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# The Growth and Development of Automatism as a Defence in Criminal Law

JOHN JENNINGS\*

It has long been a principle of English Common Law that for an act to be punishable, it must be done voluntarily. As far back as 1884, Stephen J. stated that it was not open to doubt

that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted. And why is this? Simply because he would not know what he was doing.<sup>1</sup>

Yet, as recently as 1951, the Ontario Court of Appeal held that there are two recognized defences in law to a criminal charge; insanity and drunkenness, and that anything falling outside those boundaries was something unheard of and not be entertained.<sup>2</sup> In fact, until the last decade, non-voluntary acts were held to exist in three categories only:

- (i) where the accused was insane;
- (ii) where the act was done whilst the actor was asleep; and
- (iii) where the act was literally not that of the accused as in the classic situation in which A takes B's arm and with it strikes C.

However, the law in this field has, during these past ten years, undergone some change; it would now appear that without the presence of any of the three conditions set out above, a man can commit an act which is in no way voluntary. This newly-recognized condition has been typed as non-insane automatism. It has become, or perhaps, is becoming, a good defence to a criminal charge, resulting if established, in an acquittal rather than the confinement which is the reward of a 'successful' defence of insanity.

It will be the purpose of this report to examine the growth and present position in criminal law of this defence of automatism, by means of a review of the cases, and to offer solutions to the related problems which the writer hopes will arise in the course of this examination.

What are the characteristics of this state of automatism, other than as indicated by the accused's typical statement that "I guess I must have blacked out"? In the most recent case on the subject,

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<sup>1</sup> *R. v. Tobin* (1882), 23 Q.B.D. 168, 187.

<sup>2</sup> *R. v. Kasperek*, [1951] O.R. 776.

the Court of Criminal Appeal in Northern Ireland said that automatism describes the state of a person who, though capable of action

is not conscious of what he is doing . . . it means unconsciousness involving action, and it is a defence because the mind does not go with what is being done.<sup>3</sup>

In similar language, the President of the New Zealand Court of Appeal said

I would myself prefer to explain automatism simply as action without any knowledge of acting, or action with no consciousness of doing what was being done.<sup>4</sup>

Two things will be noted from these definitions. Firstly, what might be called 'conscious' involuntary action, that is to say acts the result of physical compulsion, or control of the mind by coercion or duress, is not included. Secondly, the definition is wide enough to encompass acts rendered unconscious by sleep, drunkenness, insanity, or some other causes. In this report, the writer wishes to deal with those "automatic" acts that are rendered so by reason of unconsciousness, as the definitions above-quoted suggest. Also, it is hoped that, within this narrowed field of automatism, the survey may be restricted further still to examine that state of unconsciousness brought about by the "other causes" referred to above.

The first case of importance where automatism was a defence is that of *R. v. Charlson*.<sup>5</sup> There, the accused violently attacked his young son with a mallet, and then flung him out of a window and into a river twenty-five feet below. The accused was devoted to his son, and there was no cause for the attack. Charlson admitted to the police that he had assaulted the child, but said that he did not know why he had done so. He was charged with grievous bodily harm with intent, and with unlawful wounding. The prison doctor declared that the accused was not suffering from any disease of the mind when the assault took place. Evidence was led to show that there was a strong possibility that Charlson was suffering from a cerebral tumor, in which case he would be subject to motiveless outbursts of impulsive violence over which he would have no control at all.

No plea of insanity was entered, and the only defence raised was one of automatism. Barry J., thereupon instructed the jury that the question was

whether the accused knew what he was doing when he struck those blows . . . if he did not . . . if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit and no responsibility rests on him at all, then the proper verdict is 'not guilty'.<sup>6</sup>

The accused was acquitted.

<sup>3</sup> *Bratty v. A.G. for Northern Ireland*, [1961] 3 All E.R. 523, 527.

<sup>4</sup> *R. v. Cottle*, [1958] N.Z.L.R. 999 at 1020.

<sup>5</sup> [1955] 1 All E.R. 858.

<sup>6</sup> *Id.* at 864.

It is to be observed that this is a wide, liberal charge. Barry J., made no attempt to classify the unconscious state of the accused as insanity. It would appear that the evidence of the doctor was accepted by Barry J., to the effect that the accused's alleged state was not the result of a disease of the mind. That is, the cause of the unconscious condition was not a mental disease, but an organic illness. Accordingly, the M'Naghten Rules had no application, and although the accused may not have known the nature and quality of his act, he was allowed to leave the dock as a free man. By so ruling, the court clearly recognized a 'middle ground' between sanity and insanity, an area to which no penal consequences would attach, or mental institutions rule.

*Charlson* was considered with approval in the Canadian case of *R. v. Minor*<sup>7</sup> where Martin C.J.S. held on appeal that it was a good defence simply that the accused did not know what he was doing when he 'committed' the offence charged.

In *Minor*, the defence set up was that the accused had received a severe blow to the head and was suffering from a resulting concussion. He would not, therefore, be said to be conscious when he was driving his automobile in the manner alleged by the Crown. The trial judge directed the jury that unless the accused was insane at the time of the act, his lack of consciousness was no defence. In finding this charge to be bad in law, Martin C.J.S. specifically disapproved of *Kasperek*<sup>8</sup> and its attempt to confine defences of unconscious action to the realms of drunkenness and insanity.

In startling contrast to the *Charlson* case is *R. v. Kemp*.<sup>9</sup> The accused, an elderly man of previously unblemished character, struck his wife on the head with a hammer. Here also, there was no rational explanation for the assault. Kemp was charged with causing grievous bodily harm.

At the trial, evidence was led to show that the accused was suffering from arteriosclerosis which caused a congestion of blood in the brain. Medical witnesses agreed that at the time of the attack on his wife, Kemp was in a state of unconsciousness, caused by this congestion of blood. The defence was non-insane automatism. Counsel submitted that a 'disease of the mind' which attracted the M'Naghten Rules did not include illnesses of an organic condition, such as arteriosclerosis, but rather those illnesses of functional origin, such as schizophrenia. *Charlson* was relied upon.

Devlin J., rejected counsel's attempts to classify disease, ruling that the origin of the disease was

irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it, but simply with the mental condition which has brought about the act.<sup>10</sup>

<sup>7</sup> (1955), 15 W.W.R. 433.

<sup>8</sup> [1951] O.R. 776.

<sup>9</sup> [1956] 3 All E.R. 249.

<sup>10</sup> *Id.* at 253.

The learned judge then directed the jury that they ought to find the accused was labouring under a defect of reason caused by a disease of the mind, and that they should return a verdict of guilty but insane.<sup>11</sup>

In an attempt to distinguish *Kemp* from *Charlson*, Edwards wrote

What would seem, therefore, on outwardly similar facts to be conflicting rulings . . . are, in fact, explicable on the basis that whereas in *Charlson*, the medical evidence was agreed that no question arose of the accused suffering from a disease of the mind, in *Kemp* . . . the medical evidence . . . led to the inescapable conclusion that arteriosclerosis is a disease which is capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of the reason and understanding.<sup>12</sup>

With respect, this distinction is much too fine. It would seem obvious that in both cases evidence of a physical injury contributing to, or resulting in, a mental disorder was offered to substantiate a defence of automatism. What has really happened, it is submitted, is that Devlin J. has frowned upon Barry J.'s liberal charge, and narrowed its application to cases other than those where a physical injury results in a mental disorder. It is further submitted, therefore, that Devlin J. must have considered *Charlson* wrongly decided, although he did not say so in *Kemp*.

This conclusion is reinforced by a decision of the New Zealand Court of Appeal in *R. v. Cottle*,<sup>13</sup> where the court was unable to see any grounds for distinguishing between the *cause* of the lack of volition in *Charlson*, and of that in *Kemp*. Disapproving of Barry J.'s finding on the evidence, the court said

if the automatism . . . is shown in evidence to be attributable to an abnormal condition of the mind capable of being designated as a disease of the mind, the judge should submit to the jury the question whether, if there is to be an acquittal, the verdict should not be expressed . . . as an acquittal on account of insanity.<sup>14</sup>

Glanville Williams, supporting *Kemp*, also disapproved of *Charlson*. He thought that the evidence in the latter case was in substance evidence of insanity, which if accepted ought to have resulted in a verdict of insanity.<sup>15</sup> Although the charge in *Charlson* was not objected to as such, it should not have been applied, the learned author reasoned, to a case where insanity was really at issue.

*Hill v. Baxter*<sup>16</sup> is the next case deserving attention. There, the defendant drove his truck through a 'HALT' sign and collided with a car. He was charged with dangerous driving and failing to conform to a 'HALT' sign. Baxter's story was literally "I don't know what happened," and his defence was that he was driving in a state of

<sup>11</sup> It is to be noted that Devlin J. felt he could put the question of insanity to the jury, even though it was not raised as a defence, presumably on the grounds that the accused had put in issue his state of mind by asserting automatism. This is approved in *Bratty, supra*, footnote 3.

<sup>12</sup> *Automatism and Criminal Responsibility* (1958), 21 M.L.R. 375 at 378.

<sup>13</sup> [1958] N.Z.L.R. 999.

<sup>14</sup> *Id.* at 1013 (per Gresson P.).

<sup>15</sup> *Criminal Law—The General Part* 2nd edit. p. 484.

<sup>16</sup> [1958] 1 All E.R. 193.

automatism. He was acquitted by the magistrate on substantially his own evidence.

On appeal to the Divisional Court, it was held that in this case there was insufficient evidence to warrant a finding of automatism. However, two interesting points were discussed by the Court in obiter. With regard to the burden of proof in cases of automatism, Lord Goddard stated,

undoubtedly the onus of proving that he was in a state of automatism must be on [the defendant]. This is not only akin to a defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it.<sup>17</sup>

On the other hand, Devlin J., with whom Pearson J. concurred, thought that insanity was the only defence in which the burden of proof has been held to be completely shifted. [Automatism, by inference, is not in all cases insanity.] Devlin J. went on to say that it is for the defence to lead evidence of automatism, but the persuasive burden to prove every element of the crime [including its voluntariness] rests on the Crown throughout.

Secondly, the court suggested that in those offences in which there is no question of mens rea, i.e., where the act is said to be absolutely prohibited, a defence of automatism is still good. For example, in the case of dangerous driving, it is no defence for the accused to say 'I did not *know* I was driving dangerously'. However, the fact that this offence is absolutely prohibited should only mean that there is no need to prove a specific intent or general foresight of consequences. It would still seem to be a defence to say that the conduct — i.e. the driving, was involuntary.

Therefore, on this point, the court would appear to have held that the defence of automatism involves the denial of an act in criminal law and is not affected by absolute prohibitions.<sup>18</sup>

The questions raised, *obiter*, in *Hill v. Baxter* were discussed in the following year by the Supreme Court of Victoria in the case of *R. v. Carter*.<sup>19</sup>

The accused was charged with three counts; wounding one S with the intent to murder him, wounding S with the intent to do him grievous bodily harm, and driving a motor car on the highway in a manner dangerous to the public.

The Crown alleged that Carter drove deliberately at S, a pedestrian. The defence was that at the time of the alleged offences, the accused (a woman) was in a state of post-traumatic automatism,

<sup>17</sup> *Id.* at 196.

<sup>18</sup> See: Pearson J., p. 149—"if [the defendant] is unconscious in the full sense, he is not driving." See also Lord Goddard at p. 195—"there may be cases where the circumstances are such that the accused could not really be said to be driving at all."

<sup>19</sup> [1959] V.R. 105.

caused by an assault upon her by S about one hour earlier. Prior to Counsel's addresses to the jury, Sholl J., gave rulings on three important aspects of this defence.

Firstly, Sholl J. considered whether the defence amounted to one of insanity requiring a direction in accordance with the M'Naghten Rules. On this point, the learned judge considered that the defence raised the issue of lack of volition to commit the offences, rather than a defect of reason within the rules. However, and more important, if automatism did involve a defect of reason, Sholl J. was not satisfied that the defect under which Miss Carter was allegedly suffering could be said to arise from a 'disease of the mind'. The learned judge considered the meaning of the expression 'disease of the mind' was bound up with the practice established in England in 1800 with the Trial of Lunatics Act — that of remanding into custody a prisoner acquitted on the grounds of insanity in order to protect the public from further violence by a person whose affliction was likely to continue or re-occur. If this view was sound, the learned judge thought it to be

quite outside the policy of the law to extend the practice [of applying the Rules] to cases where there is no reason to fear any repetition of the crime, and no evidence of any brain damage or disease which is likely to give rise to any such repetition.<sup>20</sup>

Accordingly, Carter's defence was held to be distinct from one of insanity, and if accepted, the proper verdict would be one of acquittal.<sup>21</sup>

It is submitted that this approach is both reasonable and sound. It doesn't pretend to hold that all evidences of automatism, however induced, are to be dealt with independently of the M'Naghten Rules. If, as in *Kemp*, the situation arises where automatism is induced by an abnormal state of mind, so that *both* cognition and volition are affected, then the Rules apply and no outright acquittal is available.

Secondly, Sholl J. dealt with the question of the onus of proof where automatism is sought to be established.

Where automatism is raised the position is the same as in the case of drunkenness, provocation, and other such matters. The Crown is not bound in the first instance to negative such possibilities. . . . It must be for the defence in the first instance genuinely to raise the issue . . . then the Crown is bound in the long run to carry the ultimate onus of proving all the elements of the crime *including the conscious* perpetration thereof.<sup>22</sup>

Sholl J. was aware that this decision, in line with the obiter of Devlin J. in *Hill v. Baxter* might encourage attempts to raise unmeritorious defences. Accordingly, he advanced the interesting suggestion that legislation to avoid such evils be enacted, to the effect that if automatism is to be raised notice should be given to the Crown

<sup>20</sup> *Id.* at 110.

<sup>21</sup> Carter was in fact, acquitted on all three charges.

<sup>22</sup> [1959] V.R. 105, 111. The emphasis is added by the writer.

prior to trial, with an opportunity to examine the accused. The penalty for non-observance would be the exclusion at trial of evidence of the accused's mental state.<sup>23</sup>

Thirdly, Sholl J. dealt with the Crown's argument that automatism was not a defence to the charge of dangerous driving, because that offence did not involve *mens rea*. This argument was rejected as the court in *Hill v. Baxter* suggested it should be. Sholl J. held that the fact that a guilty mind is not an element of the offence, is quite distinct from the proposition that a complete lack of volition to perform the *acts* involved in the offence means no offence is committed. That is, a man cannot be criminally responsible for acts of which he is not conscious.<sup>24</sup>

What may be the final word on many of the issues contained in the defence of automatism at least for those jurisdictions bound by the House of Lords' decisions, is contained in a decision handed down last October by that tribunal in the case of *Bratty v. Attorney-General for Northern Ireland*.<sup>25</sup> The facts taken from the headnote, are as follows:

It was not open to dispute that the accused had killed a girl, with whom he was driving in his car, by strangling her with one of her stockings. He gave evidence that "a blackness" came over him, and that "I didn't know where I was. I didn't realize anything". He stated that he had previously experienced "feelings of blackness" and headaches.

The deceased had not been the object of any obvious sexual attack.

Medical evidence was led by the defence to suggest that the accused might have been suffering from psychomotor epilepsy, which was said to be a disease of the mind affecting the reason and which could cause ignorance of the nature and quality of acts done. No other pathological cause for the accused's acts or for a state of automatism on his part was assigned by the medical evidence at trial. The defences of automatism and insanity were raised at the trial.

The trial judge refused to leave the defence of automatism to the jury, but left to them the defence of insanity, which the jury rejected. The accused was then convicted. Although the appeal to the House of Lords was limited to two grounds, viz. whether the defence of insanity having been rejected by the jury, it was open to the accused to rely on a defence of automatism, and if so, whether such defence should have been left to the jury, the court took the opportunity to discuss the whole question of automatism generally.

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<sup>23</sup> *Id.* at 112.

<sup>24</sup> *Id.* at 112-113.

<sup>25</sup> [1961] 3 All E.R. 523.

On the questions presented to them for determination, the House of Lords held that where the only cause alleged for an unconscious or involuntary act is a defect of reason within the M'Naghten Rules, and the jury reject a defence of insanity, there is no room for the alternative defence of automatism.

However, both Viscount Kilmuir, L.C., and Lord Morris of Borth-y-Gest were careful to point out that the rejection of the plea of insanity does not of itself prevent the accused from raising the alternative defence of automatism. Viscount Kilmuir envisaged the somewhat unlikely situation where the accused received a blow on the head, and there was a divergence of opinion whether or not there was a defect of reason from a disease of the mind. The jury could then reject the evidence of disease of the mind, yet find that the accused did not know what he was doing, and acquit. Viscount Kilmuir adds:

that the defence would only have succeeded because the necessary foundation had been laid by evidence which, if properly considered, was evidence of something other than a defect of reason from disease of the mind.<sup>26</sup>

The situation envisaged is somewhat puzzling. How could it be suggested that a man receiving a blow to the head was suffering from a disease of the mind?<sup>27</sup> Perhaps Viscount Kilmuir had in mind an act done some months after the blow, by which time an organic deterioration of the brain had set in. At any rate, the court in the instant case found that all the evidence of involuntary conduct led to the conclusion that there was, if anything, a disease of the mind present, and under those circumstances there was *no* evidence to support automatism, and it could not therefore be left to the jury.

This led the court to a consideration of the evidentiary burden connected with the defence of automatism. On this point, all members of the court held that before a defence of automatism could be left to the jury, a proper foundation must be laid for it by evidence led at trial. That is, the court considered it quite unfair for the accused to be allowed to say at the end of the Crown's case, "I am not saying I was insane at the time of the act, but I am saying that I was acting as an automatism, and you haven't proved beyond a reasonable doubt that I was acting voluntarily", without introducing *medical* evidence to that effect.

Referring with approval to *R. v. Carter*, Viscount Kilmuir stated:

for a defence of automatism to be genuinely raised in a genuine fashion, there must be evidence on which a jury could find that a state of automatism exists . . . the defence must be able to point to some evidence . . . from which the jury could reasonably infer that the accused acted in a state of automatism. Whether or not there is such evidence is a matter of law for the judge to decide.<sup>28</sup>

<sup>26</sup> *Id.* at 528.

<sup>27</sup> For a case of this sort see *R. v. Minor* (1955), 15 W.W.R. 433.

<sup>28</sup> *Id.* at 530.

To this, Lord Denning added with approval words from the obiter of Devlin J. in *Hill v. Baxter*:

the defence of automatism ought not to be considered at all until the defence has produced at least prima facie evidence.<sup>29</sup>

Lord Denning considered that the necessity for laying this proper foundation rested upon the defence

and if it is not so laid, the defence of automatism need not be left to the jury any more than the defences of drunkenness, provocation, or self-defence need be.<sup>30</sup>

It will be noted that the court is only saying here that the accused must lead evidence to support his defence of automatism. Once such evidence is brought forth the court laid down the rule that the burden of proving the act alleged was a conscious one remained, as in all cases excepting those in which insanity is raised as a defence, upon the Crown. On this point, Viscount Kilmuir said that

once the defence . . . have satisfied the judge that there is evidence fit for the jury's consideration, the proper direction is that, if that evidence leaves them in a state of real doubt, the jury should acquit.<sup>31</sup>

Lord Denning held that whereas the ultimate burden rests on the Crown of proving every element in the crime, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes. To displace the presumption, the defence must lead evidence to the contrary, whereupon,

at the end of the day the legal burden comes into play and requires that the jury be satisfied beyond a reasonable doubt that the act was a voluntary act.<sup>32</sup>

Lord Morris of Borth-y-Gest considered that once sufficient evidence of automatism was advanced to merit consideration by the jury:

then the onus which is on the prosecution would not be dislodged unless the jury, having considered [the defence] were sure that guilt in regard to the particular crime charged was established so that they were left in no reasonable doubt.<sup>33</sup>

These pronouncements finally lay to rest the will-o-the-wisp spawned by Lord Goddard in *Hill v. Baxter*, where the learned Chief Justice suggested that a defence of automatism was akin to one of insanity. If that were so, the defence would fail unless it were established that on a balance of probabilities, the acts complained of were involuntary.

Two further observations made by Lord Denning should be noted. Firstly, Lord Denning approved of the obiter in *Hill v. Baxter*, con-

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<sup>29</sup> *Id.* at 535.

<sup>30</sup> *Id.* at 535.

<sup>31</sup> *Id.* at 532.

<sup>32</sup> *Id.* at 536.

<sup>33</sup> *Id.* at 533.

sidering it a good defence to the so-called "absolute prohibition" offences to show that the act was involuntary in the sense that the accused was unconscious at the time and did not know what he was doing. With regard to the dangerous driving line of cases, his Lordship thought that the offence would be committed if the accused drove knowing he was subject to attacks of automatism, despite the fact that he was unconscious at the actual time the car was out of control.

Secondly, Lord Denning disapproved of Barry J.'s reasoning in *R. v. Clarkson*, where the latter held that unconsciousness produced by a cerebral tumor was not a disease of the mind within the M'Naghten Rules. His Lordship said that it seemed to him

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.<sup>34</sup>

## CONCLUSIONS

### (a) *The Nature of Automatism*

A summation of the cases discussed presents the following picture of the attitude of the English courts to our subject.

There is in law a recognized defence to a criminal charge—that of involuntary or unconscious action—called for convenience "automatism". Where the state of automatism is induced by a 'disease of the mind', the accused will be found not guilty by reason of insanity, and will be detained in a mental institution at Her Majesty's Pleasure.

There is, however, an area within the field of automatism that lies without the M'Naghten Rules; where the involuntary conduct is the result of an unconscious state induced by something other than a 'disease of the mind'. What is or is not a disease of the mind is a matter for the determination of the trial judge.

In order to have his defence of automatism left to the jury, the accused must introduce evidence tending to make it a reasonable assumption that he was in fact in such a state as he alleges. Once such evidence is introduced, the onus is on the Crown to prove beyond a reasonable doubt that the accused's actions were voluntary.

The defence may be offered as an alternative to the defence of insanity, provided that evidence to support non-insane automatism, that is, evidence other than that of 'disease of the mind' is introduced.

Automatism is a good defence to an act 'absolutely prohibited' on the ground that, because of the unconscious state, there was no act.

By leading evidence of non-insane automatism, the accused puts his mental state in issue, and the Crown is entitled to lead evidence to show that the accused was insane.

<sup>34</sup> *Id.* at 534.

(b) *Evils and Possible Remedies*

If the picture presented is an accurate summary of the English law on the subject, a remarkably narrow field is left open to non-insane automatism. It would appear that the law has been established more in the rejection of the defence than in the application.

With the exception of *R. v. Carter*, the courts have been reluctant to give any scope to the defence due, no doubt, to the difficulties foreseen if any accused could argue as an excuse for a criminal act that he "simply blacked out". Yet it has been established that sound evidence must be laid to give rise to the defence, and Lord Denning suggested in *Bratty* that no evidence of automatism could be accepted unless it came from a qualified medical practitioner. Coupled with Scholl J.'s suggestion in *Carter* that the defence must give notice, a sufficient safeguard should be found to satisfy the most uneasy court.<sup>35</sup>

Also alarming is Lord Denning's statement in *Bratty* as set out above, that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind", and consequently must attract the verdict of not guilty because of insanity. His Lordship justifies this conclusion by the sentiment that such people are better locked up.

Two elements of his Lordship's opinion are objectionable. Firstly, it is the unfortunate truth that in many instances confinement in a mental institution is little different from a prison sentence, and often at least as lengthy.

Secondly, there would seem to be many illnesses which become 'disorders of the mind' within Lord Denning's definition that can be cured by the surgeon's knife or the physician's prescription. Such mal-functions as diabetes, or the cerebral tumor in *Charlson*, or petit mal epilepsy with its momentary 'black-out' period, could all be said to fit within the definition above-quoted. Indeed, His Lordship specifically disagreed, in *Bratty*, with Barry J.'s finding in *Charlson* to the effect that epilepsy and tumor were outside the M'Naghten requirements for 'disease of the mind'.

The logical and, it is submitted, ludicrous, result of Lord Denning's viewpoint is seen in the position of a diabetic without his insulin. He will experience a black-out, and subsequent 'unconscious' involuntary action. Surely this man cannot be found insane.

It is submitted that there is room here for legislation, or a strong stand by the courts that would relieve sufferers from these illnesses from the unfortunate necessity of relying on the defence of insanity. The legislation would be such that a court would have a greater degree of control over these victims of "fringe" ailments. It

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<sup>35</sup> See on this, Devlin J. in *Hill v. Baxter*, and Williams *Criminal Law—General Part*—2nd ed. p. 482.

might be possible for an accused to get a conditional discharge, subject to his undergoing the proper surgical or medical treatment to cure his complaint, and prevent a recurrence of the unconsciousness.

Also, liability for criminal acts might be founded in negligence, so if our diabetic was acquitted once of a criminal charge, we could consider him to be warned. Then, should his black-out recur because of his lack of care in taking his insulin, the defence of automatism would not be open a second time, as he himself would be at fault. If the second offence was unlawful homicide, the accused could then be convicted of manslaughter.

This would prevent the man who in all conscience cannot be called 'insane' in the accepted sense of the word, from being incarcerated for an involuntary blackout that can be controlled. The warning system would mean that for his second involuntary act, he would be held to stricter account. It has been said that "this would mean that the diabetic, like the proverbial dog, should generally be entitled to one lapse."<sup>36</sup>

Lastly, the courts might base their decisions on "disease of the mind or not" on the question of the likelihood of repetition. An example would be the case of an emotionally-distraught mother becoming hysterical and killing her 13 month old child. In such a situation, the standard used by Sholl J. in *Carter* to determine the factors behind the application of the Rules should be looked to. There may be little danger here of the mother harming again, and although she might vegetate by herself for the remainder of her life, her very harmlessness should be considered, and a verdict of not guilty rendered on the defence of automatism.

It is suggested that this might even be acceptable to Lord Denning who seemed to have doubts about his definition of insanity, as he qualified it subsequently with the thought that, at any rate, repetitive crimes the result of 'black-out' must be found to be the result of an insane mind.

### (c) *General*

It is finally submitted that in the relatively virginal state of our law on the subject, the fledgling defence of automatism must be nurtured into health. Our courts must not allow it to waste away on a diet of distrust, distaste, and nervousness. Our judges must be prepared to see that medical science can prove in some cases that a state of automatic action exists in which the actor is entirely sane. The great gift of automatism as a defence is that this person does not have to face the unhappy alternatives of prison or the mental institution.

Automatism need not be the last refuge of desperate defence, as many critics have suggested. The evidentiary burdens as established,

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<sup>36</sup> Prevazer: Automatism and Criminal Responsibility [1958] Cr. L.R. 361.

finally, in *Bratty* should protect against this. Yet when a case of non-insane automatism is “genuinely raised”, it must be given effect, and if accepted, the accused must be discharged. If this is not done, for any offence short of murder, the accused has the unhappy choice of pleading insanity, or pleading guilty, and

to brand as criminals persons to whom no moral fault can be imputed, and who, through no fault of their own, committed an act . . . which must be regarded as involuntary . . . must be avoided . . . for such a course would undoubtedly tend to weaken respect for the law and eventually bring the law into disrepute.<sup>37</sup>

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<sup>37</sup> *R. v. King* 129 C.C.C. per Schroeder J.A. at 417.