

The Problem of Automatism

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The aim of this paper is to examine the scope of the defence of automatism and to explain where, and to what extent, it conflicts with the other accepted defences, especially insanity¹ and intoxication.²

The main problems in this area were raised, although not all thoroughly canvassed,³ by the decisions of *R. v. Cottle*⁴ and *Bratty v. Attorney-General for Northern Ireland*,⁵ and these decisions will form a basis of this paper.

Before a detailed analysis of the problems concerning the inter-relation of these two defences is embarked upon, a more general statement may be helpful. The reason for the conflict between the "traditional" defences and automatism may be looked at in terms of the logical overlap of the defences, due to the width of the definition of the newer one; but this view, although in essence true, is in a sense incomplete. The better explanation would seem to be that since the 1950s the defence of automatism has been used, as the writs of ejectment and

¹ Here only the legal defence connoting lack of responsibility will be discussed and the procedural relief such as unfitness to plead, etc., under s. 32 of the Mental Health Act 1911 will not be considered.

² Although the conflict in this area has been very sparsely treated by academic writers, it still raises very real problems.

³ Problems relating to drunkenness were only elliptically referred to but later have received a full treatment: *R. v. Hartridge* (1966) 57 D.L.R. (2d) 332.

⁴ [1958] N.Z.L.R. 999.

⁵ [1963] A.C. 386.

trover were used in the sixteenth century, as a legal fiction to help the law modify itself in the light of modern scientific advances, especially in the field of psychiatric knowledge. If automatism is looked at in this light, it will aid not only the academic, but also the practising lawyer and judge, to discover solutions to the problems which are in accordance with the policy of the law, and the most practicable in the light of present social realities.

Following through this approach the defence of insanity will be examined first and the disadvantages which are part of it will be pointed out, and from there an explanation of how, if at all, automatism could or has solved these defects will be attempted.

I. INSANITY

A. GENERAL FORMULATION

It has been said of the defence of insanity:

I think that, although the present law lays down such a definition of madness that nobody is hardly ever really mad enough to be within it, yet it is a logical and good definition.⁶

Despite severe criticism levelled against them,⁷ the *McNaughten Rules*⁸ still form the basis of the test of insanity in most common law jurisdictions.⁹

Under these Rules the law relating to insanity was formulated by Tindal L.C.J. thus:

. . . every man is presumed sane and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and . . . to establish a defence on the grounds of insanity it must clearly be proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.¹⁰

From this definition of insanity at least two major areas need elucidation.

⁶ Lord Bramwell; Minutes of Evidence of the Select Committee on the Homicide Law Amendment Bill 1874, Question 186.

⁷ The *McNaughten Rules* have received very real attacks by psychiatrists and in the United States have in some states been superseded by the *Durham Rule* (*Durham v. U.S.* 214 F. (2d) 862 (United States Courts of Appeal for the District of Columbia)). See also, *R. v. Cottle* [1958] N.Z.L.R. 999, 1009 per Gresson P. and Report of the Committee on Capital Punishment. Cmnd. 8932 para. 291.

⁸ 10. Cl. & F. 200; 8 E.R. 718.

⁹ This is the *sole* test for irresponsibility in England, New Zealand and 29 states of the United States. In 17 other states of the United States it is used coupled with the irresistible impulse test. In Australia it is the sole test apart from two states which have it as one of their tests.

¹⁰ 10. Cl. & F. 200, 210; 8 E. R. 718, 722.

tion and the solutions adopted by the courts often vary with differing jurisdictions.¹¹

The first such area is that of burden of proof. Although it was at one time said that the burden of proving insanity was on the accused to "be proved beyond all doubt"¹² it has authoritatively been settled by *Woolmington v. Director of Public Prosecutions*¹³ to be an exception to the general rule of the onus being on the prosecution to prove the case beyond reasonable doubt, and lies upon the accused "not to the exclusion of all doubt, but on the balance of probability".¹⁴ Thus the statement of Tindal L.C.J. that "it must clearly be proved that" the accused was suffering from insanity must be read in the light of the later pronouncements.

The second disputed area of the definition is whether knowledge of wrongfulness means legal wrong or moral wrong. As to this question the answer received will vary upon the jurisdiction examined.

In England the test has been conclusively stated to be that of legal as distinct from moral wrongness. In *R. v. Windle*¹⁵ the decision of Devlin J. in refusing to submit the issue of insanity to the jury, and holding that the test was legal and not moral wrongness, was supported by the Court of Criminal Appeal. Lord Goddard C.J. stated:

In the opinion of the court there is no doubt that in the McNaughten Rules "wrong" means contrary to law and not wrong according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified.¹⁶

This "illegality" rule receives further justification from the statement of Lord Brougham in the House of Lords Debates after the McNaughten case.

There is only one kind of right and wrong, the right is when you act according to law and the wrong is when you break it.¹⁷

¹¹ To quote only one such problem the question of whether irresistible impulse is included in the definition of insanity thus advanced. In England, New Zealand and Australia it has been held to be excluded. *R. v. Kopsch* (1925) 19 Cr. App. R. 50, 51-52. *Attorney-General for South Australia v. Brown* [1960] A.C. 432; although it may be symptomatic of insanity

Sodeman v. R. (1936) 55 C.L.R. 192, 203, 204 per Latham C.J. In certain states of the United States it has been held to be included; *Commonwealth v. Cooper* 219 Mass. 1 5 and this is the view of Stephen, *History of Criminal Law*. Vol. ii p. 167.

¹² *Bellinghams Case* (1812), *Collinson on Lunacy*. 636, 671 per Mansfield L.C.J.

¹³ [1935] A.C. 462, 475 per Viscount Sankey L.C. It is the opinion of Morris and Howard *Studies in Criminal Law* p. 57 that this case was a benevolent piece of judicial legislation.

¹⁴ *R. v. Porter* (1933) 55 C.L.R. 182, 191 per Dixon J.

¹⁵ [1952] 2 Q.B. 826.

¹⁶ *ibid.* p. 834 affirming the decision of *R. v. Rivett* (1950) 34 Cr. App. R. 87.

¹⁷ Reproduced p. 45 Morris and Howard; *Studies in Criminal Law*.

However, outside England, there is another distinct line of authority which argues that the true test is not legal but moral wrongness, and is spearheaded by the Australian decision of Dixon J. in *R. v. Porter*.¹⁸ In that case the learned judge in a classic direction stated:

The question is whether he (the accused) was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong.

The rationale of this decision was fully approved by the High Court of Australia in *Stapelton v. R.*¹⁹ after a full consideration of *R. v. Windle*.²⁰

From the point of view of social desirability of the rule, the reasoning of the Australian courts must be preferred, for, if the legal wrong test alone were adopted, many paranoic and schizophrenic cases would be held criminally responsible for their actions where punishment, in the light of their delusions, would be ethically untenable.²¹

The position in New Zealand has clearly been settled in favour of the less restrictive moral test by the legislature under Section 23, sub-section 2 (b) of the New Zealand Crimes Act 1961 which uses the terminology:

the act or omission was *morally* wrong having regard to the commonly accepted standards of right and wrong. (italics mine)

This is an obvious reference to the test enunciated in *R. v. Porter*.²²

Thus the essentials of insanity may now be stated in three propositions:

- (1) Every man is presumed sane until the contrary is proven.²³
- (2) If the offender was, at the time of the act labouring under a natural imbecility or disease of the mind so as;
 - (a) Not to know it was morally wrong; or
 - (b) Not to understand its nature and quality²⁴
 then he is not criminally responsible.²⁵

¹⁸ (1933) 55 C.L.R. 182, 189: but NB this decision was before *R. v. Windle* (*supra*).

¹⁹ (1952) 86 C.L.R. 358.

²⁰ (*supra*). The moral wrong test was also adopted by Cardozo J. in *People v. Schmidt* (1915) 216 N.T. 324; 110 N.E. 945 because it seemed "most consonant with reason and justice".

²¹ In the report of the Royal Commission on Capital Punishment (1953) Cmnd. 8932 para. 250 the types of mental derangement which ought to excuse an offender, and which fall outside the illegality test, are enumerated.

²² (*supra*). This is the effect of the decision of the New Zealand Court of Appeal in *R. v. Macmillan* [1966] N.Z.L.R. 616.

²³ S. 23(1) New Zealand Crimes Act (1961).

²⁴ *R. v. Codere* (1916) 12 Cr. App. R. 21 where nature and quality was held to refer to the physical ingredients only.

²⁵ The New Zealand authority for this is s. 23(2) of the Crimes Act.

- (3) The burden of proof is upon the defence to raise on the balance of probabilities. From thence the burden shifts to the Crown, but it is still the same burden, viz the balance of probabilities.²⁶

B. DISADVANTAGES OF AN INSANITY PLEA

Given that the foregoing states the general ambit of a plea of insanity, the following disadvantages must be pointed out.

(1) *Lack of Harmony with Social Realities*. This objection applies particularly to England and exists due to their restrictive legal test. The consequence of this test is that the following offenders will have no legal defence to a charge, if they suffer from:

- (a) Aggressive psychopathic states,
- (b) States associated with organic damage to the brain,
- (c) Depressive states with the desire to destroy or punish oneself,
- (d) Early schizophrenia,
- (e) Paranoia and paraphrenia.²⁷

This is a highly unsatisfactory state for the law to be in, as it is obvious that most people so afflicted, ought, if their crime is caused by that affliction, to be excused.

(2) *Lack of Appeal Rights*. The relevant section of the New Zealand Crimes Act is Section 383 and the effect of the wording of that section, is that only if a conviction has been entered against the accused can he appeal.²⁸ This means that the verdict of not guilty on the grounds of insanity, not being a conviction, cannot be appealed against. Although from one point of view it may be said to be merely a trivial statement to say that if a person is not guilty then he cannot appeal, yet in a very real sense this lack of appeal rights will, in the case of insanity, be a major disadvantage. The reason for this is that a verdict of insanity really contains two issues:²⁹

- (i) Whether or not the accused should be convicted of the crime; i.e. the issue of legal responsibility,
- (ii) Whether or not the accused should undergo psychiatric treatment at an institution.

If the insanity verdict is seen in this light, then it will be conceded that although the defence will want to prove the lack of responsibility, it does not want to have the psychiatric internment enforced against it, and so will attempt to stress the former and minimise the necessity for the latter; but under our present legislation it is not possible for the defence to ask for the one without having the other, so it is on the

²⁶ *Sodeman v. R.* (1936) 55 C.L.R. 230.

²⁷ Crmnd. 8932 para. 250.

²⁸ *Felstead v. R.* [1914] A.C. 534. See also *R. v. Cottle* [1958] N.Z.L.R. 999, 1013 per Gresson P.

²⁹ Williams. "Automatism: Essays in Criminal Science" (ed. Mueller).

issue of internment that an appeal should be allowed, for a verdict of not guilty due to insanity is obviously far less desirable than an outright acquittal.

This problem has recently received recognition in England with the passing of the Criminal Procedure (Insanity) Act 1964 which gives to people, acquitted on the grounds of insanity, certain limited appeal rights.

(3) *Burden of Proof.* Another major disadvantage is that of the heavy burden of proof for insanity. Since the onus is upon the accused initially,³⁰ and the overall picture presented to the jury must satisfy it on the balance of probabilities of the accused's insanity, it follows that much affirmative evidence will have to be adduced. But it is often difficult to prove affirmatively that a man is insane, and so a defence, such as one showing the absence of *mens rea*, which requires only the raising of a reasonable doubt will be more to the liking of the defence advocate.

(4) *Psychiatric Internment.* The last and most formidable disadvantage of the insanity plea is the terms of the acquittal under Section 31 subsection 2 of the Mental Health Act 1911 which envisages internment "until the pleasure of the Minister of Justice is known".³¹

The fact that the fear of psychiatric treatment weighs heavily upon the mind of the accused is shown all too clearly by the statement of reasons for delaying the application for leave to appeal on conviction, made by the prisoner in *R. v. O'Brien*:³²

... I was afraid that if my appeal against conviction were successful I would be confined to a mental hospital, probably for the rest of my life.³³

By way of answer to this drawback of compulsory internment as a necessary consequence of a plea of insanity, two points are made.

The first is that the internment is for health purposes alone and does not seek to "punish" in any sense. However, it is of but little consolation to the person "interned" that he is not being punished but only "healed", and he will as a matter of fact still harbour a "strong sense of grievance" against the authorities.³⁴

The second point made is that although internment is "until the pleasure of the Minister of Justice is known"³⁵ this "pleasure" is

³⁰ The distinction between persuasive and evidential burdens was recognised by Devlin J. in *Hill v. Baxter* [1958] 1 Q.B. 277, 284.

³¹ Because of this threat of indefinite internment insanity pleas have been confined to cases where long sentences are anticipated on conviction.

³² (1966) 56 D.L.R. (2d) 65, 71 (New Brunswick Supreme Court).

³³ It has been pointed out by Beck (1967) 9 Crim. L.Q. 258 that she would be committed automatically at all events.

³⁴ Cmnd. 8932 para. 223 where this point is made by the Royal Commission on Capital Punishment.

³⁵ S. 31(2) of the Mental Health Act 1911.

circumscribed by Section 36 of the Mental Health Act 1911 which has provisions for the holding of an inquiry and the release of persons who recover their sanity.³⁶ However even in the relatively clear cut cases the "cure" may be followed by an observation period which can amount to over a year;³⁷ this can be a long time for a person who may be completely cured by a totally physical cure.³⁸

II. AUTOMATISM

A. GENERAL NATURE OF THE PLEA

Given the four disadvantages of the plea of insanity; the restrictive definition, the lack of appeal rights, the onerous burden of proof, and the psychiatric internment which follows as a matter of course; coupled with the rapid advances in psychiatric knowledge since the formulation of the McNaghten Rules,³⁹ pressure for a more realistic approach to the problem of insanity gradually mounted and finally found a place in the law under the generic term of automatism.

Before 1950 the authorities to support such a plea were weak to the point of being almost non-existent.⁴⁰ The two most cogent authorities at this stage were *R. v. Tolson*⁴¹ where Stephen J. asked rhetorically:

... can there be any doubt that a man who, though he might be perfectly sane committed what would otherwise be a crime in the state of somnambulism, would be entitled to be acquitted? Again, it was said by Humphreys J. in *K. v. Butterworth*;⁴² any person, however, who, through no fault of his own, becomes unconscious while driving, for example by being struck by a stone, or by being taken ill, ought not to be liable at criminal law.

Apart from these authorities⁴³ most of the automatism cases were decided after 1950, the first reported English case to use the term "automatism" being *R. v. Harrison-Owen*.⁴⁴ Since then a whole line of

³⁶ In *R. v. Cottle (supra)* p. 1029 this argument was advanced by North J.

³⁷ Criminal Statistics for England and Wales (1966) Cmnd. 3352 Annual Tables, Table XIV where the bulk of the detainees are held from one year to 10 years.

³⁸ E.g. a brain tumour case like that of *R. v. Charlson* (1955) 39 Cr. App. R. 37.

³⁹ Reference to this is made in *R. v. O'Brien* (1966) 56 D.L.R. (2d) 65, 69, per Bridges C.J.N.B., see also Cmnd. 8932 para. 250.

⁴⁰ As to this see *R. v. Cottle (supra)* 1026-7 per North J. referring to *R. v. Kessell* where a plea similar to automatism was treated without any argument from either side as a plea of temporary insanity.

⁴¹ (1889) 23 Q.B.D. 168, 187.

⁴² (1945) 173 T.L.R. 191.

⁴³ There is also the weak authority of *H.M. Advocate v. Fraser* (1878) 4 Couper. 70 where a murder was committed while sleepwalking. It is interesting to note that the acquittal was upon condition that he did not sleep in the same room with another.

⁴⁴ (1951) 39 Cr. App. R. 108, 111, 112.

authority has been built up culminating in *R. v. Cottle*⁴⁵ in New Zealand and *Bratty v. Attorney-General for Northern Ireland*⁴⁶ in England.

What then is the nature of the plea of automatism? Automatism as a defence⁴⁷ has received many elucidations,⁴⁸ but no real definition has been advanced.⁴⁹ However the necessary ingredients of the defence can be discovered from the "classic" explanation of Gresson P. in *R. v. Cottle*:⁵⁰

Automatism, which strictly means action without conscious volition has been adopted in the criminal law as a term to denote conduct of which the doer is not conscious—in short doing something without knowledge of it and without memory afterwards of having done it—a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements.

It is evident from this formulation of the defence of automatism that at least two factors must be proved. The act must be:

- (1) unconscious, to distinguish it from irresistible impulse;⁵¹ and
- (2) involuntary, to constitute an answer to the charge.

The consequence of this is that automatism will be a defence to a charge of strict liability⁵² because the action being involuntary, the accused has not caused the *actus reus*, or more simply there is no *actus reus*.⁵³

However even at its inception this definition causes problems. It has been pointed out⁵⁴ that no clear distinction can be drawn at any given time between consciousness and lack of it.

There are not two all inclusive classes, the black and the white, the responsible and the irresponsible—into one another of which every offender must fall.⁵⁵

This problem was encountered in *R. v. Hale*⁵⁶ where Moller J. put the issue to the jury by using the test of a "thinking conscious man". Such a test has been roundly attacked⁵⁷ as skirting around the main

⁴⁵ [1958] N.Z.L.R. 999.

⁴⁶ [1963] A.C. 386.

⁴⁷ It would appear also that it may be relevant to the question of capacity to understand the trial. *R. v. Kolacz*. [1950] V.R. 200, 202.

⁴⁸ See e.g. *Brattys Case* (*supra*) p. 409 per Lord Denning; p. 390 per the Court of Criminal Appeal: *R. v. Cottle* (*supra*) 1007 per Gresson P.; 1009; 1011, 1020.

⁴⁹ That there is no "legal" definition of automatism was made clear by the Divisional Court in *Watmore v. Jenkins* [1962] 2 Q.B. 572, 586.

⁵⁰ (*Supra*) p. 1007.

⁵¹ Morris and Howard *Studies* p. 62.

⁵² *Hill v. Baxter* [1958] 1 Q.B. 277; *R. v. Carter* [1959] V.R. 105, 113. *Pearson v. Police* [1966] N.Z.L.R. 1095.

⁵³ This would seem the logical consequence of the reasoning of Woodhouse J. in *Kilbride v. Lake* [1962] N.Z.L.R. 590, 593.

⁵⁴ *People v. Freeman* (1943) 61 Cal. App. (2d) 110, 117—California District Court of Appeals.

⁵⁵ Cmnd. 8932 para. 285.

⁵⁶ Supreme Court, Auckland 1966. Fully treated in (1966) 1 Otago L.R. 156.

⁵⁷ (1966) 1 Otago L.R. 156, 158.

reads “. . . when labouring under a natural imbecility or disease of the mind . . .”⁷¹

The second such definition is that given by Lord Denning in *Bratty v. Attorney-General for Northern Ireland.*:⁷²

It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.

This attempt is perhaps the first attempt by a higher English Court to define what is meant by a disease of the mind and many have seen it as an answer to the call by Gresson P. for “a pronouncement on the highest level”⁷³ on the subject. However, the definition also has its critics and it has been said of it that it may be “a cure worse than the ill it was intended to remedy”,⁷⁴ although its theoretical basis if not its actual formulation has received indirect support from other sources,⁷⁵ and was adopted with approval in *R. v. O'Brien*.⁷⁶ But it must at the same time be remembered that the decision in *R. v. Charlson*⁷⁷ cannot be reconciled with Lord Denning’s view for there although the violence was prone to recur, the brain tumour was held not to be a disease of the mind.

However, bearing in mind that definitions of this sort are largely abstract and theoretical it may be said that perhaps the best way of showing what constitutes a disease of the mind and what does not, is to examine that point where the distinction has thus far been most finely drawn. It is submitted that this point will be shown by a comparison of the decisions of *R. v. Kemp*⁷⁸ and *R. v. Charlson*.⁷⁹

In the latter case the accused was indicted on three counts one of which did not require proof of any intent. He had invited his child over to the window to look at a rat and when the child came he was struck over the head with a mallet, the attack being without provocation and apparently motiveless. There was a long history of ill-health in the accused’s family and a strong possibility that he was suffering from a

⁷¹ Crimes Act 1961 s. 23(2).

⁷² [1963] A.C. 386, 412.

⁷³ *R. v. Cottle (supra)* p. 1022.

⁷⁴ Cross, *Reflections on Bratty’s Case* (1962) 78 L.Q.R. 236, 239. See also disapproving remarks on this definition by Sutton (1966) 1 Otago L.R. 156, 165.

⁷⁵ In *R. v. Cottle* [1958] N.Z.L.R. 999, 1028 North J. advances the view that the possibility of recurrence should be examined by competent psychiatrists and if it did not exist then a discharge could be given under s. 36 of the Mental Health Act 1911.

⁷⁶ (1966) 56 D.L.R. (2d) 65, 79 per Ritchie J.A.

⁷⁷ (1955) 39 Cr. App. R. 37.

⁷⁸ [1957] 1 K.B. 399.

⁷⁹ (1955) 39 Cr. App. R. 37.

cerebral tumour. Of the possibility of insanity (which of course will imply the presence of a disease of the mind) Barry J. said:⁸⁰

No plea of insanity is raised in this case . . . That is a defence which has to be raised by the prisoner, and in this case it has not been raised. Indeed you have heard from the medical officer of Manchester Prison that the prisoner is sane and not suffering from a disease of the mind.

Since the only evidence presented was that a cerebral tumour was not a disease of the mind this would of necessity by the opinion of the jury because no direction as to insanity could be given by Barry J. as it was not "given in evidence"⁸¹ that accused was insane.

This decision must be compared to that of *R. v. Kemp*⁸² where the accused was charged with causing grievous bodily harm to his wife with intent to murder. The evidence showed that the accused was an elderly man who made an entirely motiveless attack upon the deceased with a hammer. He was suffering from arteriosclerosis or hardening of the arteries, but it had not yet reached the stage of general mental illness. It was proven that arteriosclerosis can lead to blood congestion on the brain causing a loss of consciousness. On these facts it became necessary to decide whether the disease arteriosclerosis could be described as a disease of the mind. The medical evidence differed as to whether the mental deterioration was sufficiently advanced to fall within the definition. Devlin J., after distinguishing the case of *R. v. Charlson*⁸³ on the grounds that while in that case the medical evidence precluded the implication of a disease of the mind, the medical evidence in the present case left the question open,⁸⁴ went on to say:

The broad submission that was made to me on behalf of the accused was that this is a physical disease and not a mental disease; arteriosclerosis is a physical condition primarily and not a mental condition.⁸⁵

He answers this argument thus:

Hardening of the arteries is a disease which is shown in evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind.⁸⁶

It may be said that the line between disease of the mind and mental disassociation from purely external causes has been very finely delineated by these two cases; so much so that although it has never been challenged, much judicial uneasiness has been expressed⁸⁷ concerning the

⁸⁰ *Ibid.* p. 39.

⁸¹ Trial of Lunatics Act (1883) s. 2(1).

⁸² [1957] 1 K.B. 399.

⁸³ (1955) 39 Cr. App. R. 37.

⁸⁴ [1957] 1 K.B. 399, 403.

⁸⁵ *Ibid.* p. 406.

⁸⁶ *Ibid.* p. 408.

⁸⁷ The decision is treated with distinct caution by Gresson P. in *R. v. Cottle* (*supra*) p. 1012, as does North J. p. 1027-1028. The decision of *R. v. Kemp* is distinctly favoured by Lord Denning in *Bratty's* case (*supra*) p. 411.

decision of *R. v. Charlson*⁸⁸ and it would seem clear that the weight of judicial authority is behind the reasoning of *R. v. Kemp*⁸⁹ where it conflicts (if it does) with that of *R. v. Charlson*.⁹⁰

Within this peripheral area between insane and sane automatism, as determined by the presence or absence of a disease of the mind, the case of epilepsy is particularly uncertain. In *R. v. Charlson*⁹¹ and *R. v. Foy*⁹² epilepsy was regarded as sane automatism, but the more recent decisions favour the view that it is a species of disease of the mind⁹³ and this was clearly expressed in the ratio decidendi of *Bratty v. Attorney-General for Northern Ireland*,⁹⁴ on this point *R. v. Cottle*⁹⁵ is uncertain.⁹⁶ It may be that these conflicting decisions are due to the failure on the part of the Courts, to distinguish between epileptic fugues and epileptic conditions.⁹⁷ However, it must be borne in mind that the question of whether or not any given mental condition is a disease of the mind is a question of fact for the jury and not a question of law⁹⁸ and accordingly no issue of *stare decisis* arises.

III. THE CONFLICT BETWEEN INSANITY AND AUTOMATISM

A. PRELIMINARY MATTERS

Before discussing the problems raised by the conflict between insanity and automatism two points of importance must be emphasised.

The first is that, although it is usual for the defence to raise the plea of insanity it may be "raised" by the judge.⁹⁹

The second point is that when the defence raises a plea of automatism, and alleges that the lack of conscious volition was due to sane as opposed to insane automatism, then it is at least arguable that the prosecution may raise evidence of a disease of the mind to rebut this

⁸⁸ (1955) 39 Cr. App. R. 37.

⁸⁹ (*Supra.*)

⁹⁰ (*Supra.*)

⁹¹ (*Supra.*) p. 44.

⁹² [1960] Qd. R. 225.

⁹³ *Hill v. Baxter* [1958] 1 Q.B. 277, 283; *R. v. Meddings* [1966] V.R. 306.

⁹⁴ [1963] A.C. 386.

⁹⁵ [1958] N.Z.L.R. 999)

⁹⁶ Kahn in his article *Automatism Sane and Insane* (1965) N.Z.L.J. 128, 130, alleges that the Court of Appeal regarded the case as one of sane automatism. Sutton however states that epilepsy was regarded as a disease of the mind (1966) 1 Otago L.R. 156, 170 n. 88. The latter view is, it is submitted, preferable.

⁹⁷ This is the view of Morris and Howard *Studies in Criminal Law*, p. 68-9.

⁹⁸ *R. v. Kemp* [1957] 1 Q.B. 399, 408. Where a disease of the mind is defined as one "capable of affecting the mind", whether or not it does so affect the mind is obviously a question of fact.

⁹⁹ As to this see III B post.

evidence of sane automatism.¹⁰⁰ This would in turn allow the issue of insanity to be left to the jury by the judge if the evidence was strong enough to satisfy the test under Section 1 of the Mental Health Act 1911. The case as to the prosecution's power to raise this sort of evidence was strongly affirmed by Lord Denning in *Bratty's* case.¹

The old notion that only the defence can raise a defence of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large.

Because of these powers vested in the judge and the prosecuting counsel, the benefits thought to be gained by use of the plea of automatism rather than insanity may turn out to be purely illusory.

B. FORM OF THE VERDICT

One of the major areas of conflict between insanity and automatism was thought to be the form of the verdict. Before *R. v. Cottle*² it was arguable that while a plea of insanity if successful elicited the "special" verdict under Section 31 of the Mental Health Act 1911, automatism gave a complete acquittal.³ Thus the advantages of pleading automatism on this ground alone would, if this line of argument had been correct, have been tremendous.

However the fallacy in this line of argument is that it rests upon a misreading of Section 31 of the Mental Health Act 1911.

Section 31 sub-section 1 recites that if it appears in evidence that the accused was insane

the jury shall be required to find specially whether he was insane at the time of the commission of the offence, and to declare whether he was acquitted on account of his insanity.

Since the jury cannot give a verdict of insanity without knowing its legal ingredients it follows that when there is enough evidence of insanity (albeit under the guise of automatism with insanity itself being disclaimed),⁴ for it to "appear in evidence" that the accused was insane, the issue of insanity can be put to the jury.

The issue of insanity having thus been circuitously raised it is but a logical consequence that the special verdict can be applicable, but

¹⁰⁰ *R. v. Starecki* [1960] V.R. 141, *R. v. Meddings* [1966] V.R. 306, both per Scholl J. in the Supreme Court of Victoria.

¹ *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 411.

² [1958] N.Z.L.R. 999.

³ *R. v. Charlson* (1955) 39. Cr. App. R. 37 is perhaps the strongest authority here, but see also dicta in *R. v. Tolson* (1889) 23 Q.B.D. 168, 187; *Hill v. Baxter* [1958] 1 Q.B. 277, 284.

⁴ *R. v. Foy* [1960] Qd. R. 225: despite the fact that insanity was expressly disclaimed by the defence it was put to the jury by the judge under a statute *in pari materia*.

issue and a more acceptable solution would seem to be the application of the test for knowledge in insanity, to the field of consciousness in automatism. Thus upon the question whether the accused was conscious the proper test to apply would be:

If through the disordered condition of his mind he could not reason about the matter with a moderate degree of sense and composure . . .⁵⁸

then he could not be said to be conscious of it.

Quite apart however from the problem of gauging whether or not a person is conscious, another difficulty presents itself, in that on an application of the conscious-unconscious distinction to a particular set of facts, the distinction tends to become illogical and unduly legalistic. The following set of facts will serve to illustrate this point.

Mrs. C. had a record of bizarre dreams about her 19 year old daughter Pat. One night she dreamt that the Korean War was taking place "all around the house" and that a North Korean soldier was on Pat's bed attacking her. In her somnambulistic state she fetched an axe and struck at the imaginary soldier, killing her daughter. The medical evidence established that Mrs. C. was suffering from hysteria and depression and likely to fall into states of disassociation such as fugue, amnesia and somnambulism. The defence was that her act was involuntary and she was acquitted.⁵⁹

Although in actual fact the decision arrived at was a just one, the question remains open as to what would have happened if at the time of the axing Mrs. C. had been awake, although still suffering from a fugue. Had she been awake, then, although her actions would still have been involuntary, they would not have been unconscious and so the plea of automatism would have failed, and the only possible defence would have been that of insanity.⁶⁰ At this stage the requirement of lack of consciousness seems to lose its logical foundation and becomes a mere legal sophistry.

B. SANE AND INSANE AUTOMATISM

Thus the nature of the plea of automatism is established as requiring two ingredients, an unconscious, and an involuntary action. A distinction may now be drawn, using as its basis the mode in which the lack of consciousness and voluntariness arises; the distinction between sane and insane automatism.⁶¹

⁵⁸ *R. v. Porter* (1933) 55 C.L.R. 182, 189-190 per Dixon J.

⁵⁹ These are the facts of *R. v. Cogdon* (1950) Victorian Supreme Court (unreported) reproduced in (1951) 5 Res. Judicatae 29.

⁶⁰ The point is made that probably on the facts Mrs. C. would not, without a sympathetic judge fall within the ambit of insanity either: (1951) 5 Res Judicatae 29, 31.

⁶¹ The origin of this distinction is uncertain but it was specifically used in *Bratty's Case* (*supra*) p. 405 per Viscount Kilmuir L.C. and it has been said to have evolved after the decision in *R. v. Kemp* [1957] 1 Q.B. 399 by R. J. Sutton (1966) 1 Otago L.R. 156, 169 n. 64.

Sane automatism is that species of automatism which arises from a purely external cause; a blow on the head,⁶² carbon monoxide poisoning caused by the inhalation of exhaust gases,⁶³ sleepwalking⁶⁴ and emotional shock⁶⁵ are among the more widely accepted causes which fall within this category.

In contradistinction, insane automatism is automatism arising from a disease of the mind. This at once brings the discussion into the area of conflict between insanity and automatism, but before analysing the problems arising from this conflict it may be helpful to analyse what is meant by "disease of the mind", for this term is crucial in a decision as to whether a particular cause is a ground for insane automatism (and therefore invoking the problems in a conflict with insanity) or sane automatism (which brings no such problems).

There have been many attempts to define this term,⁶⁶ especially in recent times.⁶⁷ Only two of these definitions will be given here, the first being that of the Royal Commission on Capital Punishment:⁶⁸

By "mental disease" or "disease of the mind" we mean a pathological change arising *de novo* in the mind of an individual who has already progressed some way towards maturity or has attained it.

The Commission goes on to say that it implies "a qualitative departure from a previously established norm".⁶⁹

This definition gives rise to the implication that natural imbecility will not be a ground for insanity, because there has been no progression "some way towards maturity". Although there is authority in England for the proposition that the disease must not be present from infancy,⁷⁰ in New Zealand the test is clearly not thus delimited for the legislation

⁶² *Cooper v. McKenna* [1960] Qd. R. 406; *Bleta v. R.* (1964) 48 D.L.R. (2d) 139; *Hill v. Baxter* [1958] 1 Q.B. 277, 286 per Pearson J.

⁶³ *H.M. Advocate v. Ritchie* (1926) S.C. 45.

⁶⁴ *R. v. Tolson* (1889) 23 Q.B.D. 168, 187; *Fain v. Commonwealth* (1879) 39 Am. Rep. 213 reproduced in *Brett and Waller* 738.

⁶⁵ *R. v. Carter* [1959] V.R. 105.

⁶⁶ *R. v. Cottle* (*supra*) p. 1011 per Gresson P.; p. 1022 per North J. *R. v. Kemp* [1957] 1 Q.B. 399, 403, 407-8; *R. v. Carter* [1959] V.R. 105, 109 per Scholl J.; *R. v. Porter* (1933) 55 C.L.R. 182, 188-189 per Dixon J. *R. v. Brewer* (1950) Victorian Supreme Court per Barry J. (unreported) see Morris and Howard *Studies in Criminal Law* p. 41.

⁶⁷ The reason for this is that with the rise of automatism the distinction between sane and insane automatism is being based totally on a disease of the mind criterion and so some clear definition of it is necessary.

⁶⁸ Cmnd. 8932 para. 212.

⁶⁹ *Idem*.

⁷⁰ *R. v. Straffen*; Fairfield and Fullbrook, *The Trial of John Thomas Straffen*, is a full account of the proceedings, in this case. It has been said by the Royal Commission on Capital Punishment (Cmnd. 8932) that although there is no conclusive authority for the proposition given yet probably it is nonetheless true: Para. 344.

only when the evidence gives rise to an implication of insanity.⁵ Thus the verdict under Section 31 will not be applicable to a case of sane automatism.

This was the line of argument adopted in *R. v. Cottle* and the conclusions of the Court may be stated in the words of Gresson P.:⁶

It is a matter for the presiding judge to instruct the jury whether the evidence calls for an unqualified acquittal or a finding of not guilty but insane. If there is strong evidence of insanity the judge should invite the latter verdict, whether or not insanity has been raised by the defence . . . Two major considerations will have to be balanced (1) fairness to the accused who should not have imposed upon him a defence he does not himself advance, and which, if affirmed by the jury, would lead to his confinement upon a verdict which is not appealable, (2) the public interest, which requires that a person prosecuted by the Crown on behalf of the State, should not be permitted to seek an unqualified acquittal.

C. BURDEN OF PROOF

During the formative period of the plea of automatism two possible lines of argument were open to the courts concerning its burden of proof.

The first was that lack of conscious volition was a defence in its nature "akin to insanity" and therefore the same burden of proof should be allotted to it, as has been allotted to insanity.⁷

The second was that conscious volition was merely one of the aspects of the Crown's case which had to be proved, and therefore, should be considered as an integral part of the general rule that the prosecution prove all elements of the offence.

Both solutions as all embracing answers had their disadvantages; that of the first being that it would be too deep a cut into the principle that the prosecution must prove every ingredient of its case to allow automatism as an exception; that of the second being that obvious problems would arise in a conflict with insanity, when the cause of the automatism is a disease of the mind.

With these factors obviously in mind the courts adopted a practical compromise using the sane-insane dichotomy as its basis.

1. Sane Automatism

In the area of sane automatism the Courts have argued that since automatism was simply a plea which asserted lack of voluntariness or

⁵ But under the New Zealand legislation "insane" in s. 31 must be read in the light of s. 23 of the Crimes Act 1961 which means not only must a disease of the mind appear in evidence but also the lack of knowledge of nature and quality of the act or that it was wrong: *Murdoch v. British Israel World Federation (N.Z.)* [1942] N.Z.L.R. 600.

⁶ [1958] N.Z.L.R. 999, 1013: for a contrary opinion see Williams *Criminal Law* p. 311. The conclusion in *R. v. Cottle* is supported by Lord Denning in *Bratty's* case. (*Supra*) p. 414.

⁷ See *Hill v. Baxter* [1958] 1 Q.B. 277, 284 per Lord Goddard C.J.

intent, and since by definition no problems with the conflict with insanity could be experienced, the burden must fall upon the prosecution, thus remaining consistent with the "golden thread" which Viscount Sankey L.C. detected running through the criminal law.⁸ This is the simple answer to the case of sane automatism, and has been universally adopted.⁹ In such a case the persuasive burden¹⁰ on the defence at first instance has been variously described as that of laying "a proper foundation",¹¹ "to provide some evidence"¹² or "genuinely raise the issue".¹³

Although it has been said that in order that these burdens be satisfied, medical evidence must be adduced,¹⁴ all that is really meant is that, as a matter of law¹⁵ there must be sufficient evidence to raise a reasonable doubt before automatism will be left for consideration by the jury. Having overcome this initial obstacle the defence must be put to the jury with the direction that if they are left with a reasonable doubt as to the accused's mental condition, he must be acquitted.

2. *Insane Automatism*

It soon became evident that problems would arise in the area where insanity and automatism conflicted, especially regarding burden of proof, and in this region two separate lines of argument have found favour with the Courts.

The first is that insane automatism should properly be regarded as only a species of the wider genus of automatism and therefore subject to the same rule of burden of proof as any other case of automatism. This is the line of reasoning which lies behind the decision of *R. v. Cottle*, and Gresson P. echoes the opinion of the Court when he lays down his propositions concerning burden of proof.¹⁶

... if there being no plea of insanity, automatism is advanced by the accused as negating intent or as showing him to have acted without any volition, the onus is no more than to provide some evidence upon which a finding of autom-

⁸ *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, 481.

⁹ *R. v. Charlson* (1955) 39 Cr. App. R. 37; *Bratty v. Attorney-General for Northern Ireland* (*supra*) 403, 407 per Viscount Kilmuir L.C. *R. v. Carter* [1959] V.R. 105, 111.

¹⁰ As to this see the remarks made by Lord Denning in *Bratty's* case (*supra*) p. 413.

¹¹ *R. v. Cottle* (*supra*) p. 1025 per North J.

¹² *Ibid.* p. 1014 per Gresson P.

¹³ *R. v. Carter* [1959] V.R. 105, 111.

¹⁴ *Bratty v. Attorney-General for Northern Ireland* (*supra*) p. 413 per Lord Denning. This is probably incorrect and was not followed in *R. v. Hale* (1966) New Zealand Supreme Court (unreported) noted in (1966) 1 Otago L.R. 156.

¹⁵ It was pointed out in *Watmore v. Jenkins* (1962) 2 Q.B. 572, 585 that whether the defence of automatism should be submitted to the jury is a question of law.

¹⁶ (*Supra*) p. 1014.

atism could be based. . . . Once that is done there comes into operation the over-all onus upon the prosecution (as expressed in *Woolmington's Case*) to prove the guilt of the accused.¹⁷

The problem with this solution is that it allows the defence "by a difference in nomenclature"¹⁸ alone to avoid the burden of proof which has been so long a part of insanity. Because of this defect a second line of reasoning has gradually evolved.

This postulates that automatism is logically different from insanity,¹⁹ and upon proof of the existence of a disease of the mind, the question of insanity alone remains relevant and no question of automatism arises. This is the conclusion adopted by the House of Lords in *Bratty v. Attorney-General of Northern Ireland*. The rule is clearly laid down by Viscount Kilmuir L.C.²⁰

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

Having thus authoritatively been settled by the House of Lords, this direction must command great respect. As a solution it has been adopted in Canada,²¹ England,²² the Australian States²³ and it would seem clear after the decision of the New Zealand Court of Appeal in *Corbett v. The Social Security Commission*²⁴ that the New Zealand courts are similarly bound. How far the rigidity of this rule of precedent has been affected by the recent policy statement of the House of Lords that it will no longer hold itself absolutely bound by its own previous decision, is not clear, but it may well allow a New Zealand court to decide any conflict between *Bratty's* case and *R. v. Cottle* on its merits, rather than on a strict application of *stare decisis*.

D. ALCOHOLIC AUTOMATISM

An interesting problem arises when the defences of automatism and intoxication conflict.

Intoxication as a defence received its classic statement in *Director of Public Prosecutions v. Beard*²⁵ where it was said that drunkenness is only a defence where:

¹⁷ North J. p. 1029 seems to tentatively reject this view but his opinion is so halting and unsure that he must be taken to assent to Gresson's view.

¹⁸ *Bratty's Case* (*supra*) p. 403.

¹⁹ See the definition of automatism adopted by Kahn [1965] N.Z.L.J. 113 and that of Morris and Howard *Studies in Criminal Law* p. 62.

²⁰ (*Supra*) p. 403.

²¹ *R. v. O'Brien* (1966) 56 D.L.R. (2d) 65. *R. v. Hartridge* (1966) 57 D.L.R. (2d) 332.

²² This solution was adopted in English law *ipso facto*.

²³ *R. v. Meddings* [1966] V.R. 306.

²⁴ [1962] N.Z.L.R. 878.

²⁵ [1920] A.C. 479, 500-502.

- (1) it is sufficiently advanced to constitute a disease of the mind:²⁶
or
(2) it is such that the accused was, by reason of drink, incapable of forming the intent required for the crime.

The conflict between insanity and intoxication has not as yet arisen,²⁷ and will not here be considered.

However problems arise when the defence of automatism relies upon evidence of intoxication; will the defence be automatism or intoxication? The importance of this question can be illustrated by considering the example of murder.

If the defence to such a charge were that of automatism, then, barring proof of a disease of the mind, the verdict would be a complete acquittal. On the other hand if the defence were intoxication then only the intent would be cut away and a verdict of manslaughter would be given.²⁸

This problem was considered in *R. v. Hartridge*²⁹ where the view was adopted that the intoxication defence should prevail where there was a conflict with automatism, and accordingly the offence should only be reduced insofar as the intent had not been proven. In so holding the Saskatchewan Court of Appeals applied the statement of Lord Denning in *Bratty's* case:³⁰

When the only cause that is assigned for an involuntary act is drunkenness, then it is only necessary to leave drunkenness to the jury with the consequential directions, and not to leave automatism at all.

However in *R. v. Cottle*³¹ the automatism pleaded was caused in part by the intake of alcohol and nothing there was said concerning this distinction and at least two of the members of the Court would have been prepared to let the issue of drunken automatism go to the jury as such.³² Again in a more recent decision *R. v. Meddings*³³ nothing was said of this distinction although alcohol was a predominate cause.³⁴

²⁶ E.g. delirium tremens was held in *R. v. Davis* (1881) 14 Cox C.C. 563 (per Stephen J.) to be a disease of the mind.

²⁷ It may be said that insanity due to intoxication may not result in acquittal under s. 31 of the Mental Health Act 1911 whereas ordinary insanity will: *R. v. Adams and Garr* [1916] N.Z.L.R. 356, 362 per Cooper J. But this case is weak authority as it was decided before *Beard's* case (*supra*) and is also probably inconsistent with the Act itself.

²⁸ As evidenced by *Director of Public Prosecutions v. Beard* (*supra*).

²⁹ (1966) 57 D.L.R. (2d) 332.

³⁰ (*Supra*) p. 414.

³¹ [1958] N.Z.L.R. 999.

³² (*Supra*) 1007 and 1021-2 per Gresson P.; at 1026 per North J.; but see at 1030 and 1033-4 per Cleary J.

³³ [1966] V.R. 306.

³⁴ The dictum by Lord Denning has also received some academic attacks; see Beck (1967) 9 C.L.Q. 315.

It is respectfully submitted that unless further weight is added to the dictum of Lord Denning that New Zealand Courts cannot follow it in the light of *R. v. Cottle*.³⁵

IV. POSSIBLE SOLUTIONS

To the problems caused by the conflict between insanity and automatism four possible solutions are available, and each will be considered in turn.

A. THE HISTORICAL ARGUMENT

This argument can be generally formulated by saying that automatism is merely a new, "stop-gap" defence which must be applied in the light of the other existing defences, especially those of insanity and intoxication. This is the solution adopted in English law by *Bratty v. Attorney-General for Northern Ireland*,³⁶ and lays down a burden of proof on the balance of probabilities for insane automatism, and places upon the prosecution the burden of proving that the accused was not suffering from sane automatism.

Although this line of reasoning does have the virtue of ignoring the legal forms and looking into the realities of the pleas, it has one obvious drawback. In the case where there is a plea of automatism advanced by the accused, and a number of causes for it are alleged, the pleas of sane and insane automatism may both be raised on the facts. At this stage since both defences are relevant the judge will have to explain to the jury the differing facts giving rise to each plea with differing burden of proof.

Quite apart from the difficulty of allotting the accused's mental disassociation to any one particular cause, the jury will be baffled and confused by the apparently conflicting rules, and, in failing to understand the two tests, may deliver anomalous verdicts thus bringing the administration of the law into disrepute.

A striking illustration of this multi-causal problem is given by *R. v. Meddings*³⁷ where the accused suffered from epilepsy (which is probably a disease of the mind), had partaken heavily of alcohol and had previously sustained a head injury. On these facts a detailed consideration of all these causes would have been impossible for the average jury, and a correct decision would probably be merely fortuitous.

³⁵ (*Supra*). The dictum is also probably irreconcilable with the decision in *R. v. Hale* (1966) New Zealand Supreme Court (unreported) noted (1966) 1 Otago L.R. 156.

³⁶ [1963] A.C. 386.

³⁷ [1966] V.R. 306.

Because of this failure to answer the multi-causal objection this solution, as a complete answer must be abandoned.

B. THE CONSCIOUS ACT ARGUMENT

This argument suggests that insanity can be raised only when the act complained of was done consciously and voluntarily; it relies upon statutory interpretation and its protagonists would argue as follows: The insanity provision recites that:

No person shall be convicted of an offence by reason of *an act done or omitted by him . . .*³⁸

Since the whole basis of automatism is that the act or omission was not done by the accused (i.e. was involuntary), the foundation of the plea of insanity is swept away, and from this it will follow that insanity can only be pleaded when automatism does not lie. Further justification for this line of reasoning can be gained from the judgment of Cleary J. in *R. v. Cottle*:

It would seem clear that the logical order for the jury's consideration of the plea of insanity would *first to be satisfied that the act was done* (italics mine); secondly to consider whether the accused had shown he was suffering from a disease of the mind; and then finally to consider whether it was then shown that the disease was . . . sufficient to negative criminal responsibility.³⁹

Again if it can be shown that the act was not "done" then the first step cannot be satisfied and insanity cannot therefore be proven.

This point has only once been raised in a reported decision and this was done in *R. v. O'Brien*.⁴⁰ The judge at first instance appreciated the logical force of this argument and felt constrained by it to hold that upon proof that the act was involuntary, the plea of insanity must lapse. However on appeal to the New Brunswick Supreme Court the decision was reversed, and this argument rejected.

This solution to the conflict between insanity and automatism is open to two very severe criticisms:

1. It is not a theory which has found favour with the Courts; it has been rejected in the only case where it has been argued and indeed is directly contrary to the ratio decidendi of *Bratty's* case.
2. It is open to the objection that both insanity and automatism will have to be put to the jury when the facts are such that both may be relevant and the jury may well be confused by differing directions.

Because of these two objections, especially the second, it is doubtful whether this solution is workable.

³⁸ S. 23(2) New Zealand Crimes Act 1961, the italics are mine.

³⁹ (*Supra*) p. 1035; see also remarks by Gresson P. at p. 1009 to this effect.

⁴⁰ (1966) 56 D.L.R. (2d) 65: New Brunswick Supreme Court.

C. BURDEN OF PROOF ARGUMENT

This is the view that suggests that the burden of proof for both insanity and automatism be made the same. What the protagonists of this approach envisage is the lowering of the burden of proof of insanity and placing it upon the prosecution, thus rendering it consistent with the general rule stated in *Woolmington v. Director of Public Prosecutions*.⁴¹ This solution may be said to be acceptable subject to two qualifications.

1. That medical science has advanced far enough for it to be viable for the prosecution to carry the burden once the defence has raised sufficient evidence. This has yet to be proved.⁴²
2. That some uniform rule can be evolved as to when a special verdict under Section 31 of the Mental Health Act 1911 will be given. The present test of a finding of insanity may not be sufficiently clear for standardizing of the burden of proof will probably tend to blur the distinction between automatism and insanity.

D. THE TWO TIER APPROACH⁴³

The first step in this approach is to recognise that in a verdict of insanity there are in fact two logically distinct issues:

1. Ought the insanity to negative criminal responsibility? This is a question which embraces the fields of ethics and law and is one totally divorced from medicine except in the sense that it can provide a basis for a test of lack of responsibility. This will be called *the issue of legal responsibility*.
2. Given that the accused does suffer from mental illness of some sort which has excused his crime, ought he be subject to some form of compulsory internment in order to effect a cure. This issue, which has its basis in law is nonetheless a predominately medical one and ought to be determined on medical criteria alone. This issue will be called *the issue of compulsory internment*.

Having thus separated the issues it can now be said that as to the issue of legal responsibility the burden of proof would fall upon the Crown in discharge of its general onus, and there would in fact be a presumption in favour of irresponsibility provided that some slight basis could be given for it. This basis would be purely a persuasive one, and would be the same as that which is presently required to raise the

⁴¹ [1935] A.C. 462.

⁴² If the diverse views summarized by Hall (1945) 45 Columbia L.R. 677 are any guide then this may be doubtful.

⁴³ For a full explanation of this see Williams *Automatism, Essays in Criminal Science* (ed. Mueller).

issue of sane automatism. Once this basis had been provided the prosecution would have to prove affirmatively that the accused was responsible for what he had done, and the onus would be to prove this beyond reasonable doubt.

As to the issue of necessity for compulsory internment there would be a presumption in favour of the view that internment was not necessary. This presumption would then have to be displaced by affirmative evidence by the prosecution. Perhaps the most practicable burden of proof here would be that of the balance of probabilities.

The advantage of this approach is that no matter what the plea was called, be it insanity, automatism or intoxication, the burden of proof and the problem of committal for treatment would be decided on the same basis.

The major disadvantages are:

1. It has no legal authority to support it.
2. The question of whether the accused should be interned is a question which will be too complex for a jury and would more logically be decided by a panel of psychiatric experts. But if the question of legal responsibility were decided by a jury, and medical treatment by another panel, a hiatus may occur in the sense that the fact findings of the jury may be totally different to that of the medical panel.

This problem may be solved simply by bearing in mind that all the jury must determine is legal responsibility according to evidence legally admissible at trial. The function of the Medical Board would be wider and not confined totally to facts given at trial.⁴⁴

E. CONCLUSIONS

It is clear that the present state of the law is unsatisfactory for reasons already indicated, but it is equally clear that the Courts have gone so far along their present line of reasoning that only a legislative change will afford an adequate solution. Whatever machinery is set up by this change it is submitted that if it is to be truly effective it must give recognition to the double aspect of the insanity verdict.

⁴⁴ This may also provide a basis for the answer to the problem of aliunde evidence raised by Sutton (1966) 1 Otago L.R. 156, 161.