Sleepwalking, automatism and insanity

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Cases cited
R. v Burgess (Barry Douglas) [1991] 2 Q.B. 92; [1991] 3 WLUK 427 (CA (Crim Div))
R. v Parks (1992) 95 D.L.R. (4th) 27 (Sup Ct (Can))
R. v Quick (William George) [1973] Q.B. 910; [1973] 4 WLUK 81 (CA (Crim Div))
R. v Stone (1999) 173 D.L.R. (4th) 66 (Sup Ct (Can))
R. v Luedecke (Unreported, 2005) (CJ (Gen Div) (Ont))

Legislation cited
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c.25)
Domestic Violence, Crime and Victims Act 2004 (c.28)
Mental Health Act 1983 (c.20)

Crim. L.R. 901 **Summary: I** *n discussing the issue of whether sleepwalking should be classed as automatism of the sane or insane variety, this paper questions the continued usefulness of the "external factor" doctrine as a means of answering this question.*

Two interesting papers on sleepwalking recently published in the Review [1] admirably demonstrate the complexity surrounding the law on automatism and sleepwalking. This comment will make several brief remarks on this topic. First, it is noticeable that our most recently published study into the operation of the insanity plea found no cases of sleepwalking [2] while the earlier study into the first five years of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 Act identified only two such cases. [3] It seems clear, therefore, that cases of somnambulism leading to successful defences of insanity are rare. A second

important issue concerns the disposal of those found not guilty by reason of insanity (NGRI) which is referred to in both papers. [4] While it is true that the 1991 Act introduced much needed flexibility of disposal (with the exception of murder charges) neither paper mentioned the changes recently implemented in the Domestic Violence, Crime and Victims Act 2004. [5] In respect of disposal the 2004 Act now makes it clear that hospitalisation on the grounds of unfitness to plead or insanity must comply with the Mental Health Act 1983. In short, there must be medical evidence that justifies detention in hospital on grounds of the defendant's mental state, namely a mental disorder within the Mental Health Act 1983 which in turn requires specialist treatment. This means that if the conditions for making a hospital order are not **Crim. L.R. 902* met then neither a restriction order nor a hospital order can be made irrespective of the seriousness of the alleged offence. Interestingly, the Home Office Circular dealing with these provisions states

"…for example if the reason for the finding of unfitness to plead relates to a physical disorder, the court's options are limited to a supervision order or absolute discharge." [6]

Might this apply equally to findings of NGRI in respect of sleepwalking even where the charge is murder? [7] This, however, is premised on accepting that such a condition is to be regarded in law as "a disease of the mind" within the M'Naghten Rules which is by no means clear cut.

It might be thought that any argument seeking to show that sleepwalking is a form of (non-in)sane automatism has been foreclosed by the decision in *Burgess.* [8] However, it is surprising that neither of the sleepwalking papers referred to above takes up the point that, as a form of automatism, sleepwalking seems to be unique. It is unique in that the "defect of reason" which arises from being asleep precedes the episode of automatism, namely the sleepwalking. It is this uniqueness which in part led both the Ontario Court of Appeal [9] and the Supreme Court of Canada [10] in *Parks* to rule, in the circumstances of that case, against this form of automatism being regarded in law as of the insane type. The point is succinctly put by Lamer C.J.C. in *Parks* as follows:

"For a defence of insanity to have been put to the jury…there would have to have been in the record evidence tending to show that sleep-walking was the cause of the respondent's state of mind." [11]

Rather, the cause of the automatism is not the somnambulism but is instead inevitably dependant upon sleep which even Lord Lane in *Burgess* accepts as "a normal condition" [12] If this is so then how can such an episode qualify as "a defect of reason, **from** disease of the mind" if the effect of the sleepwalking is not itself the cause of the impairment? In answer to this line of reasoning, barely acknowledged in *Burgess,* [13] Simester and Sullivan remark:

"Perhaps, in defence of *Burgess,* the somnambulism may be said to supervene over the condition of normal sleep, producing a discrete, disordered state. Such an argument is not an answer of principle for classifying sleepwalking as a form of insanity, merely an acknowledgment that it is somewhat forced to maintain a separation between somnambulism and sleep when the states are, as they must be, coincident." [14]

**Crim. L.R. 903* Certainly, the two states "coincide" as is conceded by Galligan J.A. in *Parks* [15] and in that sense it is nowhere suggested that they be regarded as separate. But to argue that sleepwalking can somehow be regarded as distinct from the normal state, namely the sleep which precedes it, seems unrealistic and fails to answer the question posed above. In reality it is the "walking" part rather than the sleep itself which the court in *Burgess* wishes to label as an episode of insane automatism. But unless the requirement of a causal link between "disease of the mind" and "defect of reason" within the M'Naghten rules is to be disregarded in the case of sleepwalkers, it is difficult to see why a sleepwalker, who is otherwise mentally normal, should be classed as legally insane. [16]

Indeed, in some recent cases this difficulty has resulted in the outright acquittal of sleepwalkers rather than the special verdict handed down in *Lowe.* [17] For example, in *Bilton* [18] the accused who had a history of sleepwalking was acquitted of raping a woman after the jury accepted his claim that he had been sleepwalking at the time. The trial judge told the jury it was "extremely rare" for a sleepwalker to carry out sexual acts and that "if [his] account was truthful, he is one of those exceedingly rare cases". A similar result was achieved in *Davies* [19] where the accused was found not guilty of sexual assault on the basis of sleepwalking. One can only assume that in both cases the defendants had pleas of sane automatism left to the jury. But how does this square with *Burgess* ? Neither case seems to have resulted from episodes of "sudden arousal disorder" which it has been

argued "appear to be due to an external factor (the arousing stimulus) and thus fall within the rubric of sane automatism". [20] Rather both cases appear to be clear somnambulistic episodes and ought therefore to fall within the ambit of *Burgess* and insane automatism. Unless, of course, it can be argued that the "external factor doctrine" has outlived its usefulness.

Abandoning the "external factor doctrine"

None of the English cases on automatism has made any attempt to evaluate the "external factor doctrine". The doctrine was the result of Lawton L.J.'s decision in *Quick* which sought to avoid the "affront to common sense" [21] of declaring ***Crim. L.R. 904*** a diabetic who suffered a transitory hypoglycaemic episode from being declared legally insane. But by requiring the need for some external factor in order to achieve this goal, it brought into English law a doctrine which creates arbitrary distinctions such as the one under discussion, namely that sleepwalking seems to qualify as insane rather than sane automatism, owing to the lack of any external trigger.

Evidence that the English courts are still wedded to the "external factor doctrine" can be found in *Roach* where the Court of Appeal stated:

"…the legal definition of automatism allows for the fact that, if external factors are operative upon an underlying condition which would not otherwise produce a state of automatism, then a defence of (non-insane) automatism should be left to the jury." [22]

Again this seems to mean that sleepwalking ought to fall within insane automatism. However, as was mentioned above, it is the lack of any critique of the "external factor doctrine" which is noticeably absent from any of the English cases and it is to Canada [23] to which one can turn to fill this gap. Unlike their English counterparts the Canadian judiciary have shown a repeated willingness to evaluate and criticise the "external factor doctrine". First, in *Parks,* the fact that sleepwalking is not well suited to an application of the external factor doctrine was recognised by La Forest J. when he remarked:

"The poor fit arises because certain factors can legitimately be characterised as either internal or external sources of automatistic behaviour. For example the Crown in this case argues that the causes of the respondent's violent sleepwalking were entirely internal, a combination of genetic susceptibility and the ordinary stresses of everyday life…However, the factors that for a waking individual are mere ordinary stresses can be differently characterised for a person who is asleep, unable to counter with his conscious mind the onslaught of the admittedly ordinary strains of life. One could argue that the particular amalgam of stress, excessive exercise, sleep deprivation and sudden noises in the night that causes an incident of somnambulism, is for the sleeping person, analogous to the effect of concussion upon the waking person…In the end, the dichotomy between internal and external causes becomes blurred in this context, and is not helpful in resolving the enquiry." [24]

This in turn led La Forest J. to conclude that what he termed the "internal cause" theory "is really meant to be used only as an analytical tool, and not as an all-encompassing methodology", a point which was endorsed by Bastarache J. in delivering the majority opinion of the Supreme Court of Canada in *Stone.* [25] There he favoured "a more holistic approach" [26] where it would be appropriate "to refer to the internal cause factor and the continuing danger factor, rather than the internal ***Crim. L.R. 905*** cause theory and the continuing danger theory" [27] thus permitting a trial judge to "find one, the other or both of these approaches of assistance". [28] Further, in cases where "the internal cause theory is not helpful because it is impossible to classify the alleged automatism as internal or external, and the continuing danger factor is inconclusive because there is no continuing danger of violence…a more holistic approach to disease of the mind must also permit trial judges to consider other policy concerns which underlie this inquiry." [29] In short what is being favoured here is an approach which, unlike that in *Quick,* does not straitjacket a trial judge.

The fact that the approach described above does not necessarily mean that automatism which is primarily attributable to an "internal factor" will be classed as "insane" is well illustrated in the Canadian sleepwalking case of *Luedecke.* [30] There the accused was found not guilty of sexual assault after the trial judge ruled that he "was in an automatistic state, being characterized under the category of parasomnia as sexsomnia, or sex sleep". [31] In his determination as to whether this condition was a disease of the mind, Otter J. applied the holistic approach adopted in *Stone.* In doing so he concluded that "The jurisprudence recognizes that somnambulism, as in the *Parks* case, is not suitable" [32] to the "internal cause" type of analysis. He then proceeded to "analysis on the second branch of the theory, called the "continuing danger theory", which basically posits that any condition

that is likely to present a recurring danger to the public should be treated as a disease of the mind". [33] In doing so he found that "This is the only incident of its kind in Mr. Luedecke's history. The evidence is that Mr. Luedecke has voluntarily embarked upon a plan of sleep hygiene, modest alcohol consumption and the taking of medication--clonazepam. All of these would reduce the risk of recurrence." [34] As a result he concluded that "sexsomnia is not a disease of the mind or a medical disorder" [35] and that, therefore, the accused "was entitled to an acquittal". [36]

What the ruling in *Luedecke* does not mean is that all sleepwalking cases will result in outright acquittals. Rather each case must be decided on its merits. But by applying the approach favoured by the Supreme Court of Canada in *Stone* what is achieved is much needed flexibility instead of being hidebound by an "external/internal factor" dichotomy which has outlived its usefulness. Surely, therefore, it is time for the English appellate courts, if given the opportunity, to re-evaluate the decision in *Quick* and to adopt a more flexible approach, not only in sleepwalking cases, but in an overall consideration of the intractable problem of distinguishing between insane and sane automatism.

Footnotes

1 Ebrahim *et al.*, "Violence, Sleepwalking and the Criminal Law: (1) The Medical Aspects [2005] Crim.L.R. 601; Wilson *et al.* "Violence, Sleepwalking and the Criminal Law: (2) The Legal Aspects [2005] Crim.L.R. 614.

2 R. D. Mackay, B. J. Mitchell and Leonie Howe "Yet More Facts about the Insanity Defence" [2006] Crim.L.R. 399 at 401, Table 2.

3 R. D. Mackay and G. Kearns "More Fact(s) about the Insanity Defence" [1999] Crim.L.R. 714 at 717, Table 2.

4 Although the reference to "a complete acquittal" at p.612 of paper (1) is an error.

5 See fn.2.

6 Home Office Circular, 24/2005, at para.12.

7 See below at fn.17.

8 [1991] 2 All E.R. 769.

9 (1990) 78 C.R. (3 rd) 1.

10 (1992) D.L.R. (4 th) 27.

11 *Ibid.*, at 39.

12 [1991] 2 All E.R. at 775.

13 *Ibid.*

14 Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd edn) at p.578, fn.41.

15 At 78 CR (3d), p.19 Galligan J.A. states: "However, while the lack of function of faculties of reason, memory and understanding ***coincides*** with the sleepwalking episode, it is not caused by it." (emphasis added).

16 For a more detailed analysis of this issue see Mackay, *Mental Condition Defences in the Criminal Law,* pp.45-51.

17 Discussed at [2005] Crim.L.R. 621-622. In that case the accused was given a mandatory admission order with restrictions. However, if the verdict had been reached on or after March 31, 2005 then it is at least open to question as to whether such a disposal could be made as the relevant provisions of the Domestic Violence, Crime and Victims Act 2004 require any hospital admission as a result of insanity or unfitness to plead to comply with the requirements of the Mental Health Act 1983. This means that sleepwalking would have to be classified as a mental disorder within the 1983 Act before a hospital order, with or without restrictions, can be given. In this connection it is of interest to note that Mr Lowe was discharged from hospital in April this year, after eight months detention.

18 *The Guardian,* December 20, 2005 at p.7.

19 *The Times,* February 11, 2006 at p.11.

20 See above fn.1 at p.608.

21 [1973] 3 All E.R. 347, at 352.

22 [2001] EWCA 2698 at [28].

23 Although see also the decision of the High Court of Australia in *R. v Falconer* (1990) 65 A.L.J.R. 20, 39 where Toohey J. remarks "… the application of the "external factor' test is artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease."

24 (1992) 95 DLR (4 th) 27, 48.

25 (1999) 173 DLR (4 th) 66.

26 *ibid.* at p.150.

27 *ibid.* at p.154.

28 *ibid.*

29 *ibid.* at p.156.

30 2005 ONCJ 294.

31 *ibid.* at [41].

32 *ibid.* at [46].

33 *ibid.* at [47].

34 *ibid.* at [48].

35 *ibid.* at [50].

36 *ibid.* at [53].

