardner Peerage Case,* Le Marchant 85-90 (the last-named case being doubted in *Wigmore on Evidence* (2nd ed. 1923) i, 1099).

[49] See *Thayer, A Preliminary Treatise on Evidence* (1898), 523 *at seq;* Gulson, *The Philosophy of Proof* (2nd ed. 1923), 410. However, evidence opinion is itself a form of hearsay when the expert relies upon textbooks and other writings; this is candidly admitted in *Wigmore on Evidence* (*supra*) i, 1096 and R. W. Baker, *The Heasay Rule* (1950), 164.

[50] *R.* v. *Ahmed Din* [1962] Cr. App. R. 269.

[51] American law compares favourably with this situation. Wigmore, *op. cit.*, vol. i, 1097 *et seq.* was able to discern a fairly clear and conscious policy in the United States decisions.

[52] Cross, (supra) 228; *R.* v. *Roberts* [1942] 1 All E.R. 187 at 191.

[53] See Cross, *ibid.*, 438 *et. seq.*

[54] Dieden and Gasparich, (supra) at 559.

[55] On which see *R.* v. *Gardner* [1932] N.Z.L.R. 1648; *R.* v. *Williams* [1959] N.Z.L.R. 505; Cross, *supra,* 505.

[56] See Cross, *supra,* 505; and particularly *R.* v. *Thompson* [1893] 2 Q.B. 12; *Ibrahim* v. *R.* [1914] A.C. 599; *R.* v. *Phillips* [1949] N.Z.L.R. 316; *R.* v. *Lee* (1950) 82 C.L.R. 133.

[57] S.20 Evidence Act 1908 (N.Z.) places the emphasis upon truthfulness as the criterion of admissibility of confessions; it did not apply, however, to the instant case.

[58] *Wigmore on Evidence, op. cit,* vol. ii, 134, 507.

[59] See *R.* v. *Coats* [1932] N.Z.L.R. 401 where exculpatory statements were held not to be a "confession".

[60] [1951] 2 All E.R. 726, commented upon by Cowen and Carter. *Essays in the Law of Evidence* (1956) 111-114.

[61] As in *Makin* v. *A. G. for New South Wales* [1894] A.C. 57; *R.* v. *Smith* (1915) 84 L.J. K.B. 2153.

[62] *Bratty's* case (supra) at 979-80; Cross, "Reflections on Bratty's Case", (1962) 78 L.Q.R. 236 at 243-4, shows that Lord Denning's criticism of the case must be carefully interpreted.

[63] Cross, *Law of Evidence* (*supra*), 349 *et seq.*; s.5(2)(d) Evidence Act 1908 (N.Z.); s.1(f)(i) Criminal Evidence Act 1898 (U.K.).

[64] See, in addition to the texts already cited, Cross "Reflections on Bratty's case", (1962) 78 L.Q.R. 236 at 241; Saku Kahn, "Automatism—Sane and Insane" [1965] N.Z.L.J. 113, 128. The distinction came into vogue after *R.* v. *Kemp* [1957] 1 Q.B. 399.

[65] See *R.* v. *Kemp* (supra).

[66] Mental Health Act 1931 s.31 (N.Z.); Trial of Lunatics Act 1883 (U.K.); Criminal Procedure (Insanity) Act 1964, s.1 (U.K.).

[67] See e.g. Cross, *Reflections on Bratty's case* (supra) at 238-9.

[68] *R.* v. *Cottle* (supra) at 1014, *per* Gresson P; at 1026 *per* North J; at 1035-6 per Cleary J; Bratty's case (supra) at 977 per Viscount Kilmuir L.C.; at 981 per Lord Denning; at 984-5 per Lord Morris.

[69] This oversimplification will be used, although in part I of this article it was submitted that the term "voluntary" by itself is insufficient.

[70] *Woolmington* v. *D.P.P.* [1935] A.C. 462.

[71] *R.* v. *Kemp* [1857] 1 Q.B. 399; *R.* v. *Cottle* (supra); *Bratty's* case (supra) at 980, per Lord Denning.

[72] *Supra,* n. 66.

[73] *Kenny's Outlines of Criminal Law* (*supra*), 80-83; *Russell on Crime* (supra) 112-116; also *R.* v. *Starecki* [1960] V.R. 141. *R.* v. *Price* [1963] 2 Q.B. 1 (on diminished responsibility).

[74] E.g. *R.* v. *Smith* (1910) 6 Cr. App. R. 19 and *R.* v. *Casey* (1947) 32 Cr. App. R. 91.

[75] See Cross, "Reflections on Bratty's case" (supra), 240.

[76] (supra) at 973 per Viscount Kilmuir; at 983 per Lord Denning; at 986 per Lord Morris.

[77] (supra) at 986.

[78] (supra).

[79] *Ibid.*, at 1014 and 1021 *per* Gresson P; at 1030 per North J; at 1035-1036 per Cleary J.

[80] All three judges expressly recognized this possibility.

[81] Re-enacted in a modified form in s.23 Crimes Act 1961. In *R.* v. *Brooks* [1945] N.Z.L.R. 584 and 595, Myers C.J. defined "sane" as meaning "simply criminally responsible".

[82] As in *R.* v. *Kemp* [1957] 1 Q.B. 399 at 407, per Devlin J.; see also *R.* v. *Cottle* supra at 1022, per Gresson P.; at 1027-8 per North J.; at 1032, per Cleary J.; *Bratty's* case (supra) per Lord Denning.

[83] e.g. *R.* v. *Cottle,* (supra) at 1022, per Gresson P.

[84] In *Hill* v. *Baxter* [1958] 1 Q.B. 277, 285-6.

[85] (supra) at 981.

[86] Cross, "Reflections on Bratty's Case", (supra) at 239.

[87] (1962) Supreme Court, Gisborne; Glasgow "The Anatomy of Automatism", (1965) 64 N.Z. Medical Journal 491 at 493-4.

[88] *R.* v. *Cottle* (supra) where the Court seemed to regard the defence as one of insane automatism.