THE FORGOTTEN RULES IN R. v. TEREI MOANA*

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It is almost trite law, at least in New Zealand and the United Kingdom, that automatism means unconscious involuntary action. Thus, in *Bratty* v. *Attorney-General for Northern Ireland*[1] Viscount Kilmuir said:

> [Automatism] means unconscious involuntary action, and it is a defence because the mind does not go with what is being done. This is very like the words of the learned President of the Court of Appeal of New Zealand (Gresson P.) in *R.* v. *Cottle* where he said, "with respect, 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".[2]

Again, in analysing Lord Denning's speech in *Bratty*,[3] North P. said:

> What His Lordship in my opinion was saying is that all the deliberative functions of the mind must be absent so that the accused person acts automatically.[4]

Such formulations, however concise as definitions, still pose formidable problems, not the least of which is what is meant by unconsciousness.[5] In *Burr*,[6] North P., in one of the few passages dealing with the problems of unconsciousness, said:

> I think it should be made plain that when Lord Denning speaks of "an act which is done by the muscles without any control by the mind", he does not mean that an accused person must be absolutely unconscious because you cannot move a muscle without a direction given by the mind. What His Lordship in my opinion was saying is that all the deliberative functions of the mind must be absent so that the accused person acts automatically.

Of the same problem Turner J. said:[7]

> The criminal law of this country is a practical law, generally concerning itself with consequences rather than causes; what a person does, knowing the nature of his act, knowing that he does it, knowing its consequences, on a level consciousness such that he can afterwards remember its details in his normal waking state the law must conclude him to have done intentionally.

Possibly much of what was said in *Burr* with respect to the question of unconsciousness would be unexceptional were it not for the large dose

* Supreme Court, Gisborne, before Mr Justice Leicester and jury, 22-24 May 1962.

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1 [1963] A.C. 386 at 401.
2 This passage was reiterated by North P. in *R.* v. *Burr* [1969] N.Z.L.R. 736 at 744.
3 *Supra.*
4 *R.* v. *Burr* (*supra*) 745.
5 There are, of course, numerous other problems raised by the defence of automatism. See, for example, "Automatism and Trial by Jury"—I. D. Elliott 6 Melb. U. L. Rev. 53, "Automatism and Social Defence" a paper delivered by Professor J. LL. J. Edwards, 13 March 1964 at the Faculty of Medicine, University of Toronto, and "Automatism"—R. J. Sutton 1 Otago L.R. 156.
6 *Supra* n. 2, at 745.
7 *Supra* n. 2 at 747. Very possibly this formulation involves an *ex post facto* rationalisation to overcome what could easily become a conceptual muddle.

of Cartesian dualism[8] involved and the fact that deliberation is often imputed if purposiveness is present and recall is taken, often mistakenly, to imply cognition at the time of acting. Vivid examples of highly purposeful behaviour manifested by persons in ictal or post ictal states[9] have been given by Dr Banay.[10] One of these examples describes a murderous attack on a young woman in which the attacker, a strongly built youth, first attempted to stab her to death, finally causing death by hanging her on a water pipe. When disturbed by a knock on the door he fled through a window.

Applying the analysis of unconsciousness as laid down by the Court of Appeal in *Burr*[11] there is, perhaps, little doubt that had the case described by Dr Banay come before a New Zealand court a plea of automatism would have failed. Clearly, in this case, all the deliberative functions of the mind were not absent.[12]

It is probable that at least part of the problem of unconsciousness lies in the judicial meaning ascribed to the word "mind". In *R.* v. *Kemp*[13] Devlin J. stated:[14]

> . . . the Trial of Lunatics Act, 1883, is not in any way concerned with the brain but with the mind, in the sense that the term is ordinarily used when speaking of the mental faculties of reasoning, memory and understanding, particularly in the present case the faculties of reasoning and understanding.

In *Burr* North P., reiterating what Richmond J. had said in his summing up in that case, obviously considered "mind" as the abstraction spoken of by Devlin J. in *Kemp*[15] but in a later passage[16] the learned President said—" . . . you cannot move a muscle without a direction given by the mind." Clearly North P. considered that all muscular activity (including, presumably, involuntary circuits) was activated by the mind, and, if this is correct, the learned President must have accepted the notion that unconsciousness and some mind function are not necessarily other excluding concepts.[17]

Whether it is "mind" or "brain" which is the subject of the judicial analysis of the automatism plea it is probably fair to say that the factors mentioned by Devlin J.[18] have, for legal purposes, become the

8 For an excellent appraisal of the conceptual faults inherent in the Cartesian theory of "mind" see Brett, *An Inquiry Into Criminal Guilt* (1963). (The Law Book Co. of Australasia) and Ryle *The Concept of Mind* (1949) (Hutchinson & Co. Ltd.).

9 In which cognition of visual input at the time of acting may be severely limited.

10 "Criminal Genesis and the Degrees of Responsibilities In The Epilepsies". 117 Am. J. Psychiat., 873.

11 *Supra* n. 2.

12 The element of deliberate (or seemingly deliberate) action on the part of the accused in *R.* v. *Hale* (Supreme Court Auckland, February 1966) was stressed by Moller J. in his summing up. The learned Judge invited the jury to consider Hale's actions as those of a "thinking conscious man".

13 [1956] 3 All E.R. 249, at 253.

14 *Ibid.*, 253.

15 *Supra* n. 13.

16 *Supra* n. 2 at 745.

17 It must be pointed out that in *R.* v. *Awatere* (unreported C.A. 82/69 at p. 7) North P., in making the same point about mind control of muscle activity said, "The muscles of a man cannot move without some signal from the *brain*. . . ."

18 In *R.* v. *Kemp* [1956] 3 All E.R. 249 at 253.

normal incidents of consciousness. Such an approach is dualistic,[19] dependent on imputed criteria and takes no cognisance of the fact that a person may be unconscious (in the sense of being unaware, or imperfectly aware, of his surroundings and motivation) and yet manifest highly purposive actions.[20] As a background to these statements the terse observations of Dr Papez[21] must be examined. "Consciousness," he states, "is a general function of the brain as a whole."

He goes on to explain:

> A non specific path from nerve cells of the reticular formation and tegmentum of the midbrain passes up to the intralaminar nuclei of the thalmus, thence to the reticular nucleus of the thalmus, and then by fibers into the internal capsule which ends in the outer layers of the cortex.[22]

The frontal polar area of the cortex may be roughly termed the mechanism for the elaboratum of thought. It is all too possible that the courts have made too crude a distinction between brain function implying consciousness (and importing legal accountability) and non, or minimal brain function importing legal non accountability. Perhaps the crux of the problem is that the vast bulk of our responses to stimuli are executed automatically, reflexively, without conscious attention. This is true of complex learned behaviour, as in skilled motor sequences, as well as the general unlearned responses.[23]

However, in assessing the degree of consciousness which will attract criminal liability the courts traditionally speak not of "brain" but of "mind",[24] creating the ever present and often realised danger that consciousness will become associated with determination, evaluation and the like. The presence of these functions in any form will imply the presence of "mind consciousness".[25]

Purpose behaviour is not however the product of one area of the brain as A. R. Luria[26] points out—

> [P]lainly they (brain functions) must be managed by an elaborate apparatus consisting of various brain structures. Modern psychological investigations have made it clear that each behavioural process is a complex function system based on a plan or program of operations that leads to a definite goal. The system is self regulating: the brain judges the result in relation to the basic plan and calls an end to the activity when it arrives at a successful completion of the program. This mechanism is equally applicable to elementary involuntary forms of behaviour such as breathing and walking, and to complicated, voluntary ones such as reading, writing, decision making and problem solving. . . . Our present knowledge of neurology indicates that the apparatus directing a complex behavioural process comprises a number of brain structures, each playing a highly specific role and all under co-ordinated control.

19 In the sense that action is preceded by a non-material volition occurring in a different spatio-temporal system, an analysis which is medically and philosophically quite unsound.

20 Good examples of this are the conduct of the accused in *Bratty* v. *Attorney-General for Northern Ireland* [1963] A.C. 386 and in *R.* v. *Hale* (*supra* n. 12).

21 Chapter 79, American Handbook of Psychiatry, 1607.

22 *Ibid.*

23 Such factors could, of course, be easily taken into account in the ascriptive scheme of guilt fixing set out by Professor H. L. A. Hart in "The Ascription of Responsibility and Rights" (1948-49), Proc. of Aristot. Soc. N.S. Vol. XLIX, 171.

24 Perhaps the best example of this is in the judgment of Devlin J. in *Kemp.*

25 The summing up of Richmond J. in *Burr* offers an example of this approach —the accused had "a mind which, though not as good perhaps as his normal mind, nevertheless was working well enough to design a rational plan . . . " [1969] N.Z.L.R. 736, at 742.

26 *Scientific American* 1970 (off print).

In accordance with this scheme, and very significant for the purposes of this note, Luria points out that the level and tone of the cortex (what may be roughly termed the level of consciousness) may vary and such level is a function of, inter alia, the brain stem, particularly the reticular formation.

The statements made by Luria and Dr Papez were somewhat paralleled by the submissions of Doctors Bennet and Bethune called for the defence in *R.* v. *Burr*[27] of which North P. said:[28]

> It is not sufficient that the medical evidence suggests that the appellant's mind was not fully functioning and that he had an imperfect appreciation of the nature and quality of his act. To allow such a plea to be submitted to a jury in a case like this would be dangerous in the highest degree.

Perhaps such an attitude is best explained in the words of Turner J. in the passage already noted,[29] and McCarthy J.:

> In their basic approach to the question whether an act is a voluntary one or not, the Courts of the United Kingdom and this country have adopted the Austinian concept of intention, demanding its two essentials of volition in relation to the muscular movement and foresight of consequences.[30]

In a sense, under any "test" for automatism both *Burr* and the basically similar *Awatere*[31] were unsatisfactory and borderline cases. In both cases the accused had an emotional relationship with the deceased[32] and there were undeniable elements of motive. Had, however, the full force of the remarks made on the nature of automatism by the Court of Appeal been applied to *Hale*[33] there is little doubt that his purposive acts of fetching a rifle and struggling violently when an attempt was made to subdue him would have denied him a defence of automatism. What was lacking in *Hale's* case was motive, a fact amply borne out by the wording of the first charge:

> That on or about the 29th day of October 1965 at Auckland in New Zealand with intent to cause grevious bodily harm to some person unknown did wound one Ta Kitai.

In some contexts motivation can be of two types—

(a) Apparent—professed or surface motivation; and
(b) Authentic motivation, manifested by actions or "real".

It is only by delving into people's behaviour that we can see the great difference between the surface motive and the real, which is often beyond their comprehension. Motivation is the moving power which

27 *Supra* n. 2.
28 *Ibid.*, 745.
29 *Supra,* n. 6. On this analysis of the word "intentionally" there is no requirement of a "free and conscious exercise of the will" a factor which, in *Kilbride* v. *Lake* [1962] N.Z.L.R. 590 attached not to *mens rea* but to the *actus reus* of an offence.
30 If this judicial definition is designed to rebut any attempt to raise more advanced "medical" definitions of intent it must be recalled that Austin's theory was borrowed from the work of Dr Thomas Brown published in 1818, *An Inquiry into the Relation of Cause and Effect,* an attempt to medically explain the relationship between volition and muscular movement. (See Samek, "The Concepts of Act and Intention and their Treatment in Jurisprudence"—41 Australasian Journal of Philosophy, 198).
31 Unreported. Supreme Court, Auckland, November 1969 before Mr Justice Speight. Also in the Court of Appeal, 82/69.
32 Cf. *Tsigos* [1964-5] N.S.W.R. 1607, but see *Cogdon* (unreported but noted in 5 *Res. Judicatae* 29).
33 *Supra.* n. 12. This case is fully discussed by Sutton in 1 Otago L.R. 156.

impels to action for a definite result. Intention is the purpose to use a particular means to effect such a result.[34] Morse[35] unreservedly asserts that the criminal law has denied motivation a rightful place. It is not taken into account until the pivotal issue of guilt has been decided and then only in the discretion of the sentencing judge. Guttmacher and Weihofen[36] state the problem succinctly when they refer to the

> . . . legal rule that although intent is essential, motive is irrelevant (except insofar as self defence, prevention of felony, etc., can be said to be based on motive). Once it is determined that a man intended to do the act the enquiry is at an end; the law is not interested in why he meant to do it . . . why did this man kill his wife? why did this other commit a series of rapes? why do others under similar circumstances refrain from doing likewise? Only when we can answer the question why can we hope to understand why society needs protection against some individuals and not against others . . . criminal conduct is ordinarily a product of a complex of pressures and resistances rather than of a single mental operation of forming an "intent". Only through studies of these conscious and unconscious motives can understanding be had of the personality of the individual and what it is that makes him a menace to society. It is time for a re-examination of the criminal law dogma that motive is irrelevant.

This note cannot, in its brief compass, discuss the issues relating to motivation and the broad notion of *mens rea* but must be confined to one of the analytic problems faced by the courts in rule making in the sphere of non usual mental states, specifically, automatism.

As indicated earlier[37] much of the judicial analysis of act and intent is cast in terms of Cartesian Dualism. In a sense the courts "split" act from intent and place each such isolated component in a different and clearly demarked quantum of time.[38] The two isolated components are then relinked over the resulting hiatus or "time gap" by means of what may be termed "relators". These relators may be objective—every man must be taken to intend the natural and probable consequences of his acts, or subjective—[because of certain given conditions] the accused must have intended to do what he did.[39] Probably the best known case involving use of an objective relator is the infamous *Smith* v. *D.P.P.*[40] the facts of which are too well known to require reiteration. Linking Smith's act with his (blameworthy) state of mind Viscount Kilmuir, L.C., said:

> The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone . . . once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result,

34 This point is made by Goldwater in "Vocational Rehabilitation of the Cardiac" in *The Heart in Industry* (1961) 24 and by Abrahamson, *Who are the Guilty* (1952) 73.

35 "The Aberrational Man" 42 Tulane L.R. 67 at 130.

36 *Psychiatry and the Law* (1952) 133.

37 *Supra*, page 409.

38 For a very full but traditionalistic analysis of the concurrence of act and intent see G. Marston, "Contemporaneity of Act and Intention in Crimes" 86 L.Q.R. 208.

39 Another classic example of a presumption can be found in s.23 Crimes Act 1961. This is the presumption of sanity which must be displaced by the accused. If the accused fails to displace the presumption, then, together with the presumption that a person is taken to intend the natural and probable consequences of his acts (see *Burr* (*supra*) 743), it is used to reunite act and intent in the equation which determines legal accountability. Presumably the latter presumption is used to prevent the accused from raising issues germane to the insanity defence to deny that he had the requisite *mens rea* for the act.

40 [1961] A.C. 290.

> or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e. was a man capable of forming an intent, not insane, within the McNaghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[41]

Clearly, in this example, the relator is what the reasonable man would have foreseen. Such a "test" (or relator) is in stark distinction to what was said in the Court of Criminal Appeal where the crux of the issue was what the accused in fact contemplated. In such an approach the relator mechanism is still operative but rests on a quasi subjective basis.[42]

Broadly speaking, the Cartesian approach to *mens rea* puzzles in the criminal law has its most harmful effects in analysing defences in which the accused displays some degree of deviance from socially accepted behavioural norms—notable insanity and automatism. In many areas of legal analysis in which facts may be difficult or sometimes impossible to ascertain, the law resorts to presumptions or fictions. In the early stages of the development of criminal theory when behavioural science was in its infancy, presumptions in the criminal law were probably inevitable and they became the lenses through which the law viewed certain fact situations.[43] This make believe world is epitomised by the insanity defence which is tenable in a criminal trial only if the accused has a "disease of mind" and does not know the nature and quality of his act or, if he does know it, he does not know that it is morally wrong.

Unhappily for contemporary legal science, make believe also pervades the world of automatism. In the contemporary analysis of automatism, a successful defence requires unconscious involuntary action. This requirement is the relator by which evidence of the accused's state of mind must be judged in determining legal accountability and it is cast in terms of absolutes. In *Burr* apparent cognition at the time of the act was fatal to the defence of automatism, stress being placed on the fact that Burr was functioning at least on some level of consciousness.

The pragmatic approach to the question of intention and automatism

41 *Ibid.*, 327.

42 "Quasi-subjective" is used in preference to "wholly" subjective because very frequently in the subjective analysis of *mens rea* foresight of consequences is imputed from the formula—the accused (in the absence of some excusing conditions) must have foreseen the result of his conduct.

43 There have been some notable exceptions to the strict cartesian analysis of *mens rea*. In *Thabo Meli* v. *R.* [1954] 1 All E.R. 373 the accused, acting in concert with others, meant to kill the deceased. The initial attack failed to kill the deceased but was believed by his attackers to have caused death. Later the accused rolled the deceased over a bank where he subsequently died of exposure. It was argued that the accused had not murdered the deceased because the initial attack, meant to cause death, did not cause death and the subsequent death of the accused was caused without *mens rea* because he was thought to be dead. This argument was rejected and it was held that the actions leading up to the death of the deceased were a continuum all coloured by the initial intent to kill. In *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349, the act of a drunken psychopath in killing his wife was held to have been committed with *mens rea* because of an earlier intention to kill formed when he was sober. In *Parker* v. *R.* [1964] 2 All E.R. 641 (P.C.) the accused was provoked but killed the deceased some considerable time later. His defence was upheld, however, because there was provocation to bring the blood to the boil and keep it there. This is a continuum approach.

adopted by the New Zealand Court of Appeal in *Burr* and *Awatere* besides utilizing the hiatus approach producing an "unreal" result also drives the court away from the crucial question of what choosing mechanisms are available to the accused and reinforces the alienation producing tendencies of the adversary system of criminal justice.[44] The upshot of these two factors is that the court is precluded from viewing the acts of the accused from a continuum basis—from a "being and doing" point of view.[45] This latter notion was developed by Professor Silber whose thesis, roughly speaking, is that what a man does is the *ratio cognoscendi* of what he is, and what a man in context is, is the *ratio essendi* of what he does. In such an analysis act and intent cannot become polarized over a time space gap and the brain's relationship with action is seen as consisting in a constant state of information exchange. Such an approach has the dual advantages of allowing a motivational approach in the evaluation of culpability and according roughly with current neurophysiological theory and research findings.[46] Perhaps somewhat surprisingly such an approach has been utilized in a New Zealand case involving the automatism defence.

In *R.* v. *Terei Moana* many of the crude approximations and fictions utilized to solve guilt equations in contemporary juristic practice were apparently set aside.

In *Moana* Leicester J. was faced with a situation not unlike that faced by Moller J. in *Hale*.[48] The accused having had a little achohol and having previously suffered a head injury, had launched a seemingly motiveless, murderous attack against his wife. The accused and his wife were to go to a hangi on New Year's Eve and there was some difference between them as to whether or not they ought to go or, if they did, what Terei should wear. During this argument, in a room containing several people, the accused seized a knife and stabbed his wife several times causing grave injuries. He was charged with attempted murder and the defence raised was automatism.

Leicester J., having held that the blow on the head suffered some months earlier when Terei fell off a tractor coupled with the alcohol which he had recently taken laid the foundation for the defence, then went on to say, basing his observations upon those of Barry J. in *R.* v. *Charlson*[49] that there was no need to raise the question of disease of the

44 Using other techniques John Griffiths very forcefully makes this point in "Ideology in Criminal Procedure" 79 Yale L.J. 359 where he sets up an alternative culpability determining model—the "family" model.

45 "Being and Doing: A Study of Status Responsibility and Voluntary Responsibility" 35 Chicago L.R. 47.

46 On this point see also Briscoe, " . . . for the Devil does not know man's intention" 44 A.L.J. 23 where he argues "that intent may be a partial summation only of the basic elements of actions, which are constellations of electrical and chemical events taking place and changing extremely rapidly, and subject to relativistic considerations in their temporal locations."

47 *R.* v. *Terei Moana* is the unreported summing up of Mr Justice Leicester given in the Gisborne Supreme Court in May 1962. R. J. Sutton mentions the case in "Automatism and the Drunken Sailor: Four Practical Problems" 1 Otago L.R. 156 at 165.

48 Unreported, Supreme Court, Auckland, February 1966. The case is fully discussed by R. J. Sutton in 1 Otago L.R. 156.

49 [1955] 1 All E.R. 859 Charlson, it will be recalled, like Bratty ([1963] A.C. 386) and Cottle ([1958] N.Z.L.R. 999) manifested some elements of recall. He could tell the police he had done "something terrible". From the facts in *Moana* it is quite possible that the accused also exhibited some elements of recall.

mind. This left the issue of sane automatism squarely before the jury.

The learned Judge firstly defined automatism along the lines of the *Cottle*[50] formulation of action without any consciousness of acting or action without conscious volition and secondly in terms of the summing up of Barry J. in *Charlson*[51] where the accused

> . . . did not know what he was doing, if his actions were purely automatic and his mind had no control over the movements 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 one of not guilty.

Where *Moana* differs remarkably from all the other cases in the books is that the trial Judge, not content to leave the jury to flounder in the twilight zone of legal abstractions, raised the question of motivation.[52]

> It is clear that on this 31 December last year, New Year's Eve, there were in this house something in the nature of minor domestic differences as to whether the accused should go to this hangi or what he should wear, or whether he should stop drinking, but I suggest to you that these minor domestic differences fall far short of any feasible explanation as to why, without rhyme or reason, this man should have perpetrated this savage and brutal attack upon his wife.

After reviewing evidence of Moana's character His Honour went on to say:

> . . . on this ground alone, this background picture, doubt may well arise in your minds as to whether such a man would form an intent to kill his wife by stabbing her to death for no reason at all and without any motive.

Although Leicester J. did not enumerate the medical "tests" for automatism as part of the legal definition of automatism his comments clearly indicate that these factors were to stand with the legal definitions in evaluating the validity of the defence. The jury were given a motivational and dynamic model with which to test the accused's case.[53]

The learned Judge asked the jury to consider:

> . . . whether the behaviour of the accused was out of character with the person as we know him—that is clearly present in this case. Secondly, that his abnormal behaviour came on abruptly—we know the whole thing took place suddenly, that he went to the drawer,[54] took out the knife, and attacked his wife and then proceeded to try to cut his throat.Thirdly that what he has done is totally unmotivated, that it does not serve any useful purpose—and what purpose was there in killing a wife who was very dear to him and leaving his children without a mother. Fourthly, where the crime is of an anti-social or "criminal" nature, was there any attempt to conceal it. The whole matter was not done in the silence of the night in a bedroom in the absence of other people: it was done in the presence of several people; and there was no attempt to conceal it. Fifthly, was the period of abnormal behaviour relatively brief—was it a matter of minutes rather than of days, weeks or months? If the abnormal behaviour was an instance of automatism it was incredibly brief, and you may think that the automatism had passed away when the accused came

50 *Supra.*

51 Reproduced in the summing of Leicester J., in *Moana* at p. 7.

52 In *Hale* the jury were asked whether the actions of the accused were those of a "thinking conscious man". In *R.* v. *Awatere* Speight J. asked the jury "was the blow struck because the mind, as a thinking mechanism, had abdicated?"

53 This "model" was supplied by Dr Glasgow who appeared for the defence in *Moana.* It is reproduced in "The Anatomy of Automatism" 64 N.Z. Medical Journal 491 (1965).

54 Providing, of course, a glaring example of highly purposive behaviour. In later judicial analysis this would readily be equated with some degree of conscious volition.

> back to look through the window to see what he had actually done. And finally, was there the peculiar characteristic that the person who was under the influence of automatism could not remember the important aspects of what he had done? On that point everybody is agreed.

Leicester J.'s summing up has never been referred to in any subsequent reported case involving the automatism defence. It could provide a path towards the future, not only in the evaluation of the automatism defence itself but also of the concept of intention. *Moana,* however, remains uncharted on the present judicial sea.