THE PATH OF AUTOMATISM

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The purpose of this note is to examine recent cases in which the defence of automatism has been raised and to attempt, despite the conflicting views as to the scope and availability of the defence, to state the general principles applicable to it.[1]

It will be convenient to consider first, in the light of *Bratty* v. *Attorney-General for Northern Ireland*,[2] what may be termed the evidential restrictions and the question of onus of proof.

In the second place, it is proposed to discuss the conflict of approach to be found in those cases concerning the precise relationship between the defence of automatism and the M'Naghten rules.[3]

It will be suggested that a too literal interpretation of the phrase 'disease of the mind' in the M'Naghten formula may result in a blurring, if not a complete obliteration, of the distinction between sane and insane automatism and result in the onus of proof of insanity being wrongly thrust on the accused in any case where the defence of automatism is raised.[4]

In the case of *Bratty*, the accused was convicted of the murder of a girl by strangulation. He told the police that when he was with the

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1 *R.* v. *Charlson* [1955] 1 W.L.R. 317; *R.* v. *Kemp* [1957] 1 Q.B. 399; *R.* v. *Cottle* [1958] N.Z.L.R. 999; *Hill* v. *Baxter* [1958] 1 Q.B. 277; *R.* v. *Carter* [1959] V.R. 105; *R.* v. *Foy* [1960] Qd. R. 225; *R.* v. *Holmes* [1960] W.A.R. 122; *Cooper* v. *McKenna ex p. Cooper* [1960] Qd. R. 406; *Bratty* v. *Attorney-General for Northern Ireland* [1961] 3 All E.R. 523. For a discussion of general principles relating to the defence see Edwards in *M.L.R.* 21 (1958) 375 and Prevezer in *Crim.L.R.* (1958) 361, 440. Automatism has not attracted much discussion in the law journals of Australia, but see the address of Sir Owen Dixon to the Tenth Australian Legal Convention and the comments of other speakers reported in *A.L.J.* 31 (1957) 225. And see 'Opas' in *A.L.J.* 36 (1962) 11.

2 [1961] 3 All E.R. 523. The case is discussed by Prevezer and Hall Williams respectively in *M.L.R.* 25 (1962) at 227 and 231.

3 The answers of the Judges to the questions put to them in *M'Naghten's* case (1843) 10 Cl. and Fin. 200 at 208-12, 8 E.R. 718 at 722, 723, still form the basis of the law relating to insanity in England and in all the Australian States. There are some differences of terminology in the statutes of the various States which give expression to the rules, but apart from those referred to specifically they do not affect the present article.

This note is concerned primarily with the requirement that a 'disease of the mind' must have been present before a defence of insanity can succeed. That condition is a prerequisite in all the Australian States and in New Zealand (Crimes Act 1908, s. 43). Tasmania (Criminal Code, s. 16), Queensland (Criminal Code, s. 27), and Western Australia (Criminal Code, s. 27), employ the expression 'mental disease', which clearly has the same meaning as 'disease of the mind'.

4 *Cf. C. Howard* in *University of Qld. L.J.* 4 (1961) 107 *ff.*

victim 'a blackness' came over him and that '(he) didn't know what (he) was doing', although he was able to give some account of what had happened. Defence counsel asked the jury to return 'one of three separate and independent verdicts'; first, 'Not Guilty', because 'Bratty was not master of the situation' due to automatism—the only cause suggested being psychomotor epilepsy; failing this, 'Guilty of manslaughter', because his mental condition was so confused that he was not capable of forming the intent necessary for murder, and, failing acceptance of either of those submissions, 'Guilty but insane', because he did not know the nature and quality of his acts or did not know that they were wrong. The trial judge apparently took the view that there was insufficient evidence of sane as opposed to insane automatism, or lack of intent, and left only the last defence to the jury who rejected it. Bratty appealed unsuccessfully to the Court of Criminal Appeal in Northern Ireland and then to the House of Lords, mainly on the ground that the trial judge was wrong in excluding the first two defences.

In the speeches both of Lord Denning and of Lord Morris of Borth-y-Gest the nature of the defence of automatism is put in proper perspective as raising the question whether a sane person, who is charged with a criminal offence, can be relieved of responsibility for his actions on the ground that they were unconscious and involuntary.[5] In *Hill* v. *Baxter*,[6] Devlin J. had made a general statement that, in considering what part automatism plays in liability for crime, one of the essential factors to be considered is the nature of the liability which the prosecution has to establish. By this he apparently meant whether or not conviction for the crime depended on full proof of *mens rea*.[7]

In emphasizing the requirement of proof of a voluntary act their Lordships clearly indicate that the function of a successful defence of automatism is to negative the fundamental requirement of all crimes, whether of absolute prohibition or not, that some willed conduct at least must be present.

Lord Denning, after referring to what has come to be termed 'the voluntary act requirement' in *Woolmington* v. *D.P.P.*,[8] regarded 'automatism' as synonymous with an involuntary act. He defined the term as meaning 'an act which is done by the muscles without any control by

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5 See *per* Lord Denning at 532, 533 and *per* Lord Morris of Borth-y-Gest at 536. Viscount Kilmuir seems also to have been aware of this, but he is not so explicit (at 531).

6 [1958] 1 Q.B. 277 at 284.

7 *Ibid.* at 284. On this point see Edwards, *op. cit.* at 383-4.

8 [1935] A.C. 462 at 482. The requirement of a voluntary act is common in the Australian Code jurisdictions although it is expressed in different terminology. Section 13 (1) of the Criminal Code (Tas.) provides that 'No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor except as hereinafter provided for an event which occurs by chance'. Section 23 (1) of the Criminal Code (Qld.) provides in part that 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'. Western Australia Criminal Code, section 23, has a similar provision to the Queensland section.

the mind such as a spasm, a reflex action or a convulsion; or an act done by a person whilst suffering from concussion or whilst sleepwalking'.[9]

Woolmington's case established without equivocation that in every criminal trial, excepting the defence of insanity and any statutory provision to the contrary, the ultimate onus lies on the Crown to prove every element of the offence charged, including the conscious perpetration thereof, beyond reasonable doubt.[10]

The benefit which an accused seeks to obtain from pleading automatism *simpliciter* rather than insanity can be illustrated by reference to the facts of *Bratty*.

In the first place, if the accused were able to have the plea of automatism put to the jury as negativing any conscious act or any intent on his part, he might be able to take advantage of the rule in *Woolmington's* case. If, on the other hand, he were confined to raising a plea of insanity the exception would apply and the onus of proving insanity would rest throughout with the accused.[11]

In the latter event, any defect in the defence's evidence would militate against it, whereas in the former, as Mr Colin Howard aptly points out in his discussion of the Queensland case of *R.* v. *Foy*, 'any inadequacy in the evidence which does not amount to proof on the balance of probabilities may well be enough to support a reasonable doubt'.[12]

Apart from the fact that a different onus attaches to each plea, the accused may also gain another advantage if he does not have to rely on the defence of insanity. For, should he succeed in establishing insanity on the balance of probabilities, he would be entitled only to a qualified acquittal. In such circumstances, the order of the court would be that he be detained in an institution during the Crown's pleasure.[13] If, however, the jury were not satisfied as to his insanity on the balance of probabilities but, on the evidence, had reasonable doubt as to the voluntary or intentional nature of the act, then, if *Woolmington* v. *D.P.P.*[14] applied, the accused would be entitled to an unqualified acquittal.

The possibility that an accused might, in circumstances which would otherwise call for the application of the M'Naghten rules, seek to gain both the advantages referred to by relying on a plea of automatism

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9 At 532. In *Watmore* v. *Jenkins* (*The Times*, June 7, 1962) Winn J. (delivering the judgment of a court comprised of Parker L.C.J., and Streatfield, Winn, Widgery and Brabin JJ.) said 'It was a question of law what constituted a state of "automatism" and that expression was no more than a modern catchphrase which the courts had not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person'.

10 See *per* Sholl J. in *R.* v. *Carter* (1959) V.R. 105 at 111, cited with approval by Viscount Kilmuir in *Bratty* v. *A.-G. for Northern Ireland* at 531-2.

11 It is settled, however, that the onus on the accused to prove insanity is only the civil standard of proof on the balance of probabilities: *Sodeman* v. *R.* [1936] 2 All E.R. 1138 at 1140.

12 *University of Qld. L.J.* 4 (1961) 107 at 109.

13 See for example, Crimes Act 1958 (Vic.) s. 420; Criminal Code (Tas.) s. 381 (3).

14 Apart from section 381 (3), which places the onus of proving insanity on the accused, the Tasmanian Criminal Code does not deal with the question of onus of proof. But Dixon J. in *Packett* v. *R.* (1937) 58 C.L.R. 190 at 212 saw no reason why *Woolmington's* case should not apply.

alone and by not raising the issue of insanity at all has not passed unnoticed. It is obvious (in the words of Devlin J. in *Hill* v. *Baxter*) 'that it would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively that the accused was not at the time of the crime, sober, or not sleepwalking or not in a trance or blackout'.[15]

Their Lordships, fully awake to the grave implications arising from the nature of the defence and to the competing demands of *Woolmington* v. *D.P.P.* and *M'Naghten*, first distinguished between sane and insane automatism and laid down that when the only cause alleged for an unconscious or involuntary act is a 'disease of the mind' within the M'Naghten formula and the jury rejects a defence of insanity, there is no room for an alternative verdict of acquittal based on the defence of automatism. However, their Lordships recognized that the rejection by the jury of a plea of insanity would not of itself necessarily prevent the accused from raising the defence of automatism.[16]

The particular ground of appeal was resolved by resorting to what may be termed the 'proper foundation doctrine', *Mancini* v. *D.P.P.*[17] being cited as authority. In that case, when considering the defence of provocation, the House of Lords stated that *Woolmington* did not lay down that the judge must in his summing-up deal with the issues of provocation or accident merely because such a defence had been raised, but that he need do so only if there had been adduced some evidence of provocation or accident on which a jury could act. 'It is necessary that a proper foundation be laid either from evidence emanating from the prosecution or the accused before a judge can leave "automatism" to a jury'.[18]

On the facts of *Bratty* it was held that there was no evidence of automatism not resulting from psychomotor epilepsy, which all their Lordships agreed is a disease of the mind. The appeal was accordingly dismissed.

Their Lordships, however, then went on to consider the further question which occurs after the defence succeeds in surmounting the initial hurdle (*i.e.* in laying a proper foundation), namely, whether the proper direction to the jury is:

(a) that they should acquit if they are satisfied on the balance of probabilities that the accused acted in a state of automatism or;

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15 [1958] 1 Q.B. 277 at 284.

16 Viscount Kilmuir L.C. at 528 said: 'What I have said does not mean that, if a defence of insanity is raised unsuccessfully, there can never, in any conceivable circumstances, be room for an alternative defence based on automatism. For example, it may be alleged that the accused had a blow on the head after which he acted without being conscious of what he was doing or was a sleep-walker'.

17 [1942] A.C. 1.

18 *Per* Viscount Kilmuir L.C. at 529, 530; *per* Lord Denning at 535, 536; *per* Lord Morris at 537. It is clear, therefore, that even if the accused fails to adduce any evidence of automatism he need not necessarily be convicted since automatism may be established on the evidence of the prosecution alone. In relation to insanity s. 381 (3) of the Criminal Code (Tas.) provides that 'the onus of proving the insanity of any such person shall be upon the defence, but the same may be established upon the evidence of the prosecution'.

(b) that they should acquit if they are left in reasonable doubt on this point.

With respect, the decision in this matter, once the distinction between sane and insane automatism was accepted, never seemed in doubt. This, despite the opinion of Lord Goddard C.J. that the onus of proving automatism lies on the accused since it 'is not only akin to insanity but it is a rule of law that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it'.[19]

Any temptation to whittle away the 'golden thread of English law'[20] was resisted and the view was approved that the proper direction to the jury is that if the evidence leaves them in real doubt whether the accused did or did not act in a state of automatism, they should acquit.[21]

In so doing their Lordships clearly reaffirmed the rule that in a criminal trial, save in circumstances of insanity or statutory exception, no onus whatever is cast on an accused beyond the burden of common prudence either to adduce evidence in support of his defence or to run the risk of an adverse verdict. The speeches of Viscount Kilmuir and Lord Denning are particularly explicit in distinguishing between the ultimate or legal onus of proving guilt (which always remains with the prosecution throughout a criminal trial), the provisional onus of proof, and the burden of adducing evidence (which may appear to shift during the course of a trial).[22]

While the speeches in *Bratty* quite clearly accept the distinction between sane and insane automatism and the importance of the evidential limitation in regard to the 'laying of a proper foundation' and the affirmation of the rule in *Woolmington* v. *D.P.P.*, the overall value of the decision must not be accepted without some hesitation.

Apart from anything else, the prime limitation on the availability of the defence of automatism is that the state of automatism in question must not be consistent only with a 'disease of the mind'. If it is the defence will merge with the defence of insanity. However, with the exception of Lord Denning's speech, no discussion of the meaning of 'disease of the mind' is to be found in the speeches in *Bratty*. In the Australian cases of *R.* v. *Carter*,[23] *R.* v. *Foy*,[24] and *Cooper* v. *McKenna Ex. p. Cooper*,[25] there appears a considerable conflict of judicial opinion as to whether 'disease of the mind' includes 'all forms of mental derangement or aberration, including an absence of consciousness or volition at the crucial time, commonly called automatism, and which can be due to a

19 [1958] 1 Q.B. 277 at 285.
20 [1935] A.C. 462.
21 In *R.* v. *Budd* (*The Times*, November 8, 1961; *Crim.L.R.* (1962) 49), the Court of Criminal Appeal (Ashworth, Davies and Veale JJ.) allowed an appeal against a conviction for dangerous driving because the jury were misdirected that the onus of proving automatism lay on the accused.
22 See further Lord Denning in *L.Q.R.* 61 (1945) 379.
23 [1959] V.R. 105.
24 [1960] Qd. R. 225.
25 [1960] Qd. R. 406.

variety of causes and may be transient, or whether it is to be limited to "disease of the mind" in a much stricter sense'.[26] A similar difference of thinking can be discerned in the judgments in the English cases of *R.* v. *Kemp*[27] and *R.* v. *Charlson.*[28]

Although all the relevant cases were cited before the House of Lords in *Bratty*, their Lordships did not avail themselves of the opportunity to make an authoritative pronouncement, albeit *obiter*. Viscount Kilmuir L.C. merely referred to *R.* v. *Carter*, *R.* v. *Foy* and *Cooper* v. *McKenna* in connection with the 'proper foundation doctrine', saying that he did not think it the occasion to pursue the particular facts or the effect of particular statutes.[29]

However, it is obvious that, as the path of automatism bears an increasing weight of traffic, some attempt, either judicial or legislative, will have to be made to resolve the existing confusion. Even Lord Denning did no more than criticise the approach of Barry J. in *R.* v. *Charlson* and approve the proposition first put forward by Devlin J. in *Hill* v. *Baxter*[30] and later adopted by Sholl J. in *R.* v. *Carter*,[31] namely, that in determining whether the accused should be detained in an institution or set free, a relevant consideration is the likelihood of his abnormal behaviour recurring and manifesting itself in violence. In his Lordship's view any condition producing such conduct is clearly a 'disease of the mind', or at any rate is 'the sort of disease for which a person should be detained in a hospital rather than be given an unqualified acquittal'.[32]

This practical limitation has been characterized by Mr Prevezer as 'an extremely sensible, though somewhat original, conclusion virtually forced on him (Devlin J.) by the inadequate safeguards of our legal system'.[33]

Nevertheless, it is suggested that this limitation is properly applicable in relation to the following cases, which may be classified into two groups. The first group appears to favour a broad literal interpretation and the other a restrictive meaning of the phrase 'disease of the mind'.

In *R.* v. *Kemp*[34] and *R.* v. *Porter*,[35] Devlin J. and Dixon J. respectively expressed opinions indicating an acceptance of the wide literal interpretation. The following passage is taken from an address of Sir Owen

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26 These two alternatives were proposed by Gresson P. of the New Zealand Court of Appeal, in *R.* v. *Cottle* [1958] N.Z.L.R. 999 at 1022, where he refers to a problem of great difficulty concerning the precise meaning of the phrase 'disease of the mind', and concludes that it is a subject upon which one would be assisted by an authoritative pronouncement.

27 [1957] 1 Q.B. 399.
28 [1955] 1 W.L.R. 317.
29 [1961] 3 All E.R. at 530.
30 [1958] 1 Q.B. 277.
31 [1959] V.R. 105 at 109 and 110.
32 [1961] 3 All E.R. 523 at 534.
33 *M.L.R.* 25 (1962) 227.
34 [1957] 1 Q.B. 399 at 406-8.
35 (1933) 55 C.L.R. 182 at 188-9.

Dixon to the Tenth Australian Legal Convention. 'I have taken it (disease of the mind) to include, as well as all forms of physical or material change or deterioration, every recognizable disorder or derangement of the understanding whether or not its nature, in our present state of knowledge, is capable of explanation or determination'.[36]

In *R.* v. *Carter*, Sholl J. was squarely confronted with the problem of adopting this meaning or of interpreting the phrase in a restrictive sense. A defence of post-traumatic automatism[37] had been raised in reply to, *inter alia*, a charge of dangerous driving. His Honour preferred the restrictive meaning and refused to take the words 'disease of the mind' so far as to cover cases 'where there is no reason to fear any repetition of the crime and no evidence of any brain damage or disease which is likely to give rise to any such repetition'.[38] In his view the term 'disease', in the M'Naghten formula, was not used 'with reference to a temporarily inefficient working of the mind due only to such outside agencies as alcohol or drugs or applied violence producing trauma'.[39] It is submitted that in recognizing the availability of the defence in this case the Judge gave effect to two major policy considerations which must always be reconciled in such cases:[40]

(1) Fairness to the accused, who should not be saddled with a defence not of his own choosing and which, if affirmed by the jury, would result in his confinement after a verdict from which there is no appeal;[41]

(2) the policy behind the formulation of the M'Naghten rules, namely, that in the public interest a person prosecuted by the Crown should not be permitted to seek an unqualified acquittal if his conduct is likely to recur and give rise to further acts of violence.

If Sholl J. had been constrained to adopt a broad literal interpretation of the insanity rules, the accused would have had to either (a) undertake the responsibility of satisfying the jury on the balance of probabilities that his state of mind amounted to 'insanity', although against his will; in which event, even if successful, he would have been ordered to detention in an institution pending the pleasure of the Crown, or (b) choose not to raise the issue of his state of mind and thereby run the risk of conviction in preference to the verdict of insanity.

If the accused did raise the defence of automatism, thereby putting his state of mind in issue, the prosecution itself might raise the question of whether the defence was one of insanity, call evidence in support and ask for a direction on this to the jury.

In *R.* v. *Kemp* the accused did not plead insanity, but sought to rely on the separate defence of automatism as negativing any conscious act

36 *A.L.J.* 31 (1957) at 260.
37 A transient state of the mind caused by concussion due to a blow on the head.
38 [1959] V.R. 105 at 110.
39 *Ibid.*
40 See Gresson P. in *R.* v. *Cottle* [1958] N.Z.L.R. 999 at 1013.
41 *Felstead* v. *R.* [1914] A.C. 534 at 542, 543.

on his part. Nevertheless, the prosecution introduced evidence of insanity and Devlin J. held that he was bound to give effect to the Trial of Lunatics Act, 'it having been given in evidence that the accused was insane', and put the issue of insanity to the jury who found a verdict of 'guilty but insane'.[42]

Although the writer does not quarrel with the decision in *R.* v. *Kemp*, it is submitted that since the special verdict is not subject to appeal, problems of civil rights, which have hitherto received scant attention, will need to be solved.

An examination of the several approaches adopted by individual judges in the Queensland cases of *R.* v. *Foy*[43] and *Cooper* v. *McKenna ex. p. Cooper*[44] readily illustrates that the eminently desirable result of a decision along the lines of *R.* v. *Carter* will not always be achieved.

In *R.* v. *Foy*, counsel for the defence put forward a defence of epileptic automatism to a charge of murder, and requested the judge not to direct the jury on insanity, a request which was granted. The facts of the case are not important in view of the absence of evidence that the accused was suffering from a fit at the material time, despite a long history of epilepsy. Counsel contended that the jury should be directed that, if they were not satisfied beyond a reasonable doubt that the accused's acts occurred independently of his will, they ought to acquit. This request was refused. On appeal against the Judge's failure to grant the second request, if was suggested, *inter alia*, that even if the evidence did not establish that the accused's acts were automatic, it might yet raise a reasonable doubt as to whether those acts were voluntary or intentional. The Judge's refusal to give the direction requested was upheld on the ground that there was no evidence of the accused having acted independently of the exercise of his will or without intention. Because a 'proper foundation' was not laid the whole argument fell to the ground. However, the Court of Appeal went on to make some observations concerning the relation of section 23 of the Queensland Criminal Code (volition) and section 27 (insanity) and the correct interpretation of the expression 'mental disease' and of the onus of proof.[45]

Indeed, the judgments supported such a broad approach to the 'insanity rules' that, if they were accepted, any distinction between sane and insane automatism would in practice disappear. In the result, the availability of the defence, at least in Queensland, was for a short time in danger of complete extinction and its fate cannot now be said to be finally settled.

While few would disagree that recurrent attacks of epilepsy resulting in violence properly call for the application of the M'Naghten rules, the wide *dicta* in *Foy's* case were capable of supporting the proposition that

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42 [1957] 1 Q.B. 399. *Cf.* ss. 381 (3) and (4) of the Criminal Code (Tas.) For a general discussion see Samuels in *Crim.L.R.* (1961) 308.

43 [1960] Qd.R. 225.

44 [1960] Qd.R. 406.

45 *Cf.* Criminal Code (Tas.) s. 13 (volition) and s. 16 (insanity).

section 26 of the Queensland Criminal Code placed on an accused the onus of establishing every condition which could conceivably be embraced within the terms automatism and automation.[46]

In fact, some few months later counsel, in reliance on the wide *dicta* in *Foy's* case, advanced in *Cooper* v. *McKenna Ex p. Cooper*[47] precisely the foregoing proposition.

McKenna, who had been charged with dangerous driving, put forward a defence of post-traumatic automatism and the charge was dismissed by a stipendiary magistrate. The accused had given evidence, supported by medical and other witnesses, to the effect that his actions were involuntary due to the fact that he was suffering from concussion caused by a blow on the head received in a football match a few hours before the alleged offence took place. The magistrate concluded his judgment as follows:

'The evidence leaves me in some doubt as to whether at the material time the defendant was driving his car with any real knowledge of what he was doing, that is whether he was acting consciously at the time. The explanation given by the defendant may reasonably be true. The complaint is dismissed'.

Counsel for the appellant argued that on the facts of the case the accused's condition amounted to unsoundness of mind within Section 27 of the Code and that accordingly the magistrate had misapplied the onus of proof.

The majority of the Court of Appeal,[48] following *R.* v. *Carter*, refused to apply the term 'disease' to a condition of post-traumatic automatism and held that such a condition could be a defence to a charge of dangerous driving. The decision of the magistrate was therefore upheld and the appeal dismissed.

However, the dissenting judgment of Wanstall J. serves to illustrate the unsatisfactory state of the law. His Honour was of the firm opinion that post-traumatic automatism is a disease of the mind, in consequence of which, by virtue of section 26 of the Code, the onus of proving such a condition on the balance of probabilities rests with the accused.

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46 Philp J. relied almost solely on the authority of Sir Matthew Hale's discussion of insanity, which Hale terms 'dementia', in Chapter IV of his *Pleas of the Crown*. After considering Hale's classification of various types of 'dementia' and referring to *R.* v. *Cottle* and *R.* v. *Carter*, the learned Judge concluded that he knew of no binding decision departing from Hale's fundamental exposition of the Common Law. Reinforced by this authority he held that the phrase 'disease of the mind' included any disorder or derangement of the understanding—any destruction of the will [1960] Qd.R. 225 at 243. Mansfield C.J. did not expressly deal with the meaning of 'disease' but was satisfied that s. 26 of the Code cast on an accused the onus of establishing a temporary or permanent derangement of his mind through which he was unable to exercise his will or did not exercise his will (*ibid.* at 232). Wanstall J. quoted with approval Sir Owen Dixon's formulation, and accordingly held that the onus of establishing any condition capable of falling within its compass lay on the accused (*ibid.* at 246-7). Section 26 provides that 'Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question until the contrary is proved'. *Cf.* Criminal Code (Tas.) s. 381 (3).

47 [1960] Qd.R. 406.

48 Stable J. delivered a written judgment with which Matthews J. concurred. Wanstall J. dissented and would have upheld the appeal.

After referring to *dicta* from the three judgments in *Foy's* case, his Honour concluded that 'there is no logical basis for treating a mind disordered or deranged temporarily by concussion as a sound mind for the purposes of section 26. The transient nature of the condition is irrelevant, provided its duration coincides with the acts constituting the offence'.[49]

Since the authority of Sir Matthew Hale is relied upon in the judgment of Philp J. in *R.* v. *Foy*, which is cited with approval in the dissenting judgment in *Cooper* v. *McKenna*, it is convenient to examine the relevant passage from Chapter IV of that author's *Pleas of the Crown*.

'Again, this accidental dementia, whether total or partial, is distinguished into that which is permanent or fixed, and that which is interpolated, and certain periods and vicissitudes; the former is phrenesis or madness; that latter is that which is usually called lunacy, for the moon hath a great influence in all diseases of the brain, especially in this kind of dementia'.[50]

The use of the word 'interpolated' in this passage is of course sufficient to cover a case of recurrent epileptic attacks. But it is suggested that the word does not necessarily include the case of a transient condition produced by violence or drugs and which is unlikely to recur.

It can be argued that the majority decision in *Cooper* has so modified the wide *dicta* in *R.* v. *Foy* that, read in conjunction, the two cases support the restrictive interpretation contended for by the present writer.

The cases which have been discussed clearly demonstrate that the expression 'disease of the mind' is incapable of precise definition, being somewhat ambiguous and open to more than one interpretation. In such circumstances, it is submitted that a judge, faced with the problem of determining whether a particular state of mind amounts to 'disease', is entitled to call in aid what has been termed 'the Mischief Rule' or the Rules in *Heydon's Case*.[51]

In *R.* v. *Carter*, Sholl J. appears to have invoked the Michief Rule in the course of arriving at his decision. 'One knows, from the origin of the practice now set out in s. 420 of the Crimes Act, that the whole of our present difficulty regarding the defence of insanity arises because it was conceived in the year 1800 that persons who were acquitted on the ground of insanity of an obvious character might, if released, constitute a danger to the community thereafter. The Trial of Lunatics Act 1800 was passed as a result of the attack committed by the lunatic Hadfield, and one can see that the practice initiated in 1800 and continued in England in a different form by the Act of 1883 was a practice designed to protect the public from possible attacks by persons acquitted on the grounds of mental irresponsibility which might recur. However, medical knowledge has increased a great deal in the intervening century and a

49 At 412.
50 [1960] Qd.R. 225 at 241.
51 (1584) 3 Co. Rep. 7a.

half since 1800, and, for myself, I think that it would be unwise to extend the practice with which the M'Naghten rules are associated to cases where there is no reason to apprehend any similar danger to the public, unless authority compels that course'.[52]

In the absence of statutory reform it seems that recourse to this principle of interpretation may be the only means of reaching logically sound decisions in cases where a transient condition of the mind, which is unlikely to recur and manifest itself in violence, is in question.

It is hoped that this article has drawn attention to some of the difficulties which are involved in the relationship between the defences of automatism and insanity.

It is submitted that one of the proper criteria for determining whether abnormal conduct results from a 'disease of the mind' is the likelihood of its recurrence accompanied by violence.

With great respect to Wanstall J. there would seem to be no more logically compelling reason why concussion should be classified as a 'disease of the mind' for the purposes of the M'Naghten rules than for classifying a minor flesh wound as a 'physical disease', in the sense in which those words are used in ordinary parlance. No doubt if the wound were to poison the whole system such use of terminology might be justified.

In the present state of the law, automatism must be treated as relevant to the requirement for a voluntary act rather than within the framework of a broad literal approach to the insanity rules, an approach which would cast on the accused the onus of establishing 'insanity'. It is also important that some legislative provision should be made for the granting of an appeal from a verdict of acquittal on the ground of insanity, at least, when the accused has no intention of relying on such a defence.

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52 [1959] V.R. 105 at 109.