VOLUNTARINESS IN CRIME: A CRITICAL EXAMINATION OF KILBRIDE v. LAKE

Sir Francis Boyd Adams*

THE LITERATURE OF THE CASE

In the decade since it was delivered, the judgment of Woodhouse J. in *Kilbride* v. *Lake*[1] has attracted widespread and continuing attention. The only English textbook reference to it I have found is in Smith & Hogan's *Criminal Law*,[2] but it has been cited in P. B. A. Sim, "The Involuntary Actus Reus";[3] in Ingrid Patient, "Some Remarks about the Element of Voluntariness in Offences of Absolute Liability";[4] and in Geoffrey Marston, "Contemporaneity of Act and Intention in Crimes".[5] In New Zealand, the case has been discussed or referred to in P. E. Kilbride, "The *Actus Reus* of an Offence";[6] in D. A. R. Williams, "Drunkenness and the Criminal Law in New Zealand";[7] in R. S. Clark, "Automatism and Strict Liability",[8] and in a recent learned and instructive lecture delivered by Mr Clark, "Accident—Or What Became of *Kilbride* v. *Lake?*"[9] There is also a passing reference to the case in Professor I. D. Campbell's lecture published in the same volume[10]—with which, however, Mr Clark did not agree.[11] *Kilbride* v. *Lake* has pride of place as the first case noted in the criminal law section of the *Abridgement of New Zealand Case Law*[12] but stands there in isolation under a heading of its own. It is also one of the cases put forward for study in Peter Burns' *Case Book in the Law of Crimes*[13] with favourable citations elsewhere in that symposium. In Australia, there are references to the case in Dr Colin Howard's work on *Strict Responsibility*.[14]

All the abovementioned references are either commendatory of the decision, or citations with implied approval, and the only apparently discordant note has emanated from the present writer in the 1966 *Supplement* to Adams' *Criminal Law and Practice in New Zealand*, and in a casual comment in para. 352 of the second edition of that work, both of which comments were written in circumstances precluding adequate discussion.

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1 [1962] N.Z.L.R. 590.
2 2nd ed. (1969), 59.
3 (1962) 25 M.L.R. 741: An English publication though written by a New Zealander.
4 [1968] Crim. L.R. 23, at 31-32, footnotes 20 and 21.
5 (1970) 86 L.Q.R. 208, at 219, footnote 50.
6 (1963) 1 N.Z.U.L.R. 139.
7 (1967) 2 N.Z.U.L.R. 297, at 314.
8 (1968) 5 V.U.W.L.R. 12, and 19.
9 Published in *Essays on Criminal Law in New Zealand* (1971), 47.
10 *Ibid.*, 26, footnote 77.
11 *Ibid.*, 62, footnote 54.
12 Volume 4 (1964), 8.
13 Sweet & Maxwell (N.Z.) Ltd. (1968), 36-9.
14 Sweet & Maxwell, London (1963), 205-7.

Turning from the academic to the judicial sphere, Mr Clark, in his lecture mentioned above, was mainly concerned with the lack of any judicial approval. He cited and discussed three New Zealand cases in which *Kilbride* v. *Lake* has been considered, but in which it could not be said to have been followed. They were *Police* v. *Taylor*,[15] *Helleman* v. *Collector of Customs*[16] and *Andrew & Andrew Ltd.* v. *Transport Department*,[17] Mr Clark's view being that, while the case may perhaps have been properly distinguished in the first two of them, the third conflicts with it. In none of them was it expressly approved or disapproved. The only other judicial references I have found are in two passages in *Barr* v. *Civil Aviation Department*[18] (which, as I understand them, are mere quotations of the arguments of counsel), and in *Farrier Waimak Ltd.* v. *Transport Department*[19] which was not reported until after Mr Clark's lecture had been delivered, and in which the *Andrew & Andrew* case was followed, and *Kilbride* v. *Lake* quoted but again distinguished.

While *Kilbride* v. *Lake* was not referred to in *McCone* v. *Police*[20] —the railway crossing case—Mr Clark in his lecture[21] finds in the decision of the Court of Appeal in that case a resurrection of "the spirit of *Kilbride* v. *Lake*", and evidence that *Kilbride* v. *Lake* is "alive but not well." *McCone's* case will be mentioned again below.

The foregoing paragraphs are, no doubt, an inauspicious and uninspiring exordium, but will at least serve the purpose of enabling the reader to examine for himself all the material I have found bearing on *Kilbride* v. *Lake*, and, if he does so, he cannot fail to be impressed by the contrast between the warm academical approval of the judgment and the hitherto neutral attitude of the judges. It is this contrast which encourages me to embark, as no one else seems yet to have done, on a critical appraisal of the decision.

THE CHARGE AND THE AGREED FACTS

Kilbride v. *Lake* was a general appeal against a conviction by justices on a defended charge relating to the absence of a warrant of fitness. No notes of the evidence had been taken, and the justices had given no reasons for their decision. No evidence was heard on the appeal, and the case proceeded on facts agreed upon by counsel to the following effect: (1) That the appellant had parked his wife's car in Queen Street, Auckland, the warrant of fitness, issued just two months before, being then in its correct position; (2) That, on his return a short time later, a traffic offence notice was found stuck to the inside of the windscreen, and the warrant could not be found; and (3) That "the warrant had become detached from the windscreen in some way and had been lost, or it had been removed by some person unknown". This third proposition is, of course, merely an inference from the other two.

The charge was that the appellant "did operate a motor vehicle . . . and did fail to display in the prescribed manner a current warrant of

15 [1965] N.Z.L.R. 87.
16 [1966] N.Z.L.R. 705.
17 [1968] N.Z.L.R. 692.
18 [1965] N.Z.L.R. 503.
19 [1971] N.Z.L.R. 699.
20 [1971] N.Z.L.R. 105.
21 *Op. cit.*, 66.

fitness." It was laid under Regulation 52 of the Transport Regulations 1957, the relevant provisions of which were then as they still appear in the 1968/32 Reprint, reading as follows:

> 52. (1) . . . no person shall operate a motor vehicle . . . , unless there is carried on the vehicle a current warrant of fitness as described in subclause (2) of this regulation.
>
> (2) Every warrant of fitness shall be in two parts as described in the Second Schedule hereto, and the owner of the motor vehicle for which the warrant is issued shall keep the portion of the warrant issued to him affixed to the vehicle with the month of expiry facing forward so that it is clearly legible, in the following manner:
>
> (a) In the case of a vehicle fitted with a windscreen, the warrant shall be affixed to the left-hand side of the inner side of the windscreen so as not to be readily detachable therefrom: . . .

Regulation 3 defines the verb "to operate" as meaning, unless the context otherwise requires, "to use or drive or ride, or cause or permit to be driven or ridden, or to permit to be on any road whether the person operating is present in person or not;" and, on the facts as agreed, the charge thus came to be one of infringing a regulation which the learned Judge paraphrased for the purposes of the case as follows:

> No person shall permit a motor vehicle to be on a road whether the person operating it is present or not unless there is carried on the vehicle a current warrant of fitness . . .

This rewriting is convenient and unobjectionable so long as, on any question of construction in regard to *mens rea* or strict liability, it does not lead one to overlook the fact that permitting to be on a road is only one of a number of ways in which an offence may be committed.

The learned Judge did not quote Subclause (2) of Regulation 52 (set out above), but summarised it as providing that, "in the case of a vehicle fitted with a windscreen the warrant shall be affixed to the inside of the windscreen". No reference was made to the obligation imposed on the "owner" to "keep" his portion of the warrant "affixed" as provided, and "so as not to be readily detachable therefrom"—a breach of which obligation is a punishable offence (Regulation 131) on the part of the "owner" as defined in Regulation 3. Kilbride was not the "owner", but could conceivably have been in breach as a secondary party to an offence committed by the owner (s.66(1), Crimes Act 1961) —a point on which the facts were not explored but which might be important on a question of blameworthiness in respect of a *mens rea* defence.

ARGUMENT AND DECISION

Appellant's counsel based his argument on alleged lack of *mens rea,* the warrant having disappeared in the appellant's absence and without his knowledge; while counsel for the respondent contended simply that the offence was one of strict liability to which knowledge or intention was irrelevant and absence of *mens rea* no answer.[22] In other words, the argument centred on the familiar problem of the absolute offence: Was this, or was it not, a charge to which the alleged absence of *mens rea* might be pleaded? The learned Judge did not answer that question,

22 [1962] N.Z.L.R. 590, at 591, lines 23-30.

but took a line of his own, holding expressly[23] that the point as to *mens rea* did not arise, and that he need express no opinion thereon.

The substance of the decision, stated briefly and in my own words, was that the prosecution failed because there was no proof of any voluntary act or omission on the part of the defendant to which the absence of the warrant could be attributed, such proof being a necessary precondition of criminal responsibility, and one without which no question of *mens rea* or strict liability could arise. In view of the way in which the decision has been acclaimed by writers referred to in my opening paragraph, it is scarcely necessary to stress its novelty, and its attraction lies in the fact that it appears to open, in some circumstances, a way of escape from strict liability.

The learned Judge's views were grounded in the main on the passage in 10 *Halsbury's Laws of England*[24], quoted in the following *Extract No.* 1 from the judgment:[25]

Extract No. 1:

> It is fundamental that quite apart from any need there might be to prove *mens rea,* "a person cannot be convicted of a crime unless he has committed an overt act prohibited by the law, or has made default in doing some act which there was a legal obligation upon him to do. The act or omission must be voluntary": 10 *Halsbury's Laws of England,* 3rd ed., 272. He must be shown to be responsible for the physical ingredient of the crime or offence. This elementary principle obviously involves the proof of something which goes behind any subsequent and additional inquiry that might become necessary as to whether *mens rea* must be proved as well. Until that initial proof exists arguments concerning *mens rea* are premature. If the first decision to be made is that the offence excludes *mens rea,* then that finding is likely to disguise the fact that there is an absence of proof showing that the accused has done all that is charged against him, should this in fact be the case. The missing link in the chain of causation, if it is noticed at all, appears to be provided by notions of absolute liability. But it is impossible, of course, to prove the one ingredient by eliminating the need to prove another. It appears to me that this confusion has arisen in this case. The primary question arising on this appeal, in my opinion, is whether or not the physical element in the offence was produced by the appellant. This physical element may be described by the convenient term *actus reus,* in contrast to the mental element or *mens rea* which is also an ingredient of a crime or offence, unless expressly excluded by its statutory definition.

It is matter of detail that "expressly excluded" is too wide and an obvious slip. But it is important to note that, except for the actual quotation from *Halsbury,* no part of this extract—not even the prefatory words introducing the quotation—has any counterpart in the *Halsbury* text. Nor, so far as I know, is there any other source.

His Honour preferred the quoted passage to the different wording in 9 *Halsbury's Laws of England,* 2nd ed. (1933) 10, and, as the reader may see, accepted it as authority for the thesis that it is only *after* proof of an *actus reus* (the physical ingredient of the offence) *produced by the accused* (i.e., caused by a voluntary act or omission) that any question of *mens rea* can arise. It will be seen that there are in fact two stipulations here: (1) the antecedent need for proof of an *actus reus* before any question of *mens rea* can arise, and (2) the need for a causal relation between the *actus reus* and some voluntary conduct of the defendant.

23 *Ibid.,* 593, lines 42-47.
24 3rd ed. (1955), 272.
25 [1962] N.Z.L.R. 590, at 591-2.

I cannot quote or discuss the remainder of the judgment in its entirety, but it is devoted almost wholly to the question of causation, and the final step in the reasoning is a lengthy passage[26] which it seems fair to quote in full as follows:

Extract No. 2:

If he is to be regarded as responsible for that *actus reus*—[i.e., the absence of the warrant]—therefore, the decision must be made on the basis that he omitted immediately to replace the warrant.

It is, of course, difficult to demonstrate that an omission to act was not, in a causal sense, an omission which produced some event. All omissions result from inactivity, and in the matter of the warrant the appellant was necessarily inactive. But, in my opinion, it is a cardinal principle that, altogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary or unconscious, or unrelated to the forbidden event in any causal sense regarded by the law as involving responibility. See for example *Salmond on Jurisprudence,* 11th ed. 401, *Causation in the Law* by Hart and Honoré 292 *et seq.,* and the passage in 10 *Halsbury's Laws of England,* 3rd ed., 272 cited above. In my opinion a correct emphasis is now given by this last paragraph to the need for an act or omission making up the *actus reus* to be voluntary, whereas in the corresponding paragraph of the second edition this distinction was blurred in discussion of *mens rea.* Naturally the condition that there must be freedom to take one course or another involves free and conscious exercise of will in the case of an act, or the opportunity to choose to behave differently in the case of an omission. But this mental stimulus required to promote acts or available to promote omissions if the matter is adverted to, and consequently able to produce some forbidden condition, is entirely distinct from the mental element contained in the concept of *mens rea.* The latter is the intention or knowledge behind or accompanying the exercise of will, while the former is simply the spark without which the *actus reus* cannot be produced at all. In the present case there was no opportunity at all to take a different course, and any inactivity on the part of the appellant after the warrant was removed was involuntary and unrelated to the offence. In the circumstances I do not think it can be said that the *actus reus* was in any sense the result of his conduct, whether intended or accidental. There was an act of the appellant which led up to the prohibited event (the *actus reus*), and that was to permit the car to be on the road. The second factual ingredient was not satisfied until the warrant disappeared during his absence. The resulting omission to carry the warrant was not within his conduct, knowledge, or control: on these facts the chain of causation was broken.

For the foregoing reasons I am of the opinion that the physical ingredient of this charge was not proved against the appellant. Accordingly, I express no opinion on the submission that *mens rea* is excluded as an ingredient of the offence. On the view I have taken of the case the point does not arise.

GENERAL COMMENTS

There is so much of sweet reasonableness in the judgment, and the desire to reach a just conclusion is so apparent, and commends itself so strongly to one's mind, that criticism seems almost akin to sacrilege. For my part, I have no wish to assert that the defendant ought to have been convicted, and prefer to hope that there may have been good legal grounds for acquitting him. But, whether there were such grounds or not—and I shall in due course explore that problem—it is necessary to face the question whether the learned Judge's grounds are sound in law, and create a precedent which ought to be followed.

The judgment rests on citations of textbooks, the only actual quota-

26 *Ibid.,* 593.

tion from which is the passage from *Halsbury* set out in *Extract No.* 1. The first sentence of that passage is accompanied in *Halsbury* by a footnote irrelevant for present purposes, but there is also a footnote to the vital words, *"The act or omission must be voluntary"*—a footnote which illustrates what is meant by involuntariness, rather than voluntariness, and which qualifies the text to some extent by treating negligence as equivalent to voluntariness.

With all respect, I have not found the remaining textbook references of any value, and they do not make good the obvious deficiency arising from the fact that the judgment does not cite a single decided case, nor any judicial utterance whatever. I am moreover unable, from my own resources, to supply the need for such authority in support of the reasoning. I am not doubting the general propositions as to the need for voluntariness, and for a causal connection between a man's conduct and his criminal responsibility. But the judgment goes beyond such generalities, and, taking it as a whole, the absence of any judicial citations is significant, particularly as it deals with matters which cannot well be supposed to have escaped the notice of generations of judges.

I do not think the judgment really turns on any question of voluntariness in the sense in which that term is commonly used in the criminal law. There was no suggestion that the appellant had not consciously willed any act done by him, or that any omission on his part was brought about by any lack of freedom of his will. The vital, and indeed the only, relevant point was that, as he did not know of the disappearance of the warrant, "his resulting omission to carry the warrant" was, in the learned Judge's words quoted in *Extract No.* 2, "not within his conduct, knowledge, or control," and "the chain of causation was broken." In other words, the *actus reus,* defined by the learned Judge as including the absence of the warrant, was not attributable to any conduct of the appellant.

It may perhaps be desirable to emphasise that the actual decision was limited to an omission committed unwittingly, and that no general question arose as to the necessity, in all criminal cases, of preliminary proof of voluntary conduct before any question of *mens rea* can arise. In so far as the judgment affirms such a necessity, it is *obiter dictum,* and in my respectful opinion erroneous.

While it is difficult or impossible to study the judgment without suspecting that there is "a nigger in the woodpile", it is difficult to find him —or so at least it has been for me. Attempts to pinpoint grounds of criticism can lead one into such complexities that I think it best to begin with an affirmative statement of my own views, leaving criticism to emerge rather by way of contrast than otherwise.

PROOF OF VOLUNTARINESS

As proof of voluntariness is obviously the fundamental question, I go straight to that point. Having written elsewhere of "the generally recognised principle that criminal responsibility attaches only to 'conscious and voluntary acts' "[27] I readily accept, *sub modo,* the proposition that criminal responsibility depends upon proof of a voluntary act or omission—*sub modo,* firstly, because I think there are exceptions, and secondly because I think it is not incumbent on the prosecution to

27 Adams' *Criminal Law and Practice in New Zealand,* 2nd ed. (1971), para. 450.

adduce specific "proof" on that point unless and until there is evidence of involuntariness. As to exceptions, there is the well-known case of *R.* v. *Larsonneur*[28] which I need not discuss, and there are also what have been described as "status offences", and the cases of vicarious liability, and possibly—though here I risk a charge of begging the question—at least some cases of strict liability. But it is the matter of proof which is important at the moment, and what needs to be borne primarily in mind is that, in the absence of evidence to the contrary, an act or omission on the part of the accused is presumed to be voluntary.

This presumption has been referred to recently by Lords Kilmuir L.C. and Denning in *Bratty* v. *Attorney-General for Northern Ireland*[29]—a case of alleged automatism, which is, of course, neither more nor less than a denial of voluntariness. It has also been referred to by Barwick C.J. in *Ryan* v. *The Queen*[30]—a case, not of automatism or any other special type of defence, but in which the accused alleged that his pressing of the trigger of a rifle was "involuntary". Judges do not often speak specifically of the presumption, but its existence is manifest from the rule, of which *Bratty's* case is a clear illustration, that questions as to voluntariness arise only if there be in the evidence a proper foundation for the allegation of involuntariness. *The Queen* v. *Cottle*[31] is to the same effect. As the cases show, if there be a proper foundation for the defence, the ultimate onus of proving voluntariness beyond reasonable doubt rests at common law on the prosecution in accordance with the *Woolmington* rule; and in that sense—but only in that sense—it is permissible to say that, as a general rule, there is no criminal responsibility without "proof" of voluntariness. But the primary evidentiary onus of raising the defence rests on the accused, though he is, of course, at liberty, if he can, to find the necessary material in the evidence adduced by the prosecution.

In other words, the law is concerned, from the practical point of view, not with specific and initial proof of voluntariness as part of the case for the prosecution, but with the negativing of allegations of involuntariness. Nowhere but in *Kilbride* v. *Lake* have I found the doctrine that the first approach to a case must always be an inquiry into initial proof of voluntariness.

The terms "voluntary" and "involuntary" are of notoriously vague import.[32] Attempts at definition lead modern writers into psychological and semantic realms where all but the angels may fear to tread or fly; and, having no angelic wings, I prefer to keep my feet on the ground with the simple statement that voluntariness, as a requisite of criminal responsibility, has reference to one's physical ability to control conduct,[33] and postulates only that the conduct must spring from a conscious exercise of the will. In practice, the proof of it almost invariably takes the form of a denial of some well recognised form of alleged involun-

28 (1933) 139 L.T. 542.
29 [1963] A.C. 386, at 407 and 413.
30 (1967) 121 C.L.R. 205, at 213; 40 A.L.J.R. 488, at 492.
31 [1958] N.Z.L.R. 999.
32 Cf. per Windeyer J. in *Ryan* v. *The Queen* (1967) 121 C.L.R. 205, at 244; 40 A.L.J.R. 488, at 504-5; and, in regard to their use in respect of confessions, see Adams' *Criminal Law and Practice in New Zealand,* 2nd ed. (1971), paras. 3857-3864.
33 Cf. Howard, *Australian Criminal Law* (1965), 277.

tariness, such as direct physical compulsion, somnambulism or other activity in sleep, or (as in *Ryan* v. *The Queen, supra*) accidental, spasmodic or reflex action. That, in the passage quoted by the learned Judge from 10 *Halsbury's Laws of England*—"The act or omission must be voluntary",—the term "voluntary" is used merely as the antithesis of "involuntary" in the sense just explained, is clear from the above-mentioned footnote to those words; and, as has also been said above, no question of this kind arose in *Kilbride* v. *Lake*. Even the omission which was the crucial matter in that case was not involuntary in any such sense, but was attributable solely to the lack of knowledge of the relevant circumstances.

Unless the terms under discussion are kept within the foregoing limits, they will naturally tend to spread beyond cases of mere exercise of or failure to exercise the will, and towards cases of lack of knowledge, mistake, accident, failure to foresee consequences, and the like—the normal sphere of the *mens rea* doctrine—just as, in *Kilbride* v. *Lake*, lack of knowledge (or mistake) came to be equated with involuntariness.

I pause here for a moment to make brief reference to certain casual words in *McCone* v. *Police*[34] in which, as mentioned in my fourth paragraph, Mr R. S. Clark perceives a resurrection of the spirit of *Kilbride* v. *Lake*. The words are, "This passage serves to re-affirm . . . that the ingredient of driving the vehicle must arise from free, deliberate and conscious choice by the defendant." But this is open to precisely the same comment as the *Halsbury* dictum, since the passage which the court had just cited and to which it was referring dealt only, like the *Halsbury* footnote, with various instances of the defence of involuntariness—cases in which the physical ability to control the vehicle is taken completely out of the hands of the driver.

I can see no reason why, within their proper limits, the requirement of voluntariness and defences of involuntariness should not apply to offences which in other respects are of strict liability—the point which Mr R. S. Clark has argued with regard to automatism.[35]

What then is one's final reaction to *Extract No.* 1? The learned Judge there uses the term *mens rea* in a sense that excludes voluntariness, whereas—though this is only a matter of personal preference on a question of nomenclature—I would treat voluntariness as an element of *mens rea*. Then I would make two reservations: (1) that allowance must be made for exceptions to what purports to be a universal rule; and (2) that the obligation to prove voluntariness arises only if there be an evidentiary foundation for a relevant allegation of involuntariness. Thus I am not far from the learned Judge's view, and would agree that —exceptions apart, and only in cases where there is evidence of involuntariness—it is (at common law)[36] incumbent on the prosecution to prove voluntariness in the proper sense of that term, and that this requirement, when it arises, does go behind, and renders it unnecessary for the moment to consider, any other mental requirement, or indeed any

34 [1971] N.Z.L.R. 105, at 109.
35 "Automatism and Strict Liability" (1968) 5 V.U.W.L.R. 12.
36 My reference to the common law is interpolated only because an allegation of involuntariness may conceivably be an "excuse" within the meaning of s.67(8), Summary Proceedings Act 1957, with the persuasive onus of proof on the defendant: cf. Adams, *Criminal Onus and Exculpations* (1968), Sweet and Maxwell's Practice Note No. 12, paras. 70 *et seq.*

other defence at all. And, as indicated above, I would apply this rule even to offences which are in other respects offences of strict liability. There is here perhaps more of agreement than disagreement.

OMISSION AND INVOLUNTARINESS

While the reasoning of *Extract No.* 2 is not limited to omissions, it shows clearly that the crucial point in the case, and the actual and only matter of decision, was the application of the principle of voluntariness to an omission. On this question there is little to be culled from the books. Glanville Williams considers that absolute impossibility to perform the omitted legal duty, or physical impossibility not resulting from accused's own fault, will be a defence, and that non-culpable ignorance of the circumstances calling for its performance may also be such.[37] *Harris' Criminal Law*[38] treats involuntariness (i.e., physical inability) as an excuse for an omission, and also treats as a good defence a mistaken belief that the duty is being performed. I have found nothing more, nor have I found anything helpful in the textbooks cited by the learned Judge.

It is, of course, impossible to suggest that a crime of omission must needs be voluntary in the sense that the omission must be willed; and the learned Judge has clearly recognised the distinction which, in the matter of voluntariness, has to be drawn between omissions and positive acts. What he stipulates for is that the defendant should have had "some other course open to him"—"freedom to take one course or another", with "the opportunity to choose to behave differently". I would respectfully agree with this in any case in which the freedom and the opportunity were denied by reason of any circumstances that would render a positive act involuntary in the sense already explained; as, for instance, if the defendant, without fault on his part, were prevented from acting by physical compulsion or by falling into a state of automatism. Further than this I do not think one can go by an application of the principle of voluntariness; and it seems clear that the learned Judge's rather imprecise words do in fact go further than a requirement of voluntariness in what I regard as its proper sense.

The particular case was one in which freedom and choice were denied, not because the defendant could not exercise his will, nor because of any physical impossibility such as Glanville Williams suggests, but because the defendant lacked knowledge of the fact which made it incumbent on him to act. The case might thus come within Glanville Williams' alternative suggestion of non-culpable ignorance of the relevant fact, or within Harris' suggestion as to a mistaken belief that the duty was being performed. But these would be normal applications of the *mens rea* doctrine which the learned Judge so emphatically rejects.

It follows that I am, with respect, unable to accept the learned Judge's reasoning in so far as it rests decision on a concept supposed to be distinct from *mens rea.* But this does not mean that the actual decision may not be supportable on other grounds and without reliance on novel views.

37 *Criminal Law: The General Part,* 2nd ed. (1961), para. 3 at its end, and para. 240.
38 21st ed. (1968), 36.

ACTUS REUS, MENS REA, AND VOLUNTARINESS

I do not propose to enter into a prolonged discussion of the differing senses in which the terms *actus reus* and *mens rea* have been defined by different writers. There is no semblance of unanimity as to the factors which should be included in the one or the other. I think it convenient and in accordance with common usage to treat all mental elements (including voluntariness) as falling within *mens rea,* and to define *actus reus* as comprising all the elements that are not to be found in the mind of the accused. This establishes a clear and workable distinction. *Mens rea* will thus include voluntariness and all the mental elements, such as intent or knowledge, which are required by the definition of the offence, and every other mental element the absence of which will give rise to a common law defence of absence of *mens rea. Actus reus,* on the other hand, will include the prohibited conduct, the surrounding relevant circumstances, and any relevant consequences.[39]

In *Kilbride* v. *Lake* voluntariness is treated as one of the physical elements of the offence, and as part of the *actus reus*—a view which is also taken, somewhat apologetically, by Glanville Williams in *Criminal Law*: *The General Part.*[40] But the important point is not that the learned Judge's nomenclature differs from mine, he having the same right to define his terms as I respectfully claim. What is important is his treatment of voluntariness as a mental element which is *sui generis* and so far distinguishable from *mens rea* that its existence becomes a condition precedent to any consideration of *mens rea.* There thus arises a two-tiered analysis of the mental elements of an offence, with one of them occupying a predominant position, and seemingly governed by principles different from those governing the other; and I do not think it can be doubted that it is this dichotomy which gives the judgment what I venture to regard as a specious appearance of logical validity.

While aware that I differ, not only from the learned Judge but also from Glanville Williams, in declining to treat voluntariness as part of the *actus reus,* and that, in not treating voluntariness as a mental element distinct from *mens rea,* I differ from Professor J. W. C. Turner (who regards voluntariness and *mens rea* as together making up "the conjoint mental element", but who carefully limits his classification to his own text in *Russell on Crime*[41]), I believe nevertheless I am following common usage in treating voluntariness as a mental element which may properly be regarded as falling within the term *mens rea.* I think it would be difficult to draw a clear line of demarcation between voluntariness and *mens rea,* and I think moreover that both are governed largely or wholly by the same principles. In each case, (1) the mental issue arises by way of answer to the proof of an act or omission which, apart from that issue, would be sufficient proof of the commission of an offence; (2) the issue arises only where the defendant can find or provide in the evidence a proper foundation for his denial; (3) a lack of the mental element will not be accepted as an answer to the charge if such lack was due to anterior blameworthy conduct of the defendant; and (4) where the defendant discharges the initial evidentiary onus referred to in (2), the ultimate persuasive onus of proving the mental element beyond

39 Cf. Smith and Hogan, *Criminal Law,* 2nd ed. (1969), 28.
40 2nd ed. (1961), at 12, 14, 18, and 22.
41 12th ed. (1964), 25-26.

reasonable doubt is on the prosecution, unless, of course, there be statutory provision to the contrary. The second of those propositions is amply supported, on an issue of voluntariness, by *Bratty* v. *Attorney-General for Northern Ireland*,[42] and by the decision of our own Court of Appeal in *The Queen* v. *Cottle*[43]—two cases of alleged automatism. The third proposition is sufficiently illustrated by the well-known rule that a man who acts involuntarily through falling asleep will not be excused if he knew he was falling asleep and failed to take necessary precautions.[44]

The question is at bottom one of nomenclature, but I can see no good purpose that can be served by treating voluntariness either as part of the *actus reus* or as a mental element distinct from *mens rea*. On the contrary, I think it can only lead to confusion and to heterodox reasoning. Glanville Williams has said[45] that to treat voluntariness as a constituent of the "act"—which is what he does and what the learned Judge also did in including it in the *actus reus*—"splices part of the mental element of crime on to the physical element", and "makes the legal distinction between act and state of mind a jagged one, and sometimes it may lead to error in reasoning". I think respectfully that it did so in *Kilbride* v. *Lake*.

RECONSIDERATION OF THE CASE

My criticisms of the learned Judge's reasoning do not lead to the conclusion that his decision was wrong, and it is necessary now to consider how, on other and perhaps more proper grounds, the case should have been decided.

One must, of course, accept unreservedly the facts as agreed and as stated above, though I think it right to comment, with respect, that the appeal should not have been heard on such material. We know nothing as to the course of the trial before the justices—not even whether the defendant gave or adduced any evidence. But there was ample power to rehear the evidence, and a short space of time devoted to that task might have saved the learned Judge and subsequent commentators a great deal of time and effort expended in research into fundamental questions as to criminal responsibility. I do not impugn anyone's veracity or good faith, and it is possible, of course, that the facts as agreed could have been clearly proved; but there is in them an inherent improbability such that any court ought to have been sufficiently sceptical to insist on sworn evidence open to the test of cross-examination. The fact that the warrant was missing after "a short time" raised a strong factual presumption that it was not there when the car was parked; and, quite apart from any such presumption, it would normally be difficult for any motorist to swear positively that he actually saw his warrant in its place when he parked the car, or even approximately at that time. A properly affixed warrant is not easily removed, and, unless the job be carefully done, there will be traces on the windscreen. Moreover, thieves do not commonly steal such warrants. There is the statutory

42 [1963] A.C. 386.
43 [1958] N.Z.L.R. 999.
44 *Hill* v. *Baxter* [1958] 1 Q.B. 277, at 282; *R.* v. *Scarth* [1945] St. R. Qd. 38, at 42-3, and 55.
45 *Op. cit.*, 12, 14; paras. 8 and 9.

obligation mentioned above to keep the warrant so affixed as not to be readily detachable, and no suggestion appears of any storm or other "act of God" which might have caused its disappearance. Finally, and even on the assumption that the agreed facts could have been convincingly proved, they are bare of any information on the question of possibly relevant fault on the part of the defendant, which might have been an answer to any allegation of involuntariness or other form of absence of *mens rea.*

But, however unsatisfactory it may be, one is bound now to deal with the case on the footing that the facts were as agreed, and also (in the absence of anything to the contrary) that the defendant was in no way responsible for the disappearance of the warrant, and neither knew nor ought to have known that it was in such a state that it might disappear in a breath of wind or might be easily stolen. It is futile to inquire now why the agreed facts were accepted by the prosecutor or by the Judge, but I suspect the reason may have lain in a misconceived assumption that the burden of proving any *absence* of the warrant when the car was parked rested on the prosecution—a burden for the discharge of which no direct evidence could well have been available. But, as the learned Judge pointed out[46], the definition of the offence took the form of "a prohibition followed by an exception", and, as the case was a summary one—and, indeed, one that could never be anything else—s.67(8) of the Summary Proceedings Act 1957 threw on the defendant the onus of proving the *presence* of the warrant—a matter I have discussed *in extenso* in *Criminal Onus and Exculpations.*[47]

Turning now from the facts to the law, the relevant Regulations were as set out above, and there was a prohibition of permitting the car to be on the road unless it carried a warrant. The only matter needing to be added to the learned Judge's analysis of the Regulations is the obligation already mentioned to keep the warrant so affixed as not to be readily detachable, and, while the defendant was not the "owner", he might well have been a party to, or cognisant of, an offence in this respect. But this would go only to the question of fault, which, as already explained, cannot now be considered for lack of the relevant facts.

The agreed facts clearly showed that the defendant had permitted the vehicle to be on the road, and, as the learned Judge said[48], this was a "continuing act which did not end when he left the vehicle". Therefore, at the moment when the vehicle was found to be without a warrant, he was still permitting it to be on the road, and, it being impossible for him to deny the absence of the warrant at that moment, the question is whether any defence was open to him. Rejecting, as I have respectfully done, the learned Judge's reasoning based on alleged lack of voluntariness, the defence actually put forward was the defendant's lack of knowledge of the disappearance of the warrant, his ignorance thereof being the factor which deprived him of the opportunity of remedying the breach, and gave rise to the inability to act on which stress was laid in the judgment. I think there can be no doubt that this was a defence of absence of *mens rea,* consisting in ignorance of, or mistake as to, a relevant fact. Such ignorance or mistake might in itself be a defence, or

46 [1962] N.Z.L.R. 590, at 592, line 41.
47 (1968) Sweet and Maxwell's Practice Note No. 12, para. 52 onwards.
48 [1962] N.Z.L.R. 590, at 592, line 52.

might be regarded as rendering it impossible for the defendant to comply with the statutory duty, thus raising a defence of impossibility.

I have expressed the opinion elsewhere[49] that it is a mistake to classify offences into two categories, those of strict responsibility and those not such; and that the inquiry should always be into the question whether or not the offence is one of strict liability in respect of *some particular element*. Accordingly, I am concerned here, not with the question whether the offence was in all, or in some other respects, one of strict responsibility, but only with the question whether it was such in respect of the particular defences to which I have just referred—in other words, whether the law will or will not accept those defences as an answer to this particular charge. It is in this sense that I use the term "strict" or "absolute" responsibility.

THE QUESTION OF STRICT RESPONSIBILITY

Where the charge is one of "permitting", there is clearly a mental element in the permitting, knowledge or its equivalent being necessary.[50] Had the charge in *Kilbride* v. *Lake* been one of permitting the vehicle to be on the road *without* a warrant of fitness, it would have been easy, and in my opinion correct, to hold that non-culpable ignorance of the absence of the warrant was a good defence, and that, knowledge being necessary, the offence was not an absolute one. But the definition of the offence is not so worded, and I doubt very much whether it can be so read. The learned Judge felt himself able to say[51] that the *actus reus* consisted in the permitting to be on the road accompanied by the omission in respect of the warrant. In other words, he was in effect applying the verb "permit" to the absence of the warrant, whereas the word "unless" appears to make a complete break in the sense, and to confine the permitting to the presence of the vehicle on the road, the act of permitting not being allowed "unless . . . "

A similar question arose in *Proudman* v. *Dayman*,[52] where Dixon and McTiernan JJ. were of opinion, on a charge of permitting an unlicensed person to drive, that the mental element of "permitting" was limited to the driving, and did not extend to the absence of the licence. Dixon J. said, "It is the driving which must not be permitted, that is, unless the driver holds a licence."[53] The word "unless" was not in fact present in that case, as it was in *Kilbride* v. *Lake*, and its use in this case makes it difficult to extend the "permitting" to the absence of the warrant. I do not like this doctrine, and, while recognising the difficulty, would prefer a more liberal construction which would extend the "permitting" to the absence of the warrant, thus taking the offence in *Kilbride* v. *Lake* out of the category of absolute offences in this respect; and, if this were permissible, the case would no longer present any difficulty.

There is also the possibility that, in view of *Sweet* v. *Parsley*,[54] and *The Queen* v. *Strawbridge*[55]—decisions which were, of course, not avail-

49 *Criminal Law and Practice in New Zealand*, 2nd ed. (1971), paras. 358-360.
50 *Grays Haulage Co.* v. *Arnold* [1966] 1 All. E.R. 896, at 898A; following *James & Son* v. *Smee* [1955] 1 Q.B. 78, at 91; *Sweet* v. *Parsley* [1970] A.C. 132 at 162E and 165C per Lord Diplock.
51 [1962] N.Z.L.R. 590, at 592, line 44.
52 (1941) 67 C.L.R. 536.
53 *Ibid.*, 542.
54 [1970] A.C. 132.
55 [1970] N.Z.L.R. 909.

able to the learned Judge—the courts will now be less ready than formerly in insisting on absolute liability.

If the foregoing suggestions are, as some may think, too hopeful, there is the final point that, as the regulation really imposes a positive duty to have the warrant there if one permits the vehicle to be on the road, and as the defendant's lack of the necessary knowledge rendered it impossible for him to perform that duty, a defence of impossibility may be available. There is certainly in our law no general recognition of such a defence, and the only discussions I have been able to find are in Glanville Williams' *Criminal Law*: *The General Part*,[56] and in Howard's *Strict Responsibility*.[57] I am disposed to agree with Williams that non-culpable physical impossibility must be a defence to a charge of non-compliance with a legal duty.[57a] *Harding* v. *Price*[58] comes near to the point, and draws the distinction between prohibited acts and omissions to perform duties. But that decision rests rather on the lack of knowledge which rendered compliance impossible, this being treated as an absence of *mens rea*, and I think it better to rely on that well-recognised ground than on the uncertain ground of impossibility as a specific defence. I note in passing that *Extract No.* 2 from the judgment in *Kilbride* v. *Lake* could well be regarded as being in effect, or could readily be paraphrased into, an argument for impossibility. But it would still be, I think, impossibility arising solely from lack of the relevant knowledge.

My own conclusion, for what it may be worth, is that, on the facts as agreed, *Kilbride* v. *Lake* was not a case of strict responsibility in the relevant respect, and that the defendant's non-culpable lack of knowledge was a good *mens rea* defence. While the case was decided on grounds which I would respectfully reject, and on what I regard as inadequate inquiry into the facts, I think nevertheless that, on the accepted facts, the actual decision was correct.

SIMILAR ENGLISH CASES

It has occurred to me to consider how such a case as *Kilbride* v. *Lake* would be dealt with in England, and the case of *Burns* v. *Bidder*[59] is an apt example. The defendant, on a charge of failing to accord precedence to a pedestrian on a pedestrian crossing, alleged successfully that the occurrence was due to a failure of his footbrake, which had deprived him momentarily of the control of his car. Just as in *Kilbride* v. *Lake*, it was an omission that was in question—the omission to stop as required—and the defence was obviously a denial of voluntariness in respect of that omission. Appellant's counsel urged the need of a "conscious act", but neither that expression nor the terms "voluntary" or "involuntary" figured in the judgment, and nothing was said that could be regarded as approaching even remotely to the *Kilbride* v. *Lake* doctrine of the preliminary necessity for proof of voluntariness. On the contrary, and in line with the views expressed above, the problem was

56 2nd ed. (1961), para. 240.
57 (1963), 204-7.
57a In *Zarb* v. *Kennedy* (1968) 121 C.L.R. 283, there are dicta suggesting that impossibility would be a defence to a charge of "failing" to perform a duty (per Barwick C.J. at 294, and Windeyer J. at 303).
58 [1948] 1 K.B. 695.
59 [1967] 2 Q.B. 227.

dealt with,[60] not on the footing of a preliminary matter requiring to be proved on the part of the prosecution, but as one of a "special defence" not arising until raised by the defendant, the evidentiary onus resting on him though the ultimate probative onus rested on the prosecution. (I mention in passing that, in view of s.67(8) of the Summary Proceedings Act 1957, to which reference has already been made, the probative onus on the balance of probabilities might, in a summary case such as *Kilbride* v. *Lake*, rest on the defendant.) Moreover, the question of absence of fault on the part of the defendant, though for special reasons not actually investigated in *Burns* v. *Bidder*,[61] was not overlooked, and was treated as a necessary element of the successful defence, this being, in words borrowed from the judgment[62] that the sole cause of defendant's failure was that his control of the vehicle was taken from him by the occurrence of an event which was outside his possible or reasonable control, and in respect of which he was in no way at fault. It will be seen that the treatment of the case accords well with what is said above. The decision has recently been cited, though distinguished on the facts, by Wild C.J. in *Police* v. *Adams*.[63] Another illustration of a defence of involuntariness, unsuccessful on the facts but dealt with on the same principles as in *Burns* v. *Bidder*, is to be found in *Reg.* v. *Spurge*.[64] I have no doubt there are other English cases, but the two referred to will suffice, and I note with interest that McCarthy J. also has treated them as falling within the same class as *Kilbride* v. *Lake*.[65]

If *Kilbride* v. *Lake* were dealt with on the same principles, and on a proper ascertainment of the facts as bearing on the possible question of fault, I do not see that any objection could be taken to the actual decision. The absoluteness of the offence—if it be absolute—ought not to go so far as to exclude such a defence.

60 *Ibid.*, 241-2.
61 *Ibid.*, 242E.
62 *Ibid.*, 240F, 242D.
63 [1971] N.Z.L.R. 695.
64 [1961] 2 Q.B. 205.
65 *Andrew & Andrew Ltd.* v. *Transport Department* [1968] N.Z.L.R. 692, at 694.