AUTOMATISM AND TRIAL BY JURY

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Automatism has recently come into prominence as an independent ground for exculpating an accused from criminal liability.[1] The defence raises new problems and may force a revision of attitudes to some older problems of the criminal law. It may well prove a lever with which the ungainly bulk of case law on the defence of insanity can be moved in the direction of rationality.

The scope of the plea that the accused acted as an automaton is still doubtful. There are signs that automatism may provide camouflage for the introduction of irresistible impulse as a defence to criminal charges.[2] It is assumed in this article, however, that the plea is confined to cases where the accused acted in an apparently purposive manner whilst unconscious of his actions.[3]

Automatism provides a defence both for offences of strict liability and offences where the prosecution must prove full *mens rea*. The criminal law knows no liability for an unconscious involuntary act or an unconscious involuntary omission.[4] An act or omission by a person in a state of automatism is involuntary and, hence, unintentional. Where the defence is pleaded to an offence of strict liability the courts stress the role of automatism as a denial that the act or omission charged was voluntary. If it is pleaded to an offence where liability is not strict courts tend to stress the role of automatism as a denial of intention. Despite this logical relationship with denials of intention, however, automatism is better classified as one of a number of 'fundamental defects' of behaviour which can be grouped under the generic heading of involuntariness.[5] It is to be distinguished from defences such as accident or mistake, which are denials that an act was done intentionally, but not that it was done voluntarily.

Automatism is referred to as a defence. It is not, however, an

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1 The legal relevance of somnambulism was remarked by Stephen J. in 1889 in *R. v. Tolson* (1889) 23 Q.B.D. 168, 187. However the first case recognizing a specific defence of automatism appears to be *R. v. Harrison-Owen* (1951) 35 Cr.App.R.108.

2 Edwards, 'Automatism and Criminal Responsibility', (1958) 21 *Modern Law Review* 375, *R. v. Carter* [1959] V.R. 105, 109. See also the perceptive comments in Morris and Howard, *Studies in Criminal Law*, 63-4.

3 In *Watmore v. Jenkins* [1962] 2 Q.B. 572, 586 Winn J. said 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'. However, most of the recent automatism cases have been characterized by a semblance of purposive action on the part of the accused whilst unconscious. Compare the mode of analysis in *R. v. Egan* (1897) 23 V.L.R. 159 (overlaying) and *R. v. Cogdon* (unreported), noted in (1951) 5 *Res Judicatae* 29 (somnambulism).

4 Howard, *Strict Responsibility*, 199-201.

5 Hart, 'Acts of Will and Legal Responsibility', *Freedom and the Will* 38.

'affirmative defence'[6] like reasonable mistake of fact and insanity, where the accused must take up the burden of proving his defence on the balance of probabilities. Automatism provides the accused with a means of denying that he acted voluntarily or intentionally and these are fundamental elements in the prosecution's case. It follows from this that the accused cannot be saddled with the burden of persuading the jury that he acted whilst in a state of automatism.[7]

Two main submissions will be advanced:

(1) There must be a 'proper foundation' for the defence of automatism before the trial judge allows the defence to go to the jury for consideration.[8]

(2) There may be a proper foundation for the defence even though the trial judge is of the opinion that the evidence of automatism is consistent only with the conclusion that the accused was insane when he did the criminal act.[9]

The first submission, though uncontroversial, seems in need of justification and explanation. The second has received a mixed reception from the courts. It was rejected by the House of Lords in *Bratty v. Attorney-General for Northern Ireland.*[10]

At the conclusion of the article some problems arising incidentally from the relationship between the defence of insanity and automatism will be treated briefly.

LAYING A PROPER FOUNDATION FOR THE PLEA OF AUTOMATISM

Denying that an Action was Intentional

If a person acts unconsciously his act cannot be described as intentional, reckless or negligent.[11] For present purposes negligence can be ignored as it does not give rise to the problems of evidence associated with intention and recklessness.

Suppose that D1 has assaulted V with a weapon and caused his death. He is charged with murder. P must establish that D1 either intended to kill V or inflict grievous bodily harm on him, or was reckless to the likelihood that V would die or suffer grievous bodily

6 Howard, *Australian Criminal Law*, 20-21.

7 *Ibid.* 21.

8 *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 413, sums up the earlier authorities in support of this submission.

9 *Bratty v. Attorney-General for Northern Ireland, ibid.* 405, 412, 417, presents the arguments against this submission. Nothing conclusive for or against the submission emerges from the English authorities on automatism before *Bratty v. Attorney-General for Northern Ireland.* In Australia the case of *Cooper v. McKenna, Ex parte Cooper* [1960] Q.S.R. 406, 418-9 contains statements inconsistent with the submission.

10 [1963] A.C. 386. Hereafter referred to as *Bratty's* case.

11 Hart, *op. cit.* 41.

harm. D1 denies that he intended, or was reckless as to, the consequences which followed his action. If P cannot disprove D1's denial beyond reasonable doubt D1 may be convicted of manslaughter, but he cannot be convicted of murder. It is implicit in this type of denial that D1 admits that he lashed out intentionally. He maintains that he neither intended nor was reckless as to the *consequences*. He may say that he was drunk and did not realize that he was endangering V's life or well being.[12] He may have acted in the heat of the moment, unthinkingly.[13] In these cases V's death was caused by D1 by an intentional assault.

Compare with D1 a second accused, D2, who is also charged with murder. D2 denies intention or recklessness on the ground that he was unconscious of what he was doing when he caused V's death.[14] He relies on a lack of capacity to form any intention at all when he killed V. One who acts unconsciously acts involuntarily. The involuntary act causing V's death is one which forms no part of 'any plan of action on which the agent [was] consciously engaged'.[15] If this defence cannot be disproved beyond reasonable doubt, D2 cannot be convicted of any crime at all. Not only was D's assault on V unintentional; it was also involuntary.

There is a further difference between these two ways of denying intention or recklessness. D1 speaks with peculiar authority when he says what he intended or realized to be a likely consequence of his acts. Though one may conclude, on the basis of other evidence, that he is lying about his state of mind it must be conceded that he knows, better than anyone else, what his intentions were. The case is different with D2 who denies that he had the capacity to form any intentions at all. He will be able to tell the court that he can remember nothing of what happened, but it does not follow from this that he was unconscious at the time the criminal act was done. The fact that he cannot remember is as consistent with simple amnesia as it is with the hypothesis that he acted unconsciously.[16] Sometimes, it is true, an accused can assert with some confidence that he acted unconsciously. The sleepwalker remembers nothing of his nocturnal exploits, but he may confidently say that he was not conscious when he

12 *Thomas v. R.* (1960) 102 C.L.R. 584, 596-7, followed in *R. v. Gordon* [1964] N.S.W.R. 1024, indicates that intoxication is a factor to be taken into account in assessing D's intentions and beliefs. Intoxication is relevant though it does not produce incapacity to form intentions. *Cf. Director of Public Prosecutions v. Beard* [1920] A.C. 479, 501.

13 The fact that D was provoked and acted in the heat of the moment is a factor to be taken into account when assessing his intentions. See, for example, the South African case of *R. v. Tenganyika* [1958] 3 S.A.L.R. 7, 11.

14 If D2 had the appropriate *mens rea before* he became unconscious and acted involuntarily, automatism will not provide him with a defence. *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349.

15 Hart, *op. cit.*47.

16 Simple amnesia is not a defence to a criminal charge. *Broadhurst v. R.* [1964] A.C. 441.

performed them. He knows that he went to sleep, believes that he performed some act whilst asleep and can now remember nothing. Enough is commonly known about sleepwalking to enable him to reject the possibility that he merely suffers from amnesia. Sometimes, however, the accused may be quite unable to eliminate one of the competing hypotheses.[17]

If an accused says that he acted unconsciously, he makes an *inference* grounded on the facts surrounding the incident and the fact that he cannot remember what happened. He is in no better position to make a correct inference than an outside observer. Indeed, an outside observer with specialized medical knowledge is in a better position to make a correct inference. The accused who asserts that he was unconscious at the time of the criminal act does not speak with the peculiar authority of the accused who simply denies that he had the alleged intent. Both may, of course, be lying. But the man who seeks to rely on automatism may have mistaken simple amnesia for automatism. The man who simply denies intent does not have to rely on an inference about his state of mind: he *knows* what his intentions were and what he realized at the relevant time.

Courts have taken the view that the accused who says that he can remember nothing of his alleged crime does not thereby adduce evidence of a lack of capacity to form an intent fit for the consideration of the jury. He must point to evidence which will exclude the hypothesis that he is merely suffering from amnesia. Only then can the defence of automatism go to the jury. Often it will be necessary for him to call medical evidence. It should not, however, be necessary in all cases.[18] An accused who was seen to receive a blow on the head, who appeared dazed after the blow and who shortly afterwards did a criminal act would adduce evidence of automatism fit for the consideration of the jury though he adduced no specifically medical evidence.[19] It could not be denied, of course, that it is sensible to call medical evidence in all cases where automatism is relied on as a defence.

The distinction between denying intention or recklessness and denying the capacity to form an intention justifies the requirement that the accused establish a 'proper foundation' for the plea of automatism. If an accused merely denies intention or recklessness, explaining what it was that he really intended, his explanations cannot be

17 See, for example, the situation which arose in *R. v. Enright* [1961] V.R. 663, 670-71.

18 *Hill v. Baxter* [1958] 1 Q.B. 277, 285 contains an *obiter* by Devlin J. to the effect that medical or scientific evidence is necessary to enable the court to distinguish between genuine and fraudulent pleas of automatism. There, however, the defendant said that he had been overcome by sudden illness causing automatism. Such a plea *would* require the support of medical evidence.

19 In *Bratty's* case, Lord Morris of Borth-y-Gest accepted that a plea of automatism might be raised on non-medical evidence.

withdrawn from the jury.[20] If he denies that he had the capacity to form any intention at the time, he cannot generally be taken to assert something within his personal knowledge. He must adduce evidence showing that he was unconscious at the time he did the criminal act.

> Before such a condition can be considered by a jury as a reasonable hypothesis of innocence, a proper foundation for such an inference must first appear. A mere assertion by the accused, such as that, 'I had a black-out' will provide no such foundation. . . . It may be added that, by hypothesis, the person has no consciousness or, at least, no memory of the relevant time and so has no capacity to give evidence of his then condition. On this basis his evidence is either a 'refuge' or 'excuse' or, at best, an unqualified opinion of doubtful validity upon a scientific subject.[21]

Courts and learned writers have occasionally tended to the view that the requirement of a 'proper foundation' for the defence of automatism compromises the principles laid down in *Woolmington v. Director of Public Prosecutions*.[22] It is submitted that this is not so. If the accused can only say: 'I cannot remember what happened' and can point to no objective evidence supporting the hypothesis that he was unconscious at the time of his criminal act he has said nothing which is relevant to the question at issue.[23]

Direct and Indirect Evidence of Intention

It has been submitted that there is a distinction to be made between mere denials of intention or recklessness, and denials of the capacity to form an intention at all. A similar distinction has been drawn by the Privy Council in the recent case of *Broadhurst v. The Queen*.[24] Broadhurst was charged with wilful homicide under section 225 of the Criminal Code of Malta. The jury acquitted him of this charge

20 The objective test of intention or foresight adopted in *Director of Public Prosecutions v. Smith* [1961] A.C. 290 has not been followed in Australia. *Parker v. R.* (1963-64) 111 C.L.R. 610, 632-3. In *Vallance v. R.* (1962-63) 108 C.L.R. 56, 83 Windeyer J. said: 'A jury must consider the whole of the evidence relevant to [intention] as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant facts.'

21 *R. v. Tsigos* [1964-5] N.S.W.R. 1607, 1630 *per* Moffitt J.

22 [1935] A.C. 462. See, for example, Glanville Williams, *Criminal Law: The General Part* (2nd ed. 1961) 888.

23 In cases of post-traumatic automatism and in somnambulism cases D asserts that he received a blow on the head, or that he went to sleep, and can remember nothing more. On the basis of general knowledge one would accept that these are not cases of mere amnesia, but of automatism. But 'being hit on the head' and 'going to sleep', are circumstances in which one accepts that the assertion, 'I can remember nothing', implies automatism. Compare with these cases situations where the accused underwent an emotional crisis, did a criminal act, and now remembers nothing. *R. v. Tsigos* [1964-5] N.S.W.R. 1067 and *R. v. Parker* [1963] N.S.W. W.N. 632 provide examples. Here the fact that the accused can remember nothing of what happened is consistent with hysterical amnesia. Medical evidence will be necessary before there is a properly founded hypothesis of automatism.

24 [1964] A.C. 441, 451.

and he was convicted, under section 234, of causing grievous bodily harm from which death ensued. The conviction was quashed by the Privy Council on grounds not directly relevant to the present submission. Broadhurst's wife was found with a fractured skull at the bottom of a short flight of steps outside their flat. The medical evidence was consistent with accidental death but the evidence given by the Broadhurst's neighbours, Mr and Mrs McKinnell, pointed to Broadhurst as the killer. Broadhurst, who was drunk on the night his wife died, said that he remembered nothing before finding her dead body at the bottom of the stairs. There was, however, no evidence that he was in a state of alcoholic automatism.[25] The trial judge adopted the language of Lord Birkenhead in *Director of Public Prosecutions v. Beard*[26] and directed the jury that Broadhurst's intoxication was relevant only if it produced in him an incapacity to form the intention to cause his wife any bodily harm.[27]

The Privy Council upheld this direction, distinguishing between cases where there was 'direct' evidence of the accused's state of mind, and cases where the evidence was not direct.[28] In part, the distinction is between cases where the accused is able and willing to give evidence about his state of mind, and cases where he is not.[29]

> This is not a case in which there is direct evidence about the accused's state of mind and the effect of drink upon it. There is evidence about what the accused did in fact, but what he intended to do is a matter for inference. In a case in which the intent of the accused is to be ascertained solely by inference, nothing short of incapacity need be considered. If an accused cannot himself give evidence about his state of mind, he cannot say what intent he in fact formed or did not form; and it is therefore only if there is material to suggest that by reason of intoxication he could not have formed a guilty intent that the inference which would otherwise naturally have been drawn from the circumstances can be questioned.[30]

So far as the issue of drunkenness is concerned, this reasoning has little to recommend it to Australian courts.[31] However, the distinction between 'direct' and 'indirect' evidence of states of mind is helpful.

[25] *Ibid.* 462. Alcoholic automatism may, in suitable circumstances, provide a complete defence. *R. v. Keogh* [1964] V.R. 400.

[26] [1920] A.C. 479.

[27] The guilty intent required by s. 234 of the Criminal Code of Malta is explained in *Broadhurst v. R.* [1964] A.C. 441, 450.

[28] Compare *R. v. Sharmpal Singh* [1962] A.C. 188. Singh, who was able to give evidence about his state of mind, was unwilling to do so.

[29] If X saw D throwing V down the stairs, would that be 'direct' evidence of D's state of mind? Or is 'direct' evidence limited to statements made by D from his personal knowledge about his state of mind? The question is complicated by the fact that in *R. v. Sharmpal Singh* [1962] A.C. 188 and *Broadhurst v. R.* [1964] A.C. 441 the Privy Council had to distinguish *Director of Public Prosecutions v. Smith* [1961] A.C. 290.

[30] *Broadhurst v. R.* [1964] A.C. 441, 462.

[31] It was suggested in Broadhurst's defence that he might have killed his wife accidentally, whilst 'skylarking'. His drunkenness would appear to be a relevant factor in assessing the likelihood of this story. N. 12 *supra.*

If the accused cannot, or will not, tell the court what his state of mind was, it must be inferred from the objective evidence before the court. Any hypothesis that he did not intend to commit the crime with which he is charged must be properly founded on the evidence. If it is not, the trial judge should not put it to the jury as a possible ground for reasonable doubt of the accused's guilt.

The requirement of a 'proper foundation' for the defence of automatism does not depend on principles peculiar to that defence. It is a general requirement in cases where the accused denies intention, recklessness or negligence, but is unable, or unwilling, to tell the court about his state of mind when he did the criminal act.

AUTOMATISM, INSANITY AND BURDENS OF PROOF

The defence of insanity, in the common law jurisdictions in Australia, is governed by the rules laid down in *Daniel McNaghten's Case*.[32] Should an accused raise the defence of insanity he must prove, on the balance of probabilities, that he suffered from a defect of reason from disease of the mind which either deprived him of the capacity to know the nature and quality of his act, or deprived him of the capacity to know that it was wrong. The remainder of this article is primarily concerned with the first limb of the rules: the proposition that an accused may establish the defence of insanity by proving that he suffered from a defect of reason from disease of the mind which deprived him of the capacity to know the nature and quality of his act.

It has been pointed out on more than one occasion,[33] that the rules allocating the burden of proof between the prosecution and the accused may come into conflict in cases where the accused relies on the defence of insanity. In an extra-judicial address Sir Owen Dixon said:

> It is only since the changed view of the law that any necessity has arisen for attempting to reconcile the application of the two rules in a case of murder where the sanity of the accused is in question, that is to say to explain how the rule that the Crown must prove beyond reasonable doubt that the accused possessed the requisite intent when he killed the deceased is to be applied consistently with the burden placed upon the accused of proving to the reasonable satisfaction of the jury that owing to disease of the mind he did not know the nature and quality of his act or did not know it was wrong and therefore could not possess the requisite intent.[34]

[32] (1845) 10 Cl. & Fin. 200; 8 E.R. 718. Compare Queensland and Western Australian Criminal Codes, s. 27 and the Tasmanian Criminal Code, s. 16, where the common law definition of insanity has been abandoned.

[33] Devlin, 'Responsibility and Punishment', [1954] *Criminal Law Review* 661, 679; Sir Owen Dixon, 'A Legacy of Hadfield, M'Naghten and Maclean', (1957) 31 *Australian Law Journal* 255, 256.

[34] Sir Owen Dixon, 'A Legacy of Hadfield, M'Naghten and Maclean', (1957) 31 *Australian Law Journal* 255, 256. Sir Owen Dixon advanced the view that the

It is far from certain what is meant by the requirement that the accused should not know the nature and quality of his act. The class of persons who have a disease of the mind depriving them of the capacity to know the nature and quality of their acts is not homogeneous. It includes cases where the person acts intentionally and cases where he does not act intentionally. A man may, apparently, do an act intentionally though he does not know its nature and quality.[35] On the other hand, it has been accepted that one who acts unconsciously does not know the nature and quality of his act.[36] To avoid confusion, a person who acts whilst in a state of automatism, whether or not it is caused by a disease of the mind, will be said to have acted 'unconsciously'. In all cases where a person acts unconsciously he can be said not to have known the nature and quality of his act. It is not necessarily true that all persons who do not know the nature and quality of their acts can be said to act unconsciously.

An accused may have acted unconsciously as a result of a defect of reason from disease of the mind. If there is evidence of this he may rely on the defence of insanity. Should this happen it is submitted that the trial judge *must* put the alternative defence of automatism to the jury.[37] Conversely, if the accused seeks to rely on the defence of automatism in a case where there is evidence before the court that he suffered from a disease of the mind, the trial judge must put the possibility of an insanity verdict to the jury.[38]

If the accused is charged with a serious crime and there is evidence of insanity at the time of the criminal act he will normally seek to rely on the defence of insanity. However, in an increasing number of cases the accused has sought to exclude the defence from the jury's consideration. In less serious offences the accused may fear the verdict

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second limb of the McNaghten Rules also leads to a conflict between the rules allocating burdens of proof to the prosecution and the defence. This depends on the proposition that it is for the prosecution to prove *guilty* intent beyond reasonable doubt. It is inconsistent with this to require the defence ever to prove insanity. There is no inconsistency between the rules, so far as the *second* limb of the McNaghten Rules is concerned, if the prosecution has merely to prove intent.

35 In *R. v. Porter* (1936) 55 C.L.R. 182, 188, Dixon J. (as he then was) directed the jury in these terms: 'In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life . . . that to him it is no more than breaking a twig or destroying an inanimate object. In such a case he would not know the physical nature of what he was doing.' Gotlieb, 'Intention, and Knowing the Nature and Quality of an Act' (1956) 19 *Modern Law Review* 270; Glanville Williams *op. cit.* 490-2.

36 '[I]t seems, having regard to the authorities, that the position must be accepted that not to know at all is not to understand the nature and quality of the act.' *R. v. Cottle* [1958] N.Z.L.R. 999, 1009 *per* Gresson P.

37 In *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 405 Viscount Kilmuir L.C. argued that the defence of automatism must be expressly pleaded by the accused. It is submitted that this conflicts with the principle that any defence, which is reasonably open on the facts, should be put to the jury whether or not it has been pleaded by the accused. *R. v. Longley* [1962] V.R. 137, 140-1; Morris and Howard, *op. cit.* 78.

38 *R. v. Kemp* [1957] 1 Q.B. 399. This is further discussed *infra* (page).

of not guilty but insane more than the verdict of guilty. It may be in the interests of the prosecution, on the other hand, to secure a verdict of not guilty but insane where the alternative is outright acquittal. If the accused cannot be convicted because the prosecution cannot prove that he had a guilty mind it may be proper to detain him in custody because he is mentally ill and dangerous to the community. Recent cases on the defence of automatism have shown a new application of the rule that the jury must be satisfied on the balance of probabilities that the accused is insane. Sometimes it may be a beneficial rule on which the accused will rely so that the verdict of not guilty but insane can be avoided. Deeper questions of policy are also raised by these cases. Is it ever permissible for the prosecution to press for a verdict of not guilty but insane? Can the prosecution at least ensure that the jury considers evidence tending to shew that the accused is insane?

The remainder of this article presents an analysis of the relations between the defences of insanity and automatism.

Burdens of Proof

In *Bratty's* case the House of Lords affirmed the principle that the defence of automatism should not be put to the jury if unless there is a proper foundation for it.[39] Their Lordships went on to say that there was no proper foundation for the defence if, in the opinion of the trial judge, the evidence of the accused's state of mind at the time he committed the criminal act was consistent only with the hypothesis that he suffered from a disease of the mind.[40]

George Bratty had strangled a young girl with one of her own stockings. On his own account of it, he had a 'terrible feeling and then a sort of blackness' before he strangled her. In a statement made to the police shortly after the killing, however, he was able to give an account of his actions. He was tried and convicted of murder. The Court of Criminal Appeal in Northern Ireland affirmed the conviction, as did the House of Lords.

Bratty's counsel relied on three different arguments at the trial. It was argued that Bratty was in a state of automatism at the time of the killing and should be acquitted. The cause assigned to the automatism was psychomotor epilepsy. Alternatively, it was submitted that Bratty was guilty only of manslaughter since he was incapable of forming an intent to murder because 'his mental condition was so impaired and confused and he was so deficient in reason that he was not capable of forming' that intent. Finally it was argued that he was guilty but insane. The trial judge left the defence of insanity to the

[39] *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 405, 414, 416.
[40] *Ibid.* 405, 415, 418.

jury but refused to leave the other defences to them. That refusal formed the ground of appeal to the Court of Criminal Appeal and, later, to the House of Lords.

In the House of Lords, Viscount Kilmuir L.C. paid unwarranted attention to the fact that the jury had rejected the defence of insanity:

> Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the M'Naghten Rules, a rejection by the jury of this defence of insanity necessarily implies that they reject the possibility.[41]

It is submitted that the conclusion does not follow from the premises. Viscount Kilmuir L.C. appears to have confused the different burdens of proof in the defences of automatism and insanity.[42] The jury which rejected Bratty's defence of insanity may have done so on the ground that it was not established, on the balance of probabilities, that Bratty suffered from a disease of the mind. They may not have been satisfied that he did not know the nature and quality of his act. They may not have been satisfied that he did not know it was wrong. But it does not follow from this that they rejected the *reasonable possibility* that any, or all, of these propositions were true. The argument appears to confuse satisfaction that a proposition is true on the balance of probabilities with reasonable belief that a proposition *might* be true.

Perhaps Viscount Kilmuir's statement is no more than an unfortunately phrased version of the argument advanced by Lord Morris, with whom Lord Hodson and Lord Tucker agreed:

> 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.[43]

Viscount Kilmuir's statement was prefaced by the condition that it was to apply only where 'the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind'.[44] If that was the case, the defence of automatism would not be available to the accused. The reason for this is not that the jury's rejection of insanity 'necessarily implies' a rejection of automatism: it is because no 'proper foundation' for the defence of automatism was ever laid. The argument put by Lord Morris is the same. In cases where the defence can be classified as one of insanity or

41 *Ibid.* 403.
42 Viscount Kilmuir L.C. accepted that the burden of disproving automatism beyond reasonable doubt lay on the prosecution. *Ibid.* 407.
43 *Ibid.* 418. 44 *Ibid.* 403.

nothing the accused cannot repeat his plea of insanity under the rubric of 'automatism' in order to avoid the rules governing burdens of proof in the insanity defence. There would then be no 'proper foundation' for the defence of automatism and, accordingly, no issue of automatism fit for the jury's consideration.

There is another way of putting the argument which, it is submitted, adds very little to its weight. It depends on the 'presumption of sanity'.

> It was urged that the jury, on a balance of probabilities, might not have considered that the appellant was insane but might have had reasonable doubts as to whether his actions were conscious ones and, accordingly, had this possible view of the matter been left to them they might have returned a verdict of not guilty. The only medical evidence, however, which could lend any support at all to the suggestion that the appellant had acted unconsciously was such evidence as could tend to show that he might have suffered from psychomotor epilepsy—which was a disease of the mind. When the plea of insanity failed the presumption of sanity remained and no medical evidence was adduced which was at all directed to the question whether on the assumption that the appellant was sane he might yet for some reason have acted unconsciously.[45]

The argument comes down to this: if the accused gives evidence of automatism resulting from disease of the mind, the evidence cannot go to the jury except as an attempt to displace the presumption of sanity.

In an attempt to preserve the rules governing burdens of proof in the insanity defence the House of Lords has, it is submitted, created an artificial distinction between pleas of automatism and pleas of insanity. The distinction may be stated most clearly in the form that no proper foundation for the defence of automatism is laid if the evidence is, in the opinion of the trial judge, consistent only with the hypothesis that the accused suffered from a disease of the mind. It is submitted that this is unjustifiable in principle and will make the rules governing burdens of proof unworkable in practice.

Since the decision in *Bratty's* case there have been two cases in which the principles enunciated by the House of Lords have been endorsed. *Reg. v. O'Brien,*[46] a Canadian case, presents a curious variation on the facts of *Bratty*. The appellant had been convicted of attempted murder. At her trial, counsel for the defence relied on the defence of automatism resulting from epilepsy and avoided the defence of insanity. The trial judge concluded that epilepsy was not a disease of the mind and rejected the Crown's contention that the defence of insanity should be put to the jury. The appellant reversed her position at the appeal and argued that the trial judge was in error in withdrawing insanity from the jury. The Appeal Division of the New

[45] *Ibid.* 418. [46] [1966] 3 C.C.C. 288.

Brunswick Supreme Court accepted the submission and ordered a new trial. Epilepsy was, they concluded, a 'disease of the mind' and the defence of insanity should not have been withdrawn from the jury. Two members of the court, relying on *Bratty's* case, went on to say that the defence of automatism should never have been allowed to go to the jury.[47] There was, in their opinion, no proper foundation for the defence as the evidence was consistent only with the hypothesis that the appellant suffered from a disease of the mind.

In *The Queen v. Tsigos*[48] the appellant had been convicted of murder and appealed to the Court of Criminal Appeal of New South Wales. He based his appeal on the grounds that the trial judge should have left the defence of automatism to the jury and that he had failed to give the jury a sufficient or proper direction on provocation.[49] A third ground of appeal, that the trial judge should have left the defence of mental illness to the jury was not pressed.[50] The substantial ground of the appeal court's decision was that there was evidence neither that the accused was provoked, nor that he had acted unconsciously.[51] Moffitt J., however, went further. He said that even if the evidence was sufficient to raise the inference that the accused had acted unconsciously, it was consistent only with mental illness and could not found the defence of automatism.[52]

If these decisions are followed their effect will be to deprive the accused, in certain cases, of the protection afforded by *Woolmington v. Director of Public Prosecutions*.[53] In a passage that has been quoted time and again, Viscount Sankey L.C. laid down the rule which governs the proof of malicious intent:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[54]

47 *Ibid.* Bridges C.J.N.B., 289 and Ritchie J.A. 303.

48 [1964-5]. N.S.W.R. 1607. Tsigos appealed to the High Court on a different ground. The appeal was dismissed, *Tsigos v. R.* (1965) 39 A.L.J.R. 76.

49 The defence of provocation in New South Wales is governed by s. 23 of the Crimes Act 1900. The Privy Council decision in *Parker v. R.* (1964) 111 C.L.R. 665, on which Tsigos relied in his appeal to the Supreme Court of New South Wales, was reached one month after his trial.

50 Mental Health Act 1958 (N.S.W.), s. 23.

51 *R. v. Tsigos* [1964-5] N.S.W.R. 1607, 1609, 1621, 1631.

52 *Ibid.* 1631. Taylor J. may also have taken this view, *ibid.* 1621.

53 [1935] A.C. 462.

54 *Ibid.* 481-2.

Suppose an accused relies on the defence of automatism resulting from epilepsy. Whilst in a state of epileptic automatism he assaulted and killed another and now stands charged with murder. Can the trial judge withdraw the defence of automatism from the jury because, in his opinion, the evidence is consistent only with the hypothesis that the accused suffered from a disease of the mind? If the trial judge can withdraw the defence the consequences are obvious. He may confer upon the jury the power to convict the accused of murder though the jury is not satisfied beyond reasonable doubt,[55] or even on the balance of probabilities,[56] that the accused acted consciously. In such a case the Crown would be absolved from its obligation to prove intention or recknessless. Unless the trial judge has the power to direct the jury to bring in a verdict of not guilty but insane,[57] there is always the possibility that the jury will reject the defence of insanity and convict.

There is a further consequence of the ruling in *Bratty's* case. If the accused relies solely on automatism the jury may be directed that the only alternatives open to them are to convict, or to bring in a verdict of not guilty but insane. In Victoria a person found not guilty but insane is detained during the Governor's pleasure.[58] In practice he is sent to Pentridge and remains there unless the Government medical officers certify him as insane so that he may be sent to a mental hospital.[59] He cannot appeal from the verdict of not guilty but insane as he has, technically, been acquitted.[60] The consequences

55 Though the jury must be told that it is for the prosecution to prove beyond reasonable doubt that the accused intended to kill or inflict grievous bodily harm, or was reckless to the likelihood of death or grievous bodily harm, they would be instructed to disregard the possibility that the accused acted unconsciously. They would then be told to determine whether, on the balance of probabilities, (a) the accused suffered from a defect of reason from disease of the mind and (b) he either did not know the nature and quality of his acts, or did not know them to be wrong. The jury may negative the defence of insanity. It by no means follows, however, that the jury has excluded a reasonable possibility that the accused acted unconsciously.

56 In a case where 'insane automatism' is in issue, *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386 would have it that the accused must establish, on the balance of probabilities, that he did not know the nature and quality of his acts. It does not follow from this that the defence of insanity will only fail if the prosecution can establish, on the balance of probabilities, that he *did* know the nature and quality of his acts. On proving a proposition on the balance of probabilities, *Murray v. Murray* (1959-60) 33 A.L.J.R. 521, 524; *Hichens v. R.* [1962] Tas. S.R. 35, 56-7.

57 This appears to have been the course taken in *R. v. Kemp* [1957] 1 Q.B. 399.

The Courts of Criminal Appeal are statutorily empowered to substitute an acquittal on the ground of insanity in appropriate cases: Crimes Act 1958 (Vic.), s. 569(4); Criminal Appeal Act 1912 (N.S.W.) s. 7(4); Criminal Law Consolidation Act, 1935-57 (S.A.) s. 354(4); Western Australian Code, s. 693(4); Queensland Code s. 668F(4); Tasmanian Code, s. 403(4). However the appeal court may be unwilling to disturb the verdict of a jury which has rejected the defence of insanity; *Hichens v. R.* [1962] Tas. S.R. 35.

58 Crimes Act 1958, s. 420.

59 *A Plea for Justice*, prepared by a Special Committee of the Victorian Central Executive of the Australian Labor Party. (See review in this issue.)

60 Crimes Act 1958, s. 420; *R. v. Meddings* [1966] V.R. 306, 311.

of an acquittal on the ground of insanity are so severe that the defence is rarely raised to a charge less than murder. In cases where the prisoner has been acquitted of murder by reason of insanity he is dealt with in substantially the same way as a prisoner convicted of murder whose sentence of death has been commuted.[61] It is surely indefensible to absolve the Crown from its obligation to prove all the elements of murder and leave the jury to choose between the two evils of conviction or acquittal on the ground of insanity.

This discussion of the consequences of *Bratty's* case has, so far, been confined to the use of automatism as a defence in murder trials. There is no indication, however, that the House of Lords intended its ruling to apply only in murder trials. Automatism is a defence to any criminal charge. If *Bratty's* case is to be followed, an accused pleads automatism at his peril. No matter what the charge, the trial judge can withdraw the defence from the jury if, in his opinion, the evidence is consistent only with disease of the mind.

The rule that the accused bears the burden of proving insanity on the balance of probabilities is an exception to the basic principle enunciated in *Woolmington*. It is probably too late for this exception to be abolished by the judiciary. It is surely not too late, however, for courts to rule that the exception cannot infringe upon the principle that it is for the prosecution to prove intent beyond reasonable doubt. Whatever the position in the United Kingdom, Australian courts are still free to do so.[62]

In *Bratty's* case the House of Lords attempted a rigorous separation of the defences of automatism and insanity. The judge, it was said, has the power to withdraw automatism from the jury if the evidence is consistent only with insanity. However, it was conceded that there might be cases where both defences should be put to them:

> What I have said does not mean that, if a defence of insanity is raised unsuccessfully, there can never, in any conceivable circumstances, be room for an alternative defence based on automatism. For example, it may be alleged that the accused had a blow on the head, after which he acted without being conscious of what he was doing or was a sleepwalker. There might be a divergence of view as to whether there was a defect of reason from disease of the mind (compare the curious position which arose in *Reg. v. Kemp*). The jury might not accept the evidence of a defect of reason from disease of the mind, but at the same time accept the evidence that the prisoner did not know what he was doing. If the jury should take that view of the facts they would find him not guilty. But it should be noted that the defence would only have succeeded because the necessary foundation had been laid by positive

61 *A Plea for Justice*, 14.

62 The High Court no longer considers itself persuasively bound by decisions of the House of Lords, *Parker v. R.* (1963-4) 111 C.L.R. 610, 632-3; *Skelton v. Collins* (1966) 39 A.L.J.R. 480. The course of proceedings in *Skelton v. Collins* indicates that the State courts will not consider themselves so strictly bound to follow the House of Lords as was previously the case.

evidence which, properly considered, was evidence of something other than a defect of reason from disease of the mind.[63]

Viscount Kilmuir L.C. appears to have had two sorts of case in mind. Suppose that there is evidence that an accused acted unconsciously. The issue is whether his unconscious action was caused by a mental disease, or a condition consistent with sanity. The prosecution and the defence may offer alternative and independent causal accounts of the unconscious action. For example, the defence may rely on alcoholic automatism, while the prosecution contends that the accused suffered from epilepsy, the attacks being precipitated by intoxication.[64] The jury's decision to bring in an outright acquittal or an acquittal on the ground of insanity may depend entirely on which of the two competing accounts they accept. The question whether epilepsy is a disease of the mind may be of little importance. There may, however, be a second type of case where there are not alternative causal accounts of the accused's unconscious action. The accused may have acted unconsciously because there was a congestion of blood in his brain caused by arteriosclerosis.[65] Here the question is whether arteriosclerosis is a disease of the mind.

Bratty's case envisages four possible situations which might arise in cases where there is evidence that the accused acted unconsciously.

(1) The evidence given in support of the plea of automatism is consistent, in the opinion of the trial judge, with insanity only. The defence of automatism will be withdrawn from the jury in favour of insanity.

(2) The evidence given in support of the plea of automatism points to a condition on the borderline between disease of the mind and sanity. Here both defences will go to the jury.

(3) There is some evidence which points to what is undoubtedly a disease of the mind and other evidence, independently capable of supporting the plea of automatism, which is consistent with sanity. Here both defences will go to the jury.

(4) The evidence offered in support of automatism does not raise any inference that the accused suffered from a disease of the mind. Automatism alone will be put to the jury.

The task of the trial judge who has to direct a jury in cases like (2) and (3) is daunting. If *Bratty's* case is to be followed he must put to the jury a complicated series of propositions about burdens of proof which will test the jury's understanding to the uttermost. If the jury is not satisfied on the balance of probabilities that the accused suffered from a disease of the mind, the prosecution must prove that the accused did not act unconsciously beyond reasonable doubt. If,

63 *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 403.
64 *Cf. R. v. Keogh* [1964] V.R. 400 and *R. v. Meddings* [1966] V.R. 306.
65 *R. v. Kemp* [1957] 1 Q.B. 399; *R. v. Holmes* [1960] W.A.R. 122.

on the other hand, the jury is satisfied on the balance of probabilities that the accused has a disease of the mind they must then decide whether he acted unconsciously on the balance of probabilities. In a short article written after the decision of the House of Lords in *Bratty's* case, Professor Rupert Cross said:

> The mind boggles at the thought of the effect of such a summing up upon the ordinary English jury, and the magnitude of the task of the judge who has to direct them.[66]

It has been submitted that the approach of the House of Lords in *Bratty's* case is indefensible in principle and affords no practical guidance to the trial judge.[67] An analysis of the rules allocating the burdens of proof in criminal trials suggests an approach by which these objections can be avoided.

The prosecution bears the burden of proving that the accused did a forbidden act voluntarily, or voluntarily omitted to do that which he should have done. In many offences the prosecution must go beyond the obligation to prove that the act or omission was voluntary. It must be shown to have been intentional, reckless or negligent. However the prosecution is never obliged to prove that the accused is sane. The verdict of not guilty but insane can only be returned by the jury if they are satisfied, on the balance of probabilities, that the accused is insane.

The logical consequences of these accepted principles are clear. The defence of insanity raises a separate issue in a criminal trial. Insanity may be proved whether or not the prosecution can establish beyond reasonable doubt that the accused acted voluntarily, intentionally, recklessly or negligently. It is not contradictory to imagine an accused who did a criminal act intentionally whilst insane within the meaning of the McNaghten Rules. There is similarly no difficulty in imagining an accused who was insane and who did a criminal act unconsciously.

If the prosecution cannot establish that the accused acted voluntarily, intentionally, recklessly or negligently, depending on the definition of the crime, the accused should run no risk of being convicted. Evidence, whether consistent with sanity or not, which tends to throw doubt on the prosecution's case should be considered by the jury. The prosecution's task should not be lightened by excluding evidence directed to the issue of voluntariness, intention, recklessness or negligence because, in the trial judge's opinion, the evidence is consistent only with the hypothesis that the accused

66 'Reflections on Bratty's Case', (1962) 78 *Law Quarterly Review* 236, 238.

67 In the two recent cases, *R. v. Tsigos* [1964-5] N.S.W.R. 1607 and *R. v. O'Brien* [1966] 3 C.C.C. 284, no consideration is given to the need to rationalize the trial judge's task in cases where both automatism and insanity are raised on the facts.

suffers from a disease of the mind. If the prosecution cannot establish the elements of its case there remain two possibilities: outright acquittal or acquittal on the ground of insanity. It is only when the jury comes to consider these alternatives that the *burden of proving* insanity becomes important. If the jury is satisfied, on the balance of probabilities, that the accused is insane he will be found not guilty but insane. If they are not satisfied, on the balance of probabilities, that he is insane he must be acquitted outright.

Insanity is also available as a defence, provided there is evidence to support it, in cases where the prosecution *can* establish the elements of its case beyond reasonable doubt. The most obvious class of cases are those where the evidence suggests that the accused suffers from a disease of the mind which, though it does not deprive him of the capacity to act intentionally, prevents him from knowing that his acts are wrong.[68] Here the alternatives before the jury are conviction or acquittal on the ground of insanity. The burden of proving insanity only becomes relevant when this choice has to be made.

The question whether the accused must be found not guilty but insane is one which arises after the prosecution has established, or failed to establish, the elements of its case beyond reasonable doubt. Only by adopting this analysis can the clash between the obligation of the prosecution to establish that the accused acted voluntarily, intentionally, recklessly, or negligently and the need to establish insanity on the balance of probabilities, be avoided.[69] To absolve the prosecution from its obligation to prove the mental element of a crime in cases where there is evidence that the accused is mentally ill is no more justified than to absolve it of the obligation to prove that it was the accused, and not some other person, who did the criminal act.

It does not follow from this analysis 'that in every case where insanity is raised, automatism must always be left to the jury as a defence'.[70] Automatism is left to the jury only in cases where there is a proper foundation for the hypothesis that the accused acted unconsciously. Those who act consciously but do not know their acts to be wrong because they suffer from a disease of the mind cannot rely on the defence of automatism. Some who do not know the nature and quality of their acts cannot be said to have acted unconsciously.[71]

68 This is by far the most important category of insane defendants. Devlin, *op. cit.* 678-9.

69 These submissions were argued, unsuccessfully, before the House of Lords in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 402. Similar arguments have been advanced by Glanville Williams, both in *Criminal Law: The General Part*, 886-891, and in an essay, 'Automatism' in *Essays in Criminal Science*, 345.

70 *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 404, *per* Viscount Kilmuir L.C.

71 *R. v. Porter* (1936) 55 C.L.R. 182, 188.

It is only in those comparatively uncommon cases where there is evidence that the accused acted unconsciously and evidence that he suffers from a disease of the mind, that both defences must go to the jury.

There is, however, one disturbing consequence of these arguments. In cases where the accused did a criminal act unconsciously the prosecution will be unable to prove the elements of its case. The accused cannot be convicted because he acted in a state of automatism. Very often he will seek to avoid the defence of insanity: the verdict of not guilty but insane may be as unwelcome as a verdict of guilty. If he can successfully exclude evidence tending to show that he is insane from the jury the community may be endangered by a person who, whilst not criminally responsible, should be detained in custody as insane. This problem will be treated briefly in the concluding pages of the article.

The analysis which has been advanced is not without support. The cases are of two kinds: those where the argument centred on the defence of automatism and those where difficulties in allocating the burdens of proof arose where only the defence of insanity was pleaded.[72] Most are the decisions of trial courts and, in a formal sense, no great authority can be claimed for them. But it has been contended that the rule in *Bratty's* case is unworkable as a guide to the trial judge. In the light of this, the reports of decisions at first instance are important.

Reg. v. Cottle[73], a decision of the New Zealand Court of Appeal, was cited to the House of Lords in *Bratty's* case and formed the basis for the argument of counsel for the defence. Only Viscount Kilmuir L.C. dealt with the case at length. Lord Morris did not mention it at all and Lord Denning accords it only a fleeting reference. This was cavalier treatment for a case which contains the most painstaking review of the authorities on automatism to date.

Cottle was an admitted epileptic whose attacks could be triggered by the consumption of alcohol. He was convicted of breaking and entering a warehouse and committing theft in company, of mischief, and of having in his possession implements of housebreaking.[74] He appealed, the conviction was quashed and a new trial was ordered. The appeal was upheld on grounds not relevant to this article and the extended treatment of automatism by all members of the court was technically *obiter*.[75]

72 Automatism has been exploited as a defence only in comparatively recent times. However, many of the problems presented by the defence arose in earlier cases where the only defence pleaded was insanity.

73 [1958] N.Z.L.R. 999.

74 Crimes Act 1908 (N.Z.) ss. 278, 282, 328-340.

75 Cottle's appeal succeeded on the grounds that the trial judge had failed to give the jury the usual warning regarding the evidence of an accomplice and failed to direct the jury regarding the probative content of the accomplice's evidence.

It is submitted that the interpretation given to *Reg. v. Cottle* by Viscount Kilmuir L.C. cannot be sustained. North J. gives, perhaps, the clearest summing up of the principles governing the defence of automatism in cases where insanity is in issue. It was this judgment which formed the basis of the arguments advanced by Bratty's counsel before the House of Lords.

> In my opinion, in the present case the medical evidence called by the defence did raise the issue of the prisoner's sanity. It was claimed that the crimes may have been committed while the prisoner was still suffering from the effects of an epileptic fit. The principal medical witness agreed that the prisoner's condition could be described as 'a disease of the mind'.
>
> In these circumstances, I think that it was proper for the Judge to rule that in substance and in fact a plea of insanity had been raised by the nature of the evidence called by the defence. It follows then that, in my view, the direction of the trial Judge would have been right if he had so treated the defence. For the reasons I have earlier mentioned, however, as the authorities at present stand, he could not treat a plea of automatism as something akin to insanity, and therefore subject to the same rule as to the burden of proof, for this would be an unwarranted extension of the rule laid down so positively in *Woolmington's case. Furthermore, I think the trial judge was obliged also to deal with the case on the assumption that the jury might be of opinion that it had not been shown that the prisoner was suffering from a disease of the mind, for this in the final result is within the province of the jury.*[76] In the ordinary run of cases, no difficulty would be experienced for, if the jury rejected the defence of insanity, a verdict of guilty would be likely to be given. This for the reason that the jury would only go on to consider the special defence, if it were already convinced that the Crown had proved to its complete satisfaction that the act had been committed by the prisoner and—if he was sane—in circumstances which compelled the conclusion that the act was deliberate and intentional. Therefore, if the plea failed, in the nature of things the jury must have been satisfied that the prisoner still possessed sufficient understanding to be held criminally responsible for his act. On the other hand, in cases like the present one, where the form of the plea is that the prisoner acted unconsciously—in a state of automatism—the rejection of the evidence that he was suffering from a disease of the mind does not wholly dispose of the defence, for it is still possible, though perhaps unlikely, that the jury may not be completely satisfied that the act was the conscious and intended act of the prisoner. In my opinion then, the presiding judge must anticipate this possible situation. He must be careful to tell the jury that—apart from the plea of insanity—the onus of proving all the facts necessary to establish guilt rests on the Crown and remains with the Crown throughout the trial. Consequently, if the jury is of opinion that it has not been made out that the prisoner was suffering from a disease of the mind, it must remember that it is the responsibility of the Crown to satisfy it that the prisoner did know and understand the nature of the act he committed.[77]

76 Author's italics.

77 *R. v. Cottle* [1958] N.Z.L.R. 999, 1029-30. Counsel for the defence in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386 relied on this section of

Cleary J., in a separate judgment, agreed with North J.[78] The judgment of Gresson P., though less clear, is consistent with the judgments of Cleary J. and North J.[79]

Viscount Kilmuir L.C. remarked that the New Zealand Court of Appeal had unanimously agreed that the defence of automatism could not go to the jury unless there was a proper foundation for the plea.[80] He concluded:

> That foundation . . . is not forthcoming merely from unaccepted evidence of a defect of reason from disease of the mind. There would need to be other evidence on which a jury could find non-insane automatism. What the Court of Criminal Appeal say about the onus of proof must be read in the context of evidence directed simultaneously to defences of insanity and automatism.[81]

It has been pointed out that the trial judge cannot ask himself whether the evidence of a defect of reason from disease of the mind has been accepted by the jury when he comes to direct them. Moreover, the fact that the jury was not satisfied that the accused was insane affords no guidance to an appeal court which is required to decide whether the defence of automatism should have been put to the jury. It is submitted that *Reg. v. Cottle* stands for the proposition that both automatism and insanity should be put to the jury if there is evidence that the accused acted unconsciously as a result of a disease of the mind. The New Zealand Court of Criminal Appeal accepted that the accused might lay a proper foundation for the defence of automatism though, in the opinion of the trial judge, automatism was caused by a disease of the mind. It was for the jury to say that the defence of automatism was not available because the accused was insane: it was not a question for the trial judge.[82] *Reg. v. Cottle* is opposed to the principles laid down in *Bratty's* case. It cannot be reconciled with that decision. It advances a view which is firmly based on the fundamental principles of the criminal law. Evidence directed to the issues of voluntariness, intentionality, recklessness or negligence cannot be withdrawn from the jury because it is consistent only with the hypothesis that the accused suffers from a disease of the mind.

North J.'s judgment to support his submission that the defence of automatism should have been allowed to go to the jury. When he came to deal with the submission, Viscount Kilmuir L.C. quoted the section, omitting the italicised words and the sentences immediately following.

78 *Ibid.* 1034-6. 79 *Ibid.* 1021-22.

80 *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 405; *R. v. Cottle* [1958] N.Z.L.R. 999, 1013, 1025, 1033.

81 *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 405.

82 *R. v. Cottle* [1958] N.Z.L.R. 999, 1034 *per* Cleary J.: 'Although I think that the direction should have been that the jury could properly find on the evidence that there was a disease of the mind, I would add that I do not think it could be told that it could not do otherwise. *It is in the end a matter for the jury to find whether there was present a disease of the mind,* and whether it was present to an extent that prevented the accused from being held criminally responsible for his actions.' (Author's italics.)

There is at least one Australian case where the approach taken in *Reg. v. Cottle* has been preferred. *The Queen v. Holmes*[83] is one of the very few cases where the direction to the jury in an automatism case has been reported.[84] It is submitted as an exemplification of the principles enunciated by the New Zealand Court of Criminal Appeal.

Holmes was charged with wilfully causing an explosion likely to cause injury.[85] It was argued in his defence that he acted unconsciously and his counsel advanced the defence of automatism. Jackson S.P.J. put both automatism and insanity to the jury though Holmes' counsel argued that Holmes was not insane and sought to exclude the defence of insanity from the jury. The only medical evidence before the court showed that Holmes suffered from a premature hardening of the arteries which, under the stress of strong emotion, would cause a restriction of the blood supply to the brain.[86] Jackson S.P.J. gave the following instructions to the jury:

> If you accept Dr Hunt's evidence which was the only medical evidence produced to you, and it seems difficult to see why you should not accept it, then I am bound to tell you that evidence does support a finding of a disease affecting the mind, and if in fact you conclude that on this occasion it resulted in the accused losing his capacity to understand what he was doing or to control his actions or to distinguish right from wrong, then the proper verdict would be not guilty on the ground of unsoundness of mind at the time.[87]

After instructing the jury on the defence of not guilty on the ground of unsoundness of mind, His Honour returned to the defence of automatism. He concluded:

> [I]t is for the Crown to prove the accused guilty and not for him to prove his innocence. It is for the Crown to show you that he did this act wilfully and unlawfully and it is for the Crown to establish that he was acting consciously and not as an automaton.[88]

The Queen v. Holmes accords with the judgments in *Reg. v. Cottle*. The jury could not convict unless they were satisfied, beyond reasonable doubt, that the accused acted voluntarily. Nor could they bring in the verdict of not guilty on the ground of unsoundness of mind if they were not satisfied, on the balance of probabilities, that Holmes suffered

83 [1960] W.A.R. 122.

84 Though *R. v. Kemp* [1957] 1 Q.B. 399 and *R. v. Meddings* [1966] V.R. 306 are reported at first instance, the judge's direction to the jury is not included in the report.

85 Western Australia Code, s. 454. Under s. 23 of the Code, 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'. S. 27 provides that, 'a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission'.

86 *Cf. R. v. Kemp* [1957] 1 Q.B. 399.

87 [1960] W.A.R. 122, 126.

88 *Ibid.* 127.

from a disease of the mind. The possibility of an outright acquittal on the ground of automatism was not withdrawn from the jury though the only medical evidence indicated that Holmes suffered from a disease of the mind. Their verdict of not guilty on the ground of unsoundness of mind is some indication that juries do not necessarily behave irresponsibly when they have to choose between the alternatives of outright acquittal on the ground of automatism and the insanity verdict.

Proving Insanity on the Balance of Probabilities

It is unlikely that defence counsel would fail to raise the plea of automatism nowadays, if there is evidence that the accused acted unconsciously when he did the criminal act. The case of *The King v. Johnson*[89] was decided in 1938 however, before the revival of the defence of automatism. It is important for its analysis of the rules for allocating burdens of proof in cases where the prosecution's obligation to prove intention or recklessness comes into conflict with the accused's obligation to prove insanity. More important, perhaps, is the role of the decision in arguments for and against the rule that insanity must be proved affirmatively before the jury can bring in the verdict of not guilty but insane.

Johnson was tried for murder, convicted and executed. His defence was that he was insane at the time he killed. The evidence of insanity tended to show that he could have had no intention to kill or inflict grievous bodily harm. Lowe J., the trial judge, had to direct the jury in terms which made it clear that it was for the prosecution to prove intention and for the accused to prove insanity. Proving insanity, however, appeared to involve disproving intention. It is difficult to say how often this conflict has arisen, as it is rare for the trial judge's direction to the jury to be reported in cases where insanity is relied on as a defence.[90] Lowe J. directed the jury in the following terms:

> It seems to me you will have no difficulty in arriving at the first step, that the accused did kill these two men on the 3rd October as is charged. The whole burden of your investigation will come as to the question of whether he wilfully killed them, and that is wrapped up in this case with the question of insanity as I have explained it more than once to you. My last words to you are these:—that it is for the prisoner to satisfy you that he was insane at the time he did this deed, if you think he did it;[91] but if you are left in reasonable doubt at the end of the case as to

89 Unreported. The direction to the jury is extracted in 'The Defence of Insanity and the Burden of Proof', by J. V. Barry Q.C. (as he then was) in (1939-41) 2 *Res Judicatae* 42, 47-8. The case was decided in 1938 by Lowe J. in the Victorian Supreme Court.

90 The classic direction given by Dixon J. (as he then was) in *R. v. Porter* (1936) 55 C.L.R. 182 involved no conflict of the rules governing allocation of the burden of proof.

91 It is submitted that the meaning of this passage becomes clearer if the sentence is read: '. . . if you think he did it *wilfully*.'

> whether by reason of insanity he did wilfully kill these two men, then he is entitled to be acquitted. If you have no reasonable doubt, that, I suggest to you, is a verdict of guilty of murder. If you are left in reasonable doubt by reason of the defence of insanity which has been raised, I suggest to you that the verdict is not guilty on the ground of insanity.[92]

The language is not altogether clear. The phrases, 'beyond reasonable doubt' and 'on the balance of probabilities', occur in uneasy juxtaposition. When the extract from the case is read as a whole, however, it appears that Lowe J. distinguished between two forms of insanity. Insanity which was consistent with proof of intent beyond reasonable doubt was to be established to the satisfaction of the jury on the balance of probabilities. If, however, the evidence of insanity tended to show that the accused could not have intended to kill or inflict grievous bodily harm the accused was not required to establish insanity on the balance of probabilities. It was enough if the jury reasonably doubted that the accused intended to kill or inflict grievous bodily harm because of insanity.[93]They might then return the verdict of not guilty but insane. In this way the conflict between the obligations of proving intention and insanity was avoided.

The direction of Lowe J. is open to some criticism now that the defence of automatism is available. If the conflict between the rules allocating burdens of proof is to be avoided, it is only necessary to adhere to the rule that the accused is never required to prove that he acted involuntarily, without intent or without recklessness. To the extent that proving insanity under the McNaghten Rules does not require the accused to prove any of these propositions there is no inconsistency in requiring the accused to prove that he was insane.[94] In particular, there is no need to abandon the rule that the jury must be satisfied, on the balance of probabilities, that the accused suffered from a defect of reason from disease of the mind before they can return the verdict of not guilty but insane. Analysis of the defence of automatism shows that this rule is sometimes a hurdle for the defence whilst in other cases it is a protective barrier. If the prosecution cannot establish that the accused acted voluntarily, intentionally or recklessly, there seems little reason to confine the accused to a mental

92 Barry, *op. cit.* 48.

93 A similar interpretation of the direction is suggested in Barry, *loc. cit.* n. 31.

94 It has been argued, on different grounds, that the burden of proving insanity should *never* rest on the accused. *R. v. Johnson op. cit.* was cited in support of this argument in the dissenting judgment of Monahan J. in *Mizzi v. R.* (1960), an unreported decision of the Full Court of the Victorian Supreme Court. Monahan J. argued, in *obiter*, that it was sufficient if the accused could establish a reasonable doubt of his sanity in any case where the defence of insanity was properly raised on the evidence. *Mizzi v. R.* is discussed by Morris and Howard, *op. cit.* 56-61. Mizzi appealed from the decision of the Full Court to the High Court. The High Court upheld the appeal, *Mizzi v. R.* (1960) 105 C.L.R. 659. Though it was argued argument appears in the judgment of the court.

institution because the jury feels that there is a bare possibility that he suffers from a disease of the mind. It is submitted that they should be satisfied of his insanity on the balance of probabilities before finding him not guilty but insane. Automatism is pleaded as a defence to many offences where the accused would fear the insanity verdict more than a conviction.

This criticism of *The King v. Johnson* affords a countervailing consideration when one comes to assess the proposal advanced by Monahan J. in *Mizzi v. The Queen*[95] Monahan J. said *obiter*:

> May it not be that the persuasive onus of proving *mens rea*[96] always remains with the prosecution, even when, to adopt the words of section 420, 'It is given in evidence' that the accused person was insane at the time of commission of the offence? May it not also be that the *giving of evidence* to that effect, that is, the satisfying of the evidential onus, was what Lord Hailsham had in mind in *Sodeman's case*?

If the proposal is adopted by the courts, the accused who pleads automatism would be deprived of the protection afforded by the rules governing burdens of proof of insanity. Unless the legislation governing the disposition of insane offenders is revised, this may be too high a price to pay for the abadonment of the rules governing proof of insanity.

CONCLUSION

In cases where a proper foundation has been laid for the hypothesis that the accused acted unconsciously it is the duty of the trial judge to put the defence of automatism to the jury. This accords with principle, and, it is submitted, would make the task of the trial judge easier. It is not denied that there is a strong case for a comprehensive scheme of legislation to eliminate the anomalies in the defence of insanity. In the present state of the law governing the disposition of insane offenders however, the rules for proving insanity should not be radically changed. On the other hand, they should not be allowed to infringe on the principle that it is for the prosecution to prove that the accused acted voluntarily, intentionally, recklessly or negligently beyond reasonable doubt.

FURTHER PROBLEMS OF INSANITY AND AUTOMATISM

The defence of automatism casts some traditional problems of the criminal law into relief and it raises some new problems. If the artificial distinction proposed in *Bratty*'s case finds acceptance in

95 *Mizzi v. R.* (1960) unreported (transcript 24).

96 *Mens rea* does not merely refer to intention, or recklessness, as a state of mind. It refers to a *guilty* state of mind. Proving that an accused had a guilty mind requires proof, or an assumption where there is no evidence to the contrary, that the accused was sane at the time of the criminal act.

Australian courts, some of these problems may be shelved. It seems better, however, to face them squarely, for an analysis of the defence of automatism will often provide courts with arguments which will enable these problems to be solved. The remainder of this article is concerned to expose problems, rather than to offer solutions.

Defining 'Disease of the Mind'

Insane automatism is distinguished from sane automatism by the presence of a 'defect of reason from disease of the mind'. As the distinction between sane and insane automatism is more often made, it is becoming increasingly apparent that medical definitions of disease of the mind are of little help to a court charged with the duty of interpreting the McNaghten Rules.[97] In *The Queen v. Carter*[98] Sholl J. devised the following criterion for distinguishing the diseased from the normal mind:

> It is . . . quite outside the policy of the law to extend the practice of section 420 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.[99]

The test, which is derived from the speech of Lord Denning in *Bratty's* case, was applied by Sholl J. in *The Queen v. Meddings*.[1] It seems to be inapplicable in cases other than those where the defence of automatism is open on the evidence and it implies that there cannot be insanity which is temporary and which is not likely to recur.[2] Again, it is one thing to say that there is a disease of the mind if a certain mental state is likely to recur: it is quite another to say that there is a disease of the mind only in those cases where there is a likelihood that a *crime* will recur as the result of a recurring state of mind. These issues require clarification. Whether a satisfactory solution can be found is doubtful. Arguments about the legal meaning of 'defect

97 There is a growing number of cases where, though the medical evidence was to the effect that the accused did not suffer from a disease of the mind, the defence of insanity has been put to the jury, or it has been said on appeal that the trial judge should have put insanity to the jury. E.g.: *R. v. Kemp* [1957] 1 Q.B. 399; *R. v. O'Brien* [1966] 3 C.C.C. 284. In *R. v. Charlson* [1955] 1 W.L.R. 317 Barry J. relied on medical evidence and did not allow the issue of insanity to go to the jury. This course was criticized by North J. in *R. v. Cottle* [1958] N.Z.L.R. 999, 1028 and Lord Denning in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 411.

98 [1959] V.R. 105.

99 *Ibid.* 110.

1 [1966] V.R. 306. In a number of cases the question, 'Is the state of mind which caused the crime likely to recur?' has been asked. Only in some of these cases is the question a *criterion* for the existence of a mental disease. *Cf. Hill v. Baxter* [1958] 1 Q.B. 277, 285-6 and *R. v. Tsigos* [1964-5] N.S.W.R. 1607, 1631. With the exception of Sholl J. who based his argument on the speech of Lord Denning in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 412, no judge has adverted to the question, 'Is the criminal act likely to recur as a result of his mental state?'

2 *R. v. Cottle* [1958] N.Z.L.R. 999, 1031.

of reason from disease of the mind' are unsatisfactory because they reflect the present unsatisfactory state of the law governing the disposition of insane offenders. The remedy is, of course, legislative and not judicial.

Persons found not guilty but insane in Victoria are detained during the Governor's pleasure.[3] Insanity has been a defence of the last resort, usually relied on by the accused only in cases where a conviction may be followed by the death penalty. Automatism, on the other hand, has become a defence of general resort. If an accused, charged with larceny, raises the defence of post-epileptic automatism it seems that the judge, though he must put automatism to the jury, must also put insanity in the alternative. Even if he goes as far as Sholl J. and asks, 'Is it likely that such a criminal act will recur?' he may still be unable to conclude that there is no evidence of a disease of the mind. If the effect of the verdict of not guilty but insane is known to the jury it is unlikely that they would return it. The choice between acquittal and detention during the pleasure of the Governor will be made by reference to the magnitude of the risk of an acquittal to the community. A more sensitive adjustment of the law to the needs of the community protection on one side, and the needs of the mentally ill accused on the other, would avoid the need to put a choice of this magnitude before the jury.[4]

Appeals from an Acquittal on the Ground of Insanity

The accused cannot appeal from an acquittal on the ground of insanity.[5] In *The Queen v. Meddings* Sholl J. said:

> [I]f an accused is found not guilty on the ground of insanity the judge is not entitled, under the provisions of the Crimes Act, to state a case for the opinion of the Full Court, nor is the accused able to appeal from the verdict. That is one of the difficulties in the administration of the law . . . but I think that state of affairs does not entitle me to disregard what I think to be the correct course where there is evidence fit to be considered by a jury of insanity within the meaning of the M'Naghten Rules. The remedy for that . . . is legislative and not judicial . . .[6]

In cases where automatism is pleaded as a defence, injustice is particu-

3 Crimes Act 1958 s. 420. The position in other states is the same: Queensland Criminal Code, s. 647; Tasmanian Criminal Code, s. 381; Western Australian Criminal Code, s. 653; Criminal Law Consolidation Act 1935-56 (S.A.), s. 292; Crimes Act 1900 (N.S.W.), s. 439 and Lunacy Act 1898-1955 (N.S.W.), s. 65.

4 Cross, 'Reflections on Bratty's Case' (1962) 78 *Law Quarterly Review* 236, 238-9.

5 In Victoria and South Australia a person acquitted on the ground of insanity has no right of appeal. However there is a limited exception to this rule in Queensland (Code s. 668), Tasmania (Code s. 399) and New South Wales (Criminal Appeal Act 1912, s. 5(2)). By these sections a person acquitted on the ground of insanity may appeal if he did not set up insanity as a defence at his trial. Western Australia (Code s. 692) is the only state to allow an unconditional right of appeal to a person found not guilty but insane.

6 [1966] V.R. 306, 311.

larly likely to occur. Generally the accused will not seek to rely on the defence of insanity. He may prefer a conviction to the verdict of not guilty but insane. In certain circumstances, however, the trial judge may put the defence of insanity to the jury though the accused does not wish to rely on it. As the distinction between sane and insane automatism depends on the developing concept of 'disease of the mind', it is not unlikely that the trial judge will err in formulating the issues for the jury. From this error there can be no appeal if the accused is acquitted on the ground of insanity. The possibility of injustice was discussed in the English case of *Reg. v. Duke*[7] and in England the verdict is now appealable.[8]

The Prosecution and the Insanity Verdict

In *Rex v. Oliver Smith*[9] Lord Alverstone L.C.J. ruled that it was improper for the Crown to call evidence of insanity. It was for the accused to raise the defence and any evidence of mental disease in the possession of the Crown was to be made available to the accused.[10] Whatever the merits of the rule in the past, it is now becoming unworkable. The defence of automatism and, in England, the defence of diminished responsibility,[11] have led the courts to reconsider the rule.

There are two main issues. Can the prosecution press for a verdict of not guilty but insane? If the Crown calls rebutting evidence which tends to show that the accused is insane can the accused successfully object to it? It has been urged that it would be illogical to allow the prosecution to ask the jury to return a verdict of not guilty but insane.[12] *Rex v. Oliver Smith* stands for the proposition that the accused may exclude evidence to show insanity from the consideration of the jury. To what extent have the courts overridden these objections?

It is now clear that the accused may 'raise' the defence of insanity in two ways. He may lay a proper foundation of evidence for the defence and specifically plead it. He may, on the other hand, wish to exclude the issue of insanity from the jury. This is normally the case where the accused relies on the defence of automatism. If the evidence given by the accused in support of that defence indicates that the accused suffers from mental illness then the defence of insanity will be put to the jury.[13] No objection by the accused can prevent this course being taken once insanity is raised in evidence. It follows from this that the defence may be raised on evidence

7 [1963] 1 Q.B. 120, 124.
8 Criminal Procedure (Insanity) Act 1964 (U.K.), s. 2.
9 (1910) 6 Cr. App. R. 19.
10 *R. v. Casey* (1947) 63 T.L.R. 487; *R. v. Starecki* [1960] V.R. 141; *R. v. Jeffrey* (1966), Full Court of the Victorian Supreme Court, unreported.
11 Homicide Act 1957 (U.K.), s. 2.
12 *Russell on Crime* (12th ed. 1964) i, 115.
13 *R. v. Kemp* [1957] 1 Q.B. 399.

called by the Crown to rebut the accused's defence: the only question for the judge is whether, on the whole of the evidence before the court, the issue of insanity has been properly raised. This is not to say, however, that the accused may not successfully object to rebutting evidence tending to show that he is insane.

At least three attempts have been made in England to abolish the rule enunciated in *Rex v. Oliver Smith*.[14] It was cogently criticized by Louis Blom Cooper in his book on the A6 murder.[15] In *Bratty's* case Lord Denning suggested *obiter* that the prosecution is entitled to raise the issue of insanity, and 'it is their duty to do so rather than allow a dangerous person to be at large'.[16] Prior to the Criminal Procedure (Insanity) Act 1964 (Eng.) it seemed that the prosecution could call evidence tending to show that the accused was insane in cases where automatism or diminished responsibility were pleaded. Moreover the cases lent support to the view that the prosecution could ask the jury to return a verdict of guilty but insane.[17] Indeed, it seemed that it was the duty of the prosecution to take this course in cases where the community might be threatened by an outright acquittal of the accused where automatism had been pleaded, or the release of the prisoner after a determinate gaol sentence where diminished responsibility was pleaded. The new Act avoids the illogicality of allowing the prosecution to ask the jury to return a verdict of not guilty but insane. It does allow the prosecution, however, to adduce rebutting evidence of insanity where diminished responsibility is pleaded by the defence, and rebutting evidence of diminished responsibility where insanity is pleaded.[18] The English position, so far as the defence of automatism is concerned, was not touched by the Act and remains obscure.

The Victorian Supreme Court appears to be following a conservative course on these issues.[19] The Court has taken the view that it would be against principle to allow the prosecution to press for a verdict of not guilty but insane. In *The Queen v. Jeffrey*,[20] decided in 1966, the Full Court adopted the reasoning of Lawton J. in *Reg. v. Price*.[21]

[14] *R. v. Bastian* [1958] 1 W.L.R. 413; *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386; *R. v. Russell* [1964] 2 Q.B. 596.

[15] *The A6 Murder*, (Penguin Books) ch. 4.

[16] [1963] A.C. 386, 411.

[17] A more cautious attitude was manifested in *R. v. Dixon* [1961] 1 W.L.R. 337 and *R. v. Morris* [1961] 2 Q.B. 237. In *R. v. Price* [1963] 2 Q.B. 1 Lawton J. allowed the prosecution to call evidence in rebuttal which tended to show that the accused was insane. He decided, however, that it was not open to the prosecution to invite the jury to return a verdict of guilty but insane.

It is uncertain how far the authorities on the defence of diminished responsibility can be applied to the defence of automatism.

[18] Criminal Procedure (Insanity) Act 1964 (U.K.) s. 6.

[19] *R. v. Starecki* [1960] V.R. 141; *R. v. Meddings* [1966] V.R. 306; *R. v. Jeffrey* (1966) (unreported) Full Court of the Victorian Supreme Court.

[20] *Ibid.* [21] [1963] 2 Q.B. 1.

> Prosecutors prosecute. They do not ask juries to return a verdict of acquittal. A trial in England is concerned with the proof of a charge; it is not an inquisiton.[22]

In *The Queen v. Meddings* the Crown called medical evidence to rebut the defence of automatism. No objection was made to this by the accused, though the evidence tended to show that the accused would be classified by doctors as suffering from a disease of the mind. The trial judge, Sholl J., put both insanity and automatism to the jury. However it appears from *The Queen v. Jeffrey* that such evidence can be excluded if the accused objects to it.[23]

The obvious dangers of the present situation were recognized by the Full Court in *The Queen v. Jeffrey*.[24] An accused who suffers from a disease of the mind may rely on the defence of automatism without allowing his affliction to appear in the evidence. If he is acquitted a dangerous man may have been set loose. If he is convicted he cannot appeal on the ground that a verdict of not guilty but insane should have been returned by the jury.[25] It is unfortunate that the Court has taken the view that the matter must await legislative change. There is English authority for the proposal that the Crown is under a duty to adduce evidence of insanity in cases where the accused may be mentally ill and dangerous. This is consistent with the rule that the Crown may not ask the jury to acquit on the ground of insanity.[26]

22 *Ibid.* 7.
23 (1966) unreported (transcript) 12.
24 *Ibid.* 21; *R. v. Starecki* [1960] V.R. 141, 145.
25 Affirmed *R. v. Jeffrey* (1966) unreported.
26 *Ryan v. The Queen* (1966-67) 40 A.L.J.R. 488, 492, decided after the preparation of this article, contains a short discussion of *Bratty's* case by Barwick C.J. The Chief Justice appeared to reject the view that the issue of voluntariness could be withdrawn from the jury if it was founded on evidence consistent only with D's suffering from a disease of the mind.