The act requirement

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I INTRODUCTION

The Crimes Bill has at the time of writing already been the subject of controversy, having been subjected to criticism by the Chief Justice and by the President of the Court of Appeal. Somewhat reluctantly, for carping at change seems a reactionary activity, I must add to that criticism.

Although the discussion which follows focusses on the requirement in the Bill of an "act" as a foundation for criminal liability, I venture one general criticism. Most of those who practise in the criminal courts find it frustrating to have to work through not less than three statutes, two of them heavily amended, in order to ascertain the law of criminal procedure. Many would go further and complain that there are a number of aspects of criminal procedure which could fruitfully be reformed and simplified. The effort devoted to producing a Crimes Bill which makes some seemingly fundamental changes to the substantive criminal law, but leaves the procedural part largely untouched, seems a waste both of opportunity and of effort.

The conclusion I draw about the Bill as it relates to the requirement of an act or omission for the imposition of criminal liability is that there is little in it that clarifies, and some that obscures, the basic principles. Primitive as the substantive criminal law on these principles is, it has provided workable rules for the courts and for juries and by and large has achieved the virtue of conforming with some kind of average every day morality.[1] (I leave aside questions of how and whether and why a criminal code should make provision for different cultural conceptions of responsibility and punishment; that is a larger debate upon which, again, the drafters of the new code have not embarked.)

II DEFINITION OF "ACT" AND "OMISSION"

The Bill provides, in clause 3, a partial definition of "act" and "omission":

> . . . a reference to an 'act' or to an 'omission' as an element of an offence includes, unless the context otherwise requires, -
> (a) Any result of the act or omission; and
> (b) The circumstances in which the act or omission is done or made or the result of the act or omission occurs, -
> Where that result is, or those circumstances are, an element of the offence.

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1 For a fuller discussion of the general position, see J Hannan, "Responsibility for the Actus Reus" in *Movements and Markers in Criminal Policy* (Legal Research Foundation, Publication 23, 1984).

This is a provision shrouded in some obscurity. The explanatory notes to the Bill do not help much. The definition in clause 3 seems, in fact, so circular as to be unnecessary. A reference to an act or omission *as an element of an offence* is said to include its results and circumstances, or the circumstances in which its results occur, *where those results or circumstances are an element of the offence.* Seemingly, stipulating in the relevant statute that the results or circumstances are an element of the offence is all that would ever be needed. Either the results or circumstances are elements of the offence or they are not; if they are not, clause 3 adds nothing.

The clause may provide a useful definitional clarity (if such clarity was lacking) by ensuring that wherever the term "act" appears in an offence provision, it will connote the circumstances and results of the act in question. I believe, however, that its primary effect may be by way of interaction with the principles of mens rea, as restated in clause 21. On basic principles, an accused must be shown to intend the prohibited act; accordingly, clause 3 would seemingly operate to require intent as to circumstances and results of the act, where such circumstances and results are elements of the offence and where the relevant offence specifies that intent is required. This may in some instances (where the word "act" is used in the section creating the offence) reduce the freedom presently enjoyed by courts to broaden or cut down the mens rea required for particular offences. That this will be the case is reinforced by clause 21, where intention as to "consequences" (why not "results"?) or circumstances is said to include meaning to bring about the consequence or believing that it is highly probable.

Certainly, the clause 3 definition removes the likelihood of any movement by judges to see the actus reus of an offence as merely the act done or omission made by the accused, rather than as the "event" or "physical element" brought about by the act of the accused (I am here using the word "act" in a narrow sense).[2] That is significant in relation to how far the mens rea must run (and also, possibly, in relation to questions of voluntariness).

An interesting problem is presented by the interaction of clause 19 with the clause 3 definition of act. By virtue of clause 19 involuntary acts do not attract criminal responsibility. What, however, if D *initiates* a forbidden act but then becomes unconscious, before the results have worked themselves through, in a situation where D could have intervened to halt the otherwise inevitable progress to the result? As the results are part of the act, does D have a defence? The problem just mentioned was met in the UK Law Commission Draft Criminal Code[3] by clause 27(i), which in effect embodied the rule in *Miller*.[4]

> Where it is an offence to be at fault in causing a result, a person who causes the result by an act done without the fault required commits the offence if, after doing the act and with

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2 Compare *Tipple* v *Pain and McQuoil* Unreported, 10 February 1982, High Court, Christchurch Registry A42/81 with *Kilbride* v *Lake* [1962] NZLR 590.

3 Law Commission, *Criminal Law: Codification of the Criminal Law: A Report to the Commission* (Law Comm No 143, 1985).

4 [1983] 2 AC 161.

the fault required, he fails to take reasonable steps which might have prevented the result occurring or continuing.

This leads us to the question as to the larger principle of liability for omissions; in particular, what kinds of omissions, by what kinds of persons, should be punished? This question has always been productive of disagreement. Glanville Williams, for example, has generally been hostile to penalising omissions, and points out that there is inherent uncertainty in such liability. He observes that this is because it generally rests upon being able to point to some legal duty. The categories of persons upon whom duties are imposed, and the content of such duties, frequently tend to be fluid.[5]

III "CRIMINAL RESPONSIBILITY" : A NEW PART FOR THE CRIMINAL CODE

Part II of the Bill is headed "Criminal Responsibility". It contains clauses dealing with such things as involuntary acts, omissions, intention, knowledge, recklessness, heedlessness, negligence and mistake and ignorance. To some extent, the clauses in this part of the Bill are definitional. For example clause 21, dealing with intention and knowledge, does not itself create liability but rather provides a definition of intention where the section creating an offence specifies that mens rea may be satisfied by proof of intention.

However, despite being superficially definitional, this part effects substantive changes. Some clauses, indeed, seem to create substantive offences. The Bill does not cast liability for omissions very widely, but even to the extent that it does create liability for omissions, there are uncertainties. Note, for example, clause 20(5)(b) placing liabilities on persons who have "... undertaken the care of [some] other person ...". Further, by virtue of clause 20(2), coupled with subclauses (3) and (4), D will apparently be liable to punishment for culpable homicide and offences of reckless endangerment if, through his or her tenure of any office he or she is under a duty to do some act, there is a risk of serious injury to another if the act is not done, and death or serious injury results by reason of the omission. D must, of course, omit to act with the mental element required for the offence. Similarly, subclause (5) appears to create a new substantive offence, when coupled together with subclause (3). At the least, the definition of culpable homicide and the duties to preserve life or prevent harm set out in clauses 118-121 are added to by clause 20(5).

On the other hand, clause 19 arguably creates a statutory defence in providing that a person is not criminally responsible for doing any act or omitting to do any act involuntarily. As "criminally responsible" is defined in clause 2(1) as meaning "... liable to punishment for an offence ...", a new defence is seemingly created. But as it is not expressed to be an affirmative defence, it should probably be treated as definitional. Further, clause 20(1) provides that other than as provided elsewhere in clause 20, a person is *not* criminally responsible for any omission to do any act. It

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5 Glanville Williams, "What should the code do about omissions?" (1987) 7 Legal Studies 92.

would appear that the incipient doctrines of offending by omission found in such cases as *Fagan* v *Metropolitan Police Commissioner*[6] have been cut off short.

IV INVOLUNTARINESS : A NEW CONCEPTION OF "ACT"?

Clause 19(1) provides that a person is not criminally responsible for doing or omitting any act involuntarily. As such it restates a well established principle although the value of doing that is perhaps doubtful. As Windeyer J remarked in *Ryan* v *R*:[7]

> That an act is punishable as a crime only when it is the voluntary act of the accused is a statement satisfying in its simplicity. But what does it mean? What is a voluntary act? The answer is far from simple, partly because of the ambiguities in the word 'voluntary' and its supposed synonyms, and partly because of imprecise, but inveterate, distinctions which have long dominated men's ideas concerning the working of the human mind.

An initial point to make is that it is in some ways artificial to speak of an "act" being done "voluntarily". It would be better to describe such an event as "behaviour" or "conduct" rather than an "act", for when we speak of someone's act we generally have in mind the notion that the person is in some way responsible for their behaviour and that, usually, requires voluntariness. If we wanted to achieve greater descriptive clarity we could usefully say that if a person's behaviour causes a prohibited event, s/he will be criminally responsible if the behaviour was voluntary and accompanied by the necessary mental state (intent etc). The problem with this is that it presupposes that we have a coherent conception (in a positive sense) of what is meant by "voluntarily". As experience has shown, it is much easier to state what counts as involuntariness, than to provide an account of what is meant by "voluntary".

The interaction of clause 19 with clause 3 has already been mentioned. One may further explore the effect of these two clauses by consideration of the facts of *Ryan*. Ryan carried a rifle in the course of a robbery. While he was attempting to tie V's hands, he pointed the cocked and loaded rifle at V; it fired and V was killed. Ryan maintained that V moved suddenly, as if to attack him. He was surprised and the gun accidentally discharged. Various theories as to what precisely had happened were canvassed, but one theory which was certainly at least credible was that the trigger was pressed in a "reflex" or convulsive unwilled movement of his hand or of his muscles. The case records that several police officers re-enacted the scenario as described by Ryan, and all pulled the trigger. Ryan was convicted of murder.

Under the proposed Crimes Bill there would be doubt that Ryan could be convicted of culpable homicide; clause 122(3) would be the only possibility: "doing an act known to be likely to cause death or serious bodily harm, for an unlawful object". At the least, he would be guilty of an offence under clause 132(2) (negligent endangering), which appears to be the nearest thing in the Bill to a replacement for negligent

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6 [1969] 1 QB 439.

7 (1967) 40 ALJR 488, 504.

manslaughter. But that still leaves the question as to whether he would be completely protected by virtue of clause 19 (involuntary acts). That this is a possibility is the result of the fact that the Bill gives the word "reflex" as an example of involuntariness. As Elliot has pointed out[8] the term "reflex action" is little more than quasi-scientific. Specifying it in a statute may tend to increase the legitimacy of claims by defendants that actions were done as the result of "reflex". In *Ryan* the jury had a considerable degree of scepticism about such a claim. There was however no statute such as the proposed clause 19 with which to contend.

One technique used by some of the judges in *Ryan* was to employ the "accordion effect" with regard to the description of an "act". Under this, an "act" can be conceptually stretched out according to the level of generality of the language used in the statute and according to the period encompassed by the description. Thus in *Ryan* if the relevant unlawful act was viewed not as pulling the trigger but as the pointing of a loaded and cocked gun at V in the course of a robbery, a relevant voluntary act could be found. An acute judicial observation to this effect can be found in *R* v *Knutsen*:[9]

> The determination of what was a person's willed act does not depend solely upon consideration of the physical movement made by the person - it depends upon consideration of that physical movement viewed in the context of its surrounding circumstances. Thus to pull the trigger of a rifle is a physical movement but the act which the person who pulled the trigger does will vary according (for example) to whether the rifle when the trigger was pulled was loaded, or was pointing to the sky, or was pointing toward another person.

How would clause 19 impact on this question? Clause 3 provides than an "act" includes the circumstances in which an act or omission is done, but only where the circumstances are an element of the offence. If pointing a loaded gun at someone can be said to be an element of the offences of culpable homicide or endangerment, the defence of involuntariness by reflex action can be overcome as the relevant "act" will be voluntary. But then the question will become whether this act can be said to *cause* death. One is left with no definition of "act" for the purpose of clause 19 which will help clarify the *Ryan* situation. As I have said, the mere presence of clause 19 *invites* defences based on claims of "reflex" action, coupled with attempts to persuade courts to adopt extremely truncated or "squeezed up" definitions of the relevant acts.

V INVOLUNTARINESS AND THE INSANITY DEFENCE

The advent of clause 19 seems likely to result in arguments by defence counsel that the new Act evidences a legislative intent to shift the balance between insane and non-insane automatism.

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8 DW Elliot, "Responsibility for Involuntary Act: *Ryan* v *The Queen*" (1968) 41 ALJ 497.

9 [1963] Qd R 157 per Philp J at 165. See also the brief discussion in *Wickliffe* [1987] 1 NZLR 55, 60-61.

The borderline cases such as diabetes, epilepsy, hardening of the arteries (and other disorders) that have troubled the courts in the past are all cases where physical behaviour may occur that can aptly be characterised as "convulsions". Nevertheless, it is not at all clear that such situations would be covered by clause 19. Additionally, they are not clearly indicated as being within or without clause 28 (the insanity defence).

The courts have of course developed well understood principles as to what will count as sane and as insane automatism.[10] The application of those principles can justly be described as being capricious on occasion. But one must acknowledge that these are very difficult lines to draw, and there is at least certainty on a number of points. The use of the term "convulsions" in clause 19 of the Bill may be argued to be a statutory indication that the doors are open somewhat wider to non-insane automatism. Greater clarity on this point is desirable. Although it is probably unlikely that clause 19 will colonise the territory of insane automatism, because of the well-developed caselaw on the topic, a clearer statutory indication as to whether some shift in emphasis is intended would be useful.

VI ACCIDENT AND CAUSATION

The new Part II of the Bill proclaims itself as dealing with the topic of "criminal responsibility". As such it is a little surprising that it does not deal with questions of causation and accident. Comparison might be made with section 23 of the Queensland and Western Australian Criminal Codes:

> A person is not criminally responsible for an act ... which occurs independently of the exercise of his will, or for an event which occurs by accident.

This provision has not avoided the necessity for courts in the relevant jurisdictions to grapple with difficult questions of causation. In fact the provision may well have made it easier for such questions to be raised and it may be for that reason that no such provision appears in this Bill. On the other hand, the definition of "act" in clause 3, referring as it does to the "result" of an act or omission, raises the question of causation. For example, consider the duties imposed in clauses 119 (duty of person doing dangerous act), 120 (dangerous things) and 121 (duty to avoid dangerous omissions). Plainly, there is scope for the intervention of accident subsequent to the initial conduct of an accused and before the result (within clause 3) has taken place. The American Law Institute in its Model Penal Code attempted to provide a concise principle of causation:

> Conduct is the cause of a result when:
> (a) It is an antecedent but for which the result in question would not have occurred; and

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10 See eg *Cottle* [1958] NZLR 999; *Quick* [1973] 3 All ER 347; *Rabey* (1981) 54 CCC (2d) 1; *Sullivan* [1984] AC 156.

(b) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offence.[11]

The Model Penal Code goes on to deal with situations where actual results differ from those designed or contemplated or the wrong person or property is injured or affected and so forth.

One may, indeed, question whether words such as "... it is an antecedent but for which the result ... would not have occurred ..." will provide any useful guidance in dealing with questions of causation. Given the Commonwealth jurisprudence on causation and the various tests which have been suggested, statutory clarification may simply be a pointless exercise. On the other hand, clause 3 of the Bill does extend the definition of "act" to results of the act and we can justifiably ask for some indication as to whether the intention is to leave determining what counts as a "result" entirely to the courts. No doubt the "act-accordion" can be pulled out and pushed in as the courts please, within the boundaries of policy, common sense and public morality. Those who believe that our courts generally do not do a bad job with the substantive criminal law will not wish to be burdened with having to re-think such questions, by reason of new departures of the nature set out in the Bill.

VII CONCLUSION

Any re-working of an established area of law will create areas of uncertainty which will require judicial clarification. The question is whether the benefits of the re-working will outweigh the difficulties and expenditure of time involved in achieving that clarification. The introduction of the definition of an "act" and the restatement of the requirement of voluntariness in the Bill in my view is only likely marginally to improve the operation of the principles of criminal liability. At best, the balance is even. There is a point to statutory restatement of judge-made principles if the principles are unclear or produce capricious decision-making, but there seems to me to be doubt that New Zealand criminal law as it relates to the concepts of "involuntariness" and "act" is in any real need of such restatement. Clause 3 may, despite these reservations, prove a useful addition if it can clarify which elements of an offence require mens rea to be proved. "Involuntariness" as defined in clause 19 may prove a more unruly horse.

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11 American Law Institute, *Model Penal Code, Proposed Official Draft* (1962) section 2.03(1).