A new defence in spouse murder?

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Serious problems remain for an accused who raises non-insane automatism in a case of spouse murder.

Section 23 of the *Criminal Code* of Western Australia (the Code) provides that:

> a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will.

In *The Queen v Falconer* (1990) 171 CLR 30, the High Court held that a 'dissociative state', in which the actor does not know or cannot control what she or he is doing, and which results from stress and shock may amount to a 'defence' under s.23. The court said the equivalent applies under the common law.

As with *R v The Queen* (1981) 4 A Crim R 127 in which the re-interpretation of provocation made that defence available to women who retaliate against on-going violence and pressure in a marital relationship, *Falconer* makes s.23 available where the response is dissociation rather than merely anger or fear. In this sense the case is important — at least in so far as it confirms the law at Appeal Court level (*The Queen v Radford* (1985) 42 SASR 266). But there remain possibly insurmountable problems, both practical and conceptual, in relying on the provision in these circumstances. It is still inextricably linked with the insanity defence and this may, practically, preclude its use.

Section 27 of the Code provides:

> A person is not criminally responsible for an act . . . if at the time of doing the act . . . he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions . . .

An acquittal under s.27 results in the accused being kept in strict custody at the Governor's pleasure (Code, s.653).

This article examines, first, the *Falconer* decision itself, focusing on the test which emerges from this judgment for distinguishing non-insane automatism under s.23 from insanity under s.27. Second, I will look at some of the implications of the use of s.23 in this new context — on-going and serious violence and pressure. The focus of the analysis is on the utility of the s.23 'defence' for women.

The Queen v Falconer

Mary Falconer was in a violent marriage for 30 years, the violence extending to broken bones, sexual assault and repeatedly being dragged by her hair. In 1988 she discovered that her husband had raped two of their daughters when they were teenagers and subsequently charges were laid against him. Mrs and Mr Falconer separated. She became progressively frightened of what he might do to her or her daughters. She obtained a non-molestation order against him. There was evidence that in the days prior to the shooting Mrs Falconer was terrified. In October 1988 Mr Falconer entered the house and, on Mrs Falconer's account, sexually assaulted her and taunted her that no-one would believe the allegations of sexual abuse of the daughters. From something Mr Falconer said, Mrs Falconer came suddenly to the realisation that Mr Falconer had also sexually abused their foster daughter in earlier years. He went to grab Mrs Falconer by the hair. She panicked and remembers nothing more until she was standing by Mr Falconer's body with her discharged rifle in her hands.

Mrs Falconer's counsel sought to have admitted in evidence the testimony of two psychiatrists. Both would have testified that Mrs Falconer was, in their opinion, 'completely sane' but that her account was consistent with her having been in a dissociative state so that she would have had no awareness or control in the usual sense over her actions.

This evidence was to have been the basis of a submission under s.23 but it was rejected by the trial Commissioner after he had heard it on a *voir dire*. He ruled that it could only support a defence of insanity (for which it was expressly not advanced). Mrs Falconer was convicted of wilful murder.

On appeal, the Supreme Court of Western Australia overturned the conviction holding that the psychiatrists' testimony did support a submission under s.23 and a re-trial was ordered. The Crown appealed to the High Court.

Before the High Court the Crown did

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not challenge the evidence of the two psychiatrists. Counsel accepted that Mrs Falconer was not medically insane, but argued that evidence of a dissociative state resulting from stress or conflict amounted to an unsound mind for the purposes of s.27 and therefore supported a defence of insanity only, not non-insane automatism. The Crown accepted as the High Court held that the distinguishing feature between sane and insane automatism is the presence of a mental disease or natural mental infirmity. Involuntary action as a result of a mental disease supports a defence under s.27 only. Involuntariness in the absence of mental disease raises s.23.

The court was unanimous in holding that acts performed in a dissociative state resulting from stress-producing factors may amount to automatism under s.23 and the appeal was dismissed.

But when will *only* s.23 be raised? Realistically, an accused usually will not wish to rely on s.27. Even if s.23 is available the risk of also raising s.27 may have the effect of precluding its use. The presence of a mental disease attracts the operation of s.27 and where the only possible cause of a dissociative state is a mental disease, that section will subsume, as it were, the operation of s.23. If there is some evidence to suggest the cause of a dissociative state was a mental disease and some evidence to suggest no such cause, both s.23 and s.27 will be raised. When can it be said, then, that there is evidence of a mental disease in this context of 'psychological blow' automatism? The minority[1] and majority differed on this question (though it was not explored in any detail) as a result of their differences on the question of onus of proof.

The minority held that where a claim of involuntarism is supported by evidence of mental malfunction (including dissociation) *prima facie* the mental malfunction is a mental disease. To avoid s.27 the accused must prove on the balance of probabilities that the malfunction was

- transient,
- caused by trauma which the mind of an ordinary person would be likely not to have withstood, and
- not prone to recur.[2]

Thus, where an accused raises s.23, s.27 is also, necessarily, raised and presumably should be left to the jury even if it is to be disposed of by them peremptorily.

The majority on the other hand clearly envisaged circumstances where only s.23, and not s.27, is raised in dissociative state situations. Deane, Dawson and Gaudron JJ expressly (and Toohey J by implication) stated that on the evidence, as it stood, no question of s.27 arose. The conclusion that s.27 was not raised seems to have been based on the fact that there was no expert medical testimony that the accused was of unsound mind, and, for all practical purposes, such testimony is required.

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As noted, the difference in this respect between the minority and the majority is determined by their differences on the question of onus of proof. On the minority view, where an accused raises the question of automatism she or he bears the onus of proving its cause; the question is what constitutes sanity? For the majority, the threshold question is what constitutes insanity? But even apart from the question of onus, the basic conclusion of the majority, that in some circumstances where there is evidence of a dissociative state s.27 will not be raised, whether the dissociative state arises from a physical or psychological blow, is more sound. Where there is evidence of a dissociative state, s.23 only will be raised unless there is medical evidence that the accused was suffering from an underlying mental infirmity.

Such a proposition may not be so simple in the context of psychological blow automatism. In practice, expert medical testimony will make the difference but, strictly speaking, the majority judgments indicate that, as a matter of law, there will be circumstances where a conclusion that a dissociative state was caused by a mental disease cannot be drawn. Although it seems absurd to contemplate a judge rejecting evidence from a medical expert that an accused was insane, the possibility becomes somewhat more realistic in this new area of automatism. At least the issue of the role of medical evidence is brought into focus. The question arises whether expert testimony as to the presence of a mental disease can, in this context, be based merely on a conclusion that the accused's capacity to withstand pressure is abnormally low.

The ordinary mind's capacity

It is often said[3] that what constitutes a mental disease is a question of law for the judge as opposed to the question of fact for the jury ('did a particular accused suffer from a mental disease?') or a question of medicine for a psychiatrist. But it is not entirely clear what this proposition means.

There emerges in *Falconer* the concept of the ordinary person's capacity to withstand pressure and shock in the context of non-insane automatism. In the minority judgment this concept was express. In the majority judgments it follows from their conclusions. Though they preferred to speak in terms of the need for evidence of a discrete 'underlying mental infirmity', it did not appear from their judgments that a dissociative state resulting from a psychological blow would raise s.23 only in every circumstance. If such a state resulted from a blow to an abnormally susceptible mind then, presumably, this would be evidence of an infirmity supportive of a defence under s.27.

If 'psychological blow' automatism may amount to insanity where a dissociative state occurred due to an accused's capacity to withstand stress being abnormally low, then where an accused seeks to rely on s.23 her or his claim in fact comprises two claims:

- that the accused experienced a dissociative state (that her or his actions were involuntary); and
- that that response was within the realm of what a normal mind would have done.

It is this second, objective question, particularly, which has been introduced by the *Falconer* decision.[4] Moreover, even if the two questions are conflated the second is, in fact, answered by the conclusion reached as to whether or not the accused suffered from a mental disease.

With regard to the first, subjective question the prosecution may attempt to show the accused is lying or that a defendant's or another's account is inconsistent with dissociation. But given that the acts of the accused were involuntary what is the nature of the second question? Is normality in this context a medical or a social concept —

a scientific fact about the pathology of the accused or a measure of what society can or is prepared to accept? The distinction determines the role of the jury and the function of expert medical testimony.

If the question of normality is a medical one then the jury's task is to assess the credibility of the medical witnesses. The concept of mental disease in law is essentially a medical one and medical evidence that an accused's stress threshold is abnormally low, without more, will be relevant to the issue of insanity. If the question of normality is essentially a social one then it is for the jury and analogous to the objective test in provocation: whether an ordinary person in the circumstances of the accused would have reacted as the accused did. The jury's task is, rather than an assessment of the credibility of medical witnesses, a direct examination of the social pressures operating on the accused. Medical evidence consisting of specialist information of a general nature about the circumstances in which human beings have entered a dissociative state could be adduced to assist the jury.

The distinction between a diagnosis of an underlying infirmity and simply a low stress threshold, amounting in the circumstances to a mental disease will of course be blurred because the fact of a disproportionate response will be part of a medical diagnosis of mental infirmity. But where there is evidence of a dissociative state caused by a psychological blow or blows, the question arises from the idea of a normal mind's capacity, who, ultimately, determines the limits of normality and on what basis? If it is the jury, should medical evidence of insanity in the particular accused be limited to the first question — whether or not the accused actually entered a dissociative state?

If that is the case, the suggested criterion for determining whether s.27 is raised — namely, expert testimony of a 'mental disease' — is not as simple as it first appears.

Section 23 and women in violent relationships

Where physical and mental abuse results in a woman acting violently while in a dissociative state, she may rely on s.23, but there are considerable difficulties in doing so. A defendant may receive an unqualified acquittal but only if she can avoid the Charybdis of insanity — a not inconsiderable task or risk. There are other difficulties in raising s.23, apart from the fear of raising s.27.[5] The meaning of s.23 presents problems for women acting out of prolonged marital violence.

At first glance where a person cannot remember what she or he has done in response to extreme stress, s.23 seems to be the appropriate defence. Focusing on the moment the offence was committed, the most accurate description, morally and legally, may be that she or he acted without will and was therefore not responsible for the act or its consequences. But is this legal (or moral) category the most appropriate one when events are looked at in their context and as lived experience? Regina Graycar said:[6]

> It is not only feminist legal scholars who question the categories and definitions used to define legal problems. Practising lawyers have always known that people's lives did not readily fit into legal categories, yet this has not often been reflected in a legal system which fragments its treatment of people's problems into categories such as tort, crime, family law etc. . . . For women, these artificial classifications are especially problematic since women have played no part in defining those categories. It is because of this exclusion of women from traditional legal scholarship that taking women's lives as a starting point for any legal analysis may require a fundamental rethinking of those categories.

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The same may be said of classifications within the general categories of law. The *Falconer* case represents a re-classification according to lived experience. Unwilled action in response to extreme pressure need not be insanity. But, ultimately, whose lived experience is represented in this re-classification? Three points can be noted about the use of s.23 in the context of a dissociative state resulting from prolonged and serious violence and other abuse.

First, if a woman cannot avoid having s.27 left to the jury as well as s.23 then the first question to be answered by the jury is: was she insane? The discourse is mental disease. This is reflected in the High Court's decision in *Falconer* which (in response to the Crown case) overwhelmingly discusses insanity. What, in this context of retaliation against serious violence are we considering insanity for? In legal terms the answer is clear. Evidence of dissociation introduces questions of an accused's mental state which attracts consideration of s.27. But there is an element of unreality about it. Take the *Falconer* case itself: 30 years of serious abuse, information and charges of incest, separation, restraining order — broken, sexual assault. In terms other than legal, there is no plausible reason to pursue another cause for Mrs Falconer's response. Logically, there is no room for the idea of mental disease. The majority decision may be said to be to this effect. But the exclusion of s.27 is, as a matter of theory, tenuous in the sense that there is a ready, commonsense, assumption that where there is evidence of a dissociative state there is very likely to be evidence of a mental disease.[7] The point here is not the likelihood of a verdict of insanity but that, whatever the outcome, the *question* involves the choice between 'irresponsibility' and 'madness'. Generally speaking, whose experience is reflected in the proposition: a woman who retaliated against her abusive husband was either insane or otherwise out of her mind?

Second, a difficulty arises where automatism is based on a dissociative state and severe domestic violence because of the tension between the evidence which supports the defence and the elements of the defence itself. Along with insanity, non-insane automatism is an ultimate statement of irresponsibility, of an unwilled, and in one sense unintended, act. An automaton does not will or, relevantly, want events to occur. Yet the evidence supporting a woman's claim of dissociation in this context is evidence suggesting, precisely, that she *would* want and intend retaliation, that she would will and want harm to occur to the person she attacked. Thus the structure of the defence encourages a perception of her as a liar or as manipulating the facts — and if the abuse occurred and she did not will harm she must surely be mad. The dichotomy between criminality and insanity becomes clearer.[8]

Moreover, this problem does not occur in the same way in the classic case of automatism involving concussion or somnambulism where there is a random or tangential relationship between the source of dissociation and the object of the accused's attack. Where a person retaliates against an actual attacker she or he attacks the

source of harm — an essentially sane action suggestive of mindfulness.

The third point follows from both of the above points. Non-insane automatism is a quintessential excuse as opposed to a justification like, for example, self-defence or necessity. Where automatism is accepted by a jury the conclusion characterises the act which caused the harm as without volition, the actor irrational. The focus of the defence is on the moment the act was performed. The defence results in a conclusion as to the pathological condition of the accused at one moment of time; the context is essentially irrelevant and issues of sex equality, central to marital violence, play no part. This is inherent in the provision. The notion that the act was one of defence or designed to protect the accused's self or children is precluded. Where retaliatory action is directed against the source of serious and prolonged abuse, *even given the occurrence of a dissociative state,* why is it easier to characterise the action as meaningless than to consider its context and characterise it as an act of defence or protection? Granted this would require a re-classification of what is now self-defence — or an addition to include other experience — but 'taking women's lives as a starting point'[9] the latter is the fullest and most appropriate classification. Whose interests would be served if automatic or 'unwilled' action on the one hand and acts of defence or protection on the other were not mutually exclusive?

Conclusion

The High Court in *Falconer* confirmed the proposition that a dissociative state resulting from shock and stress may support a 'defence' under s.23. However, s.27 will also be raised where there is evidence that the dissociative state was caused by a mental disease. In this new category of 'psychological blow' automatism the question of what constitutes a mental disease is not simple because it involves the idea of a normal mind's capacity to withstand stress. Questions arise about the nature of the concept of normality and the function of medical evidence.

The *Falconer* case decided that women who act violently while in a dissociative state, as a result of on-going violence against them can rely on s.23. But there are difficulties in doing so. These involve the risk of raising s.27 and conceptual difficulties associated with s.23 even where it is invoked successfully.

References

1. Mason CJ, Brennan and McHugh JJ constituted the minority on the issue of onus of proof though the court was unanimous in holding that 'psychological blow' automatism may raise s.23.
2. Minority judgment at p.56.
3. See, for example, *Falconer*, at pp.49, 60, 68-9, 74, 84; Leader-Elliot, '*Falconer*' (1991) 15 *Criminal Law Journal* 205 at p.210; Campbell, Mental Disorder and Criminal Law in Australia and New Zealand (1988) p.126.
4. See, generally, Goode, 'On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford' (1987) 11 *Criminal Law Journal* 131, at pp.142-4.
5. This fear may have helped to determine the outcome of the *Falconer* prosecution. The retrial ordered by the High Court never eventuated. The Crown altered the charge to manslaughter to which Mary Falconer pleaded guilty.
6. Graycar, Regina, 'Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence', paper given at the Women and the Law Conference, organised by the Australian Institute of Criminology, Sydney, 24 September 1991, p.3.
7. This is reflected in the fact that even though the majority decided s.27 was not raised on the evidence, they went on to consider what became, possibly, the major issue in the case, the question of the onus and burden of proof as between s.23 and s.27. This issue only arises where there is evidence to support insanity under s.27.
8. Note, also, Dr Jocelynne Scutt's notion of the 'incredible woman': 'The Incredible Woman: A Recurring Character in Criminal Law'. Draft paper given at the Women and the Law Conference, organised by the Australian Criminology Institute, Sydney, 24 September 1991.
9. Graycar, op. cit.

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cies, the Australian Tax Office and the Department of Defence, and DEET 'centralised access' to the records of the Australian Security Commission and the land data systems in the States and Territories.

While the Attorney General, Mr Duffy, emphasises that data stored in the network is all publicly available, the NSW Privacy Committee has raised serious doubts about the development. The Privacy Commissioner has noted that LEAN allows data on individuals (presently held separately) to be readily cross-referenced. Moreover, he has observed that it will greatly enhance the Commonwealth's capacity to examine routinely individuals' property and business affairs where that information is in publicly accessible records.

There are also concerns that the scheme will be expanded to include personal information from other publicly available sources, such as electoral rolls and motor registration. These would enable the creation of a substantial body of information which had been provided by individuals for one purpose and which could then be put to a completely different use.

A particular concern about the LEAN system is that it may not be subject to the relevant *Privacy Act* 1988 Information Principles because it does not process or generate records within the meaning of the Information Principles.

Perhaps it is time for a more rigorous examination of the TFN system and a closer scrutiny of other privacy-related issues.

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