Exploring a Quagmire: Insanity and Automatism

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boundary arbitration and the difficulty in obtaining information and documents from third states. Evidence ranged from maps to photographs, videos, conduct of both the parties and of prior territorial sovereigns (as well as United Nations' peacekeeping forces) and including visits of the Tribunal to the area in dispute. There were disagreements over the weight to be given to the various material evidence, with the majority giving little evidential value to the scientific or technical publications in which some of the maps were contained where these could not be considered authoritative (i.e. state sponsored) statements. This balancing of evidence can be seen as an indication of what may be considered to be administrative acts indicating territorial entitlement, as part of the application of the test expounded in the *Eastern Greenland* case (1933) P.C.I.J. Rep. Series A/B, No. 53. The Tribunal was also prepared to accept as accurate a non-authentic translation of the 1906 Agreement, because of the general practice of both the parties to the Agreement and to the dispute.

The Tribunal was empowered to determine the location of the 14 pillars only and was expressly "not authorised to establish a location of a boundary pillar other than a location advanced by Israel or by Egypt." In deciding on the locations the Tribunal confirmed the principle in the *Island of Palmas Case* that territorial title claims are relative. Consequently, the majority, at least in regard to pillar no. 91 where they found that the evidence did not clearly support either party's locations, rejected the argument of *non licet* (where the merits of the case do not enable a decision to be made) in favour of Egypt's location. Nevertheless, the decision is consistent with the parties' declared intention "to resolve fully and finally" the dispute.

Pursuant to the compromis, the Tribunal's decision has been accepted and implemented. Finally, it is worthy of note that, pending the Tribunal's decision, the parties had agreed to move behind the lines indicated by each other, with a Multinational Force and Observers maintaining security in the area, thus enhancing the chances of a pacific settlement of this dispute.

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EXPLORING A QUAGMIRE: INSANITY AND AUTOMATISM

INNOCENT people plead guilty to criminal offences for many reasons, most commonly because they are advised that their sentence will be significantly less than if they are convicted after a trial. However, there have been several cases in recent years where defendants have pleaded guilty to offences for which they may not have had the

necessary fault, because of the unsatisfactory nature of the defences of insanity and automatism. In *R.* v. *Quick and Paddison* [1973] 3 All E.R. 347 Lawton L.J. described this area as "a quagmire of law seldom entered nowadays save by those in desperate need of some sort of defence."

In the most recent case, *R.* v. *Hennessy* (1989) 1 W.L.R. 287, the appellant, a diabetic, was charged with taking a car and driving whilst disqualified. His defence was that he had failed to take the proper dose of insulin because of stress, anxiety and depression and, as a consequence, was suffering from hyperglycaemia (high blood sugar). He pleaded guilty after the trial judge had ruled that this defence fell within the legal definition of insanity within the McNaghten Rules, and not within the defence of automatism. Lord Lane, delivering the judgment of the Court of Appeal, dismissed the appellant's appeal. He stated that the importance of the McNaghten Rules in the context of automatism was this: "If the defendant did not know the nature and quality of his act because of something which *did not* amount to defect of reason from disease of mind then he will probably be entitled to be acquitted on the basis that the necessary criminal intent which the prosecution has to prove is not proved. But, if, on the other hand, his failure to realise the nature and quality of his act was due to a defect of reason from disease of the mind, then in the eyes of the law he is suffering from insanity, albeit McNaghten insanity." In this case, the function of the mind had been disturbed by disease and not by some external factor. Stress, anxiety and depression were not in themselves external factors of the kind in law capable of contributing to a state of automatism since they constituted a state of mind which was prone to recur.

The legal definitions of both automatism and insanity bear little relationship to their medical counterparts. Indeed, insanity is not a medical concept and automatism only exists in medical texts in relation to some forms of epilepsy. Lord Lane points out that although the McNaghten rules "deal with what they describe as insanity, it is insanity in the legal sense and not in the medical or psychological sense." He accepted without criticism the distinction between internal and external factors established by Lawton L.J. in *Quick and Paddison*. In that case, the Court of Appeal held that the appellant's hypoglycaemia (low blood sugar) caused by his failure to eat could not be said to be due to disease. Therefore the court held that Quick, a nurse in a mental hospital who was charged with assaulting a patient, was entitled to have his defence of automatism left to the jury. Applying the same test, the opposite result was reached in *Hennessy*. Since he was in a hyperglycaemic state (high blood sugar)

because he had failed to take his insulin, he was insane within the McNaghten Rules, a finding which results in a mandatory hospital order. If however, he had been in a hypoglycaemic state (low blood sugar) by taking his insulin and failing to eat, he would have been regarded, like Quick, as being in a state of non-insane automatism, and would have been acquitted.

The distinction between external and internal factors only makes sense if it differentiates between those who can be safely acquitted, and those in need of restraint. Professor J. C. Smith argues (in [1989] Crim.L.R. at p. 356) that if the ordinary stresses of life cause the defendant to behave as an automaton, this must be because there is something abnormal about him and therefore the real cause of the behaviour is an internal one, and one that is likely to recur. He argues that the external factor will usually be a "one-off" event, with no likelihood of recurrence. It is difficult to support this in the light of the case-law; why should Quick's failure to eat be less likely to recur than Hennessy's failure to take his insulin?

Consider the plight of *Sullivan* [1983] 2 All E.R. 673, who caused grievous bodily harm to a friend whilst, he said, recovering from an epileptic fit. The House of Lords upheld the trial judge's decision that epilepsy, because it is a disease of the mind and therefore an internal condition, is to be regarded as insane automatism. Therefore, Sullivan had to plead guilty to avoid a finding of "automatism by reason of insanity." By analogy, sufferers from both sleep-walking and arteriosclerosis risk being regarded as "legally insane." Of course, most sleepwalkers do not commit crimes. Those who do are unlikely to be prosecuted. The prosecution clearly did not accept Sullivan's version of events, but it is no justification of bad law that it is rarely enforced, and Sullivan, like Hennessy, should have had the chance to put his case before a jury.

The Butler Committee (Report of the Committee on Mentally Abnormal Offenders, 1975, Cmnd. 6244) suggested radical reforms which have lain dormant for fourteen years. They have now been adopted in large measure into the Draft Criminal Code (1989, Law Com. No. 177), perhaps surprisingly given that the Code is essentially about codification not reform. Clause 33(1) states that "a person is not guilty of an offence if—(a) he acts in a state of automatism, that is, his act (i) is a spasm or convulsion; or (ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of the act; and (b) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication." Thus, a person charged with an offence that may be committed by negligence could be convicted if his state of automatism was the

result of his own negligent conduct, but would be acquitted if he was not at fault in bringing on a hypoglycaemic state.

However, under the Code proposals, the courts would retain control over those defendants acquitted under clause 33: clause 34 includes within the scope of a mental disorder verdict "a state of automatism (not resulting only from intoxication) which is a feature of a disorder, whether organic or functional and whether continuing or recurring, that may cause a similar state on another occasion." The Code proposes that the court be given flexible powers after a mental disorder verdict (clause 39). The Butler Committee wished to protect from a mental disorder verdict a diabetic who causes harm in a state of confusion after failing to take his insulin. The Law Commission disagreed, on the grounds that there seems to be no satisfactory way of differentiating between conditions that may cause repeated episodes of disorder and those that constitute a one-off event. By accepting that the present internal and external factors test does not work, the Law Commission proposes that it should lie entirely at the discretion of the court whether or not to use its powers against those found not guilty by reason of automatism as much as against those who plead guilty. If the proposal were enacted, the need to enter this particular quagmire would disappear.

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NECESSITY: A NECESSARY DEFENCE IN CRIMINAL LAW?

IN science, necessity is the mother of invention. In law, it fathers confusion and fosters subversion. Should the homeless be allowed to squat? Are the hungry to be permitted to steal? Does the poor student who nicks a little of the College silver to pay next year's new tax on his existence deserve a full acquittal? Well-meaning people who think the world is fair believe a defence of necessity would make it fairer still. The judges, who know better, realise that it would parade for public view the inequalities and iniquities inherent in our affluence, without ever threatening to remove them—the Crown Court is hardly the place, after all, to abolish the law of property. So the courts prefer fairness within the system to revolution through it. And, within this constraint, they have achieved a large measure of success.

Thus, we already have the defence of duress, which is a sub-set of necessity, but restricted in its ambit by the requirement for unlawful threats: a class of unlucky defendants who can rely on it may safely be exonerated without confronting any deeper and more equivocal categories of misfortune. Now, in two recent cases, a new sub-set has emerged, analogous to duress and restricted in the same way. In