Original article

An anatomy of automatism

Medicine, Science and the Law
2015, Vol. 55(3) 150–155

DOI: 10.1177/0025802414566373
msl.sagepub.com
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Abstract
The automatism defence has been described as a quagmire of law and as presenting an intractable problem. Why is this so? This paper will analyse and explore the current legal position on automatism. In so doing, it will identify the problems which the case law has created, including the distinction between sane and insane automatism and the status of the 'external factor doctrine', and comment briefly on recent reform proposals.

Keywords
automatism, insanity external factor doctrine

理智和瘋狂的自動化

Sane and insane automatism

Automatism was defined in *Bratty v AG for N Ireland* as 'connoting the state of a person who, though capable of action, is not conscious of what he is doing . . . It means unconscious involuntary action, and it is a defence because the mind does not go with what is being done' (p. 401).[1] This defence has given rise to considerable problems, stemming in the main from the unqualified acquittal which results if it succeeds. As a result, the courts have restricted the scope and availability of automatism. This has been achieved primarily by dividing automatism into sane and insane varieties, a distinction which is built upon the interpretation of the phrase 'disease of the mind' contained in the *M'Naghten Rules*.[a] With this in mind, it is important to understand that whether a particular medical condition is (a) to be regarded as automatism and (b) if so, whether it is to be classified as of the sane or insane variety are both questions of law rather than of medicine. In short, therefore, if the accused's automatism was the result of a condition which can be classified in law as a 'disease of the mind', then it is regarded as being of the 'insane' variety. This in turn will result in a verdict of 'not guilty by reason of insanity', with corresponding disposal powers, rather than an ordinary unqualified acquittal. It follows that the distinction between sane and insane automatism is both theoretically and practically important.

By using the sane/insane automatism dichotomy, the courts have been able to restrict and control the scope of the automatism defence. But this has been at a price, namely the creation of a wide gulf between the law and medical practice. Some aspects of this gulf are more serious than others. For example, although the term automatism is normally restricted in medical usage to epilepsy, it is nonetheless generally recognised amongst psychiatrists and other relevant experts that a person's normal state of consciousness may be interfered with by a whole host of different factors. However, it is the legal classification of such factors within the context of 'disease of the mind' which has clearly been the source of the gulf's primary cause. A prime example concerns epilepsy which has long been classified as automatism of the insane variety, despite criticism from psychiatrists.[2,3] Thus, in an attempt to control the scope of this classification, the courts have resorted to the creation of what has become known as the 'external factor doctrine'.

This doctrine was discussed in the recent decision of the Court of Appeal in *Coley and others v R*[4] which called for a consideration of the 'interplay between the law relating to voluntary intoxication and the law relating to insanity or (non-insane) automatism' (para 1). In this case, the defendant (D) was convicted of the attempted murder of his next-door neighbour, having entered the victim's house late at night and repeatedly stabbing him in a motiveless attack. Three psychiatrists testified that although D did not suffer from any underlying mental illness or disorder, the likelihood was that at the time of the incident he had had a 'brief psychotic episode' induced or triggered by his excessive use of cannabis. On that basis,

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D asked the judge to leave both insanity and automatism to the jury, but he refused. It was argued on appeal that this refusal was mistaken. In dismissing the appeal, Hughes LJ agreed with the trial judge that this was a case of voluntary intoxication and, as such, both insanity and automatism were properly excluded from the jury's consideration. With regard to insanity, his Lordship concluded that although D's condition may have resulted in a 'defect of reason' within the *M'Naghten Rules*, it could not in law be regarded as a 'disease of the mind'. A clear distinction needed to be drawn between the temporary effects of drugs and/or alcohol voluntarily consumed – even if this gives rise to a brief psychotic episode – and a mental disease induced by a repeated use of intoxicants, such as delirium tremens. In the court's opinion, D's condition fell 'comfortably on the side of the line covered by voluntary intoxication' (para 18). In addition, because the sole cause of D's psychotic episode was the ingestion of cannabis, this fell within the ruling in *R v Quick*, namely that a condition caused by an external factor could not be classed as a 'disease of the mind'. In effect, therefore, if D's condition amounted to one of automatism, it could only be classed as sane or non-insane automatism. In relation to this issue, Hughes LJ emphasised that for an action to qualify as automatism, it must be 'wholly involuntary' rather than merely 'irrational' (para 22). D's mind might have been affected by hallucinations or delusions which resulted in a detachment of reality, but this fell 'short of involuntary, as distinct from irrational action' (para 23).

While the actual decision in *Coley* is unsurprising in the light of the existing legal position surrounding self-induced intoxication, it is nonetheless significant for several reasons. First, it confirms that although automatism does not mean that D be '*un*conscious, in the sense of comatose' (para 23), it does require 'movements or actions of the defendant at the material time that were wholly involuntary' (para 22). In reaching this conclusion, Hughes LJ cites the decision in *A-G's Reference (no 2 of 1982)* and prefers the expression 'complete destruction of voluntary control'. Despite the fact that this narrow approach to what constitutes automatism has been the subject of much criticism, it must now be regarded as the prevailing judicial approach. In addition, the Law Commission recently remarked, 'Our view is that, although the case law is not entirely consistent in requiring a total loss of control, the overwhelming weight of the recent authority supports the stricter view' (para 2.64).[5] The problem with this approach is that, as already stated, it would seem to restrict the defence to 'spasms, convulsions and reflex acts'.[6] Thus, it will continue to cater for forms of epileptic automatism but is likely to exclude most forms of outwardly purposeful behaviour where D argues that his condition deprived him of 'effective control of the act'. In short, a state of reduced, partial or altered consciousness will not, in principle, suffice.

Second, although the court was obliged to endorse the distinction between external and internal factors created in *Quick* on the simple basis that 'drugs or alcohol are an external factor', it did not do so without some comment. The next section will now consider this distinction.

The 'external factor doctrine'

As Hughes LJ notes in *Coley* (para 19),[4] the decision in *R v Quick*[7] recognised that a legal device was needed to prevent the 'affront to common sense' of 'a diabetic being sent to a [mental] hospital when in most cases the disordered mental condition can be rectified by pushing a lump of sugar or a teaspoonful of glucose into the patient's mouth'.[8] In that case, in order to prevent the accused's condition of hypoglycaemia from being classified as a 'disease of the mind', Lawton LJ ruled that the automatism 'was not caused by the diabetes but by the use of insulin . . . Such malfunctioning as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease'.[9] In this way, the accused's automatism was able to be classified as sane rather than insane. But by relying on the need for any such malfunctioning of the mind of transitory effect to be attributable to 'the application to the body of some external factor', the court was conceding that if no such external factor is present, then a condition such as diabetes will still qualify as a 'disease of the mind', irrespective of the 'affront to common sense' argument. Such was the case in *R v Hennessy*,[10] where a diabetic's hyperglycaemic episode was ruled to fall within insane automatism, as it was 'caused by an inherent defect and not corrected by insulin'[11] and was therefore a 'disease of the mind'. In his decision in *Coley*, although Hughes LJ remarks that this distinction between 'external factors inducing a condition of the mind and internal factors which can properly be described as a disease can give rise to apparently strange results at the margin' (para 20),[4] he added that any future rationalisation of the law of insanity must take into account the rules for disposal.

In *Hennessy*, the disposal was one of mandatory and indefinite hospitalisation, which since the 1991 Criminal Procedure (Insanity and Unfitness to Plead) Act is no longer the case. Indeed, since the 2004 Domestic Violence, Crime and Victims Act, a hospital order in respect of a successful insanity defence is now identical to one under the Mental Health Act 1983, which in essence means that it can only be imposed on those who are mentally disordered. This in turn means that a diabetic defendant such as *Hennessy* could not be the subject of such an order. What is clear, however, is that the court is limited in its analysis by the strictures of the external factor doctrine, and in that respect a comparison with

the approach of the Supreme Court of Canada may be instructive. In *R. v. Bouchard-Lebrun*,[12] exactly the same issue arose as in *Coley*, namely whether a toxic psychosis caused by self-induced intoxication can qualify as a 'mental disorder' and so fall within the defence of not criminally responsible on account of mental disorder. In answering this question in the same way in which it was answered in *Coley*, the court took the 'opportunity to review the respective scopes of the insanity defence and the defence of self–induced intoxication' (para 1). In so doing, it drew heavily on its analysis in *Stone*,[13] a case dealing with psychological blow automatism. In delivering the majority judgment, Bastarache J agreed with the court's earlier decision in *Parks*, a sleepwalking case, where La Forest J concluded 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'.[14] This in turn lead Bastarache J to adopt 'a more holistic approach' (para 150) where it would be appropriate 'to refer to the internal cause factor and the continuing danger factor, rather than the internal cause theory and the continuing danger theory' (para 154) thus permitting a trial judge to 'find one, the other or both of these approaches of assistance' (para 154). 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' (para 156). In Bastarache J's view, policy concerns were relevant not only to distinguishing between sane and insane automatism but also to determining an appropriate legal burden of proof in all such cases. With regard to the latter, he concluded that 'because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness' (para 180). In reaching this conclusion, Bastarache J made it clear that this legal burden on the defence applies to both sane and insane automatism, thus ending the distinction that continues to exist in most common law jurisdictions, including England, namely that in cases of sane automatism, the legal burden is on the prosecution to prove beyond reasonable doubt that the act in question was both conscious and voluntary once a proper foundation has been laid by the accused for the defence.

This shift in the burden of proof has been the subject of criticism. With this in mind, it is important to consider whether it is as radical as some have suggested. In short, has it meant that sane automatism is now rarely successful in Canada? Although this is difficult to assess due to a lack of any official statistics on automatism in Canada, some relevant pointers may be found from post-*Stone* cases. First, in *R v Fontaine*,[15] the Supreme Court of Canada made it clear that the evidential burden in cases of mental disorder automatism is satisfied provided there is some evidence upon which a properly instructed jury could reasonably decide the issue. Thus, an assertion of involuntariness on the part of the accused, supported by evidence from a qualified expert which, if accepted by the jury, would tend to support that defence, will normally provide a sufficient evidentiary foundation for putting the defence to the jury. In giving the unanimous judgment of the court, Fish J stated:

> This formulation of the test signifies that the trial judge, in determining whether a defence is in play, must assume the truth of the evidence that tends to support it, leaving the reliability, credibility and weight of that evidence to be determined by the jury. (para 72)

While this case only concerns mental disorder or insane automatism, there is no reason to suppose that the same approach would not apply to non-mental disorders or sane automatism, in which case it has become clear in Canada that the judge in all automatism cases is not required to 'evaluate the quality, weight or reliability of the evidence', as that is the province of the jury. In essence, therefore, the threshold for satisfaction of the evidential burden in automatism cases in Canada is low, which in turn means that many such cases will reach the consideration of the fact finder. It seems likely then that the legal question as to the type of automatism – sane or insane – will be of paramount importance. This brings us back to the 'holistic' approach endorsed in *Stone* and how its application may lead to different results from that achieved by use of the 'external factor' doctrine in England. With this in mind, two conditions which give rise to automatism – epilepsy and sleepwalking – can be used to contrast the position in Canada with that in England. As far as English law is concerned, it is clear that the former is classed as automatism of the insane type, while the position with regard to sleepwalking is less clear. Both conditions have been the subject of interesting litigation in Canada. In *R v Bohak*,[16] the accused in answer to a charge of assault claimed that at the time he had suffered an epileptic seizure. There was strong evidence to support this, so the judge, Giesbrecht, PJ, had no difficulty in deciding that the evidential burden had been satisfied. More difficult was how this form of automatism should be classified – sane or insane. To answer this question, the judge relied on the holistic

approach endorsed in *Stone*. In doing so, he reached the conclusion that the internal cause theory which had resulted in epilepsy being categorised as a disease of the mind needed to be reconsidered, as it was of limited value in the present case in view of the fact that both internal and external factors were operating. He then proceeded to consider the continuing danger factor in the context of the two issues of particular relevance identified in *R v Stone*, namely 'the psychiatric history of the accused and the likelihood that the trigger that caused the automatistic episode will recur' (para 101). In so doing, he found that the accused, although diagnosed with epilepsy in 1977, had no psychiatric history. In addition, he found that although certain triggers such as lack of rest, lack of proper food, excitement and the possibility that the accused had not taken his medication might recur, a consideration of such triggers was not very helpful in this case, as epilepsy was far removed from Stone's condition of psychological blow automatism and the triggers which had been considered important in that case. As a result, he concluded that the continuing danger factor did not lead to any obvious result in the present case. This meant that it became necessary to consider other policy factors, which he summarised as including:

> . . . such things as the fact that 'blackout' or automatism is easily feigned; that the credibility of the criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on the basis of automatism; that the success of the defence depends upon the 'semantic ability of psychiatrists tracing a narrow path between the twin shoals of criminal responsibility and an insanity verdict'; and the concern that the floodgates will be raised if automatism in certain instances is recognized. (para 112)

The judge gave the following reasons for clearly distinguishing between epilepsy-related and psychological blow automatism: (a) an epileptic seizure is not easily feigned; (b) epileptic automatism would not strain the credibility of the criminal justice system in the way psychological blow automatism would; (c) there was little support for the floodgates argument with epileptic automatisms; and (d) there were compelling public policy reasons for not labelling people with epilepsy as mentally disordered or insane. In conclusion, the judge being satisfied on the balance of probabilities that at the time of the alleged assault the accused was in a state of epileptic automatism, he returned a verdict of simple acquittal.

Before leaving this case, another interesting comment was made by the judge relating to burden of proof, which was as follows:

> I suspect that part of the reason that courts in the past have concluded that epilepsy and other neurological conditions, which are not ordinarily viewed as mental disorders, are a disease of the mind is due to this difference in the burden of proof . . . In view of the natural skepticism that courts have stated time and again in dealing with claims of automatism, it is perhaps not surprising that conditions were classified as a disease of the mind in order to ensure that the legal burden remained with the accused. All of this should change however, in view of the fact that the legal burden in the case of mental disorder automatism and sane automatism is now the same. The legal burden in each case is on the accused to prove the defence on a balance of probabilities. (para 95)

Thus, this change in the burden of proof rather than acting against the accused's interests might actually be in his favour. It certainly seems to have been one of the many factors which lead the court to conclude that Bohak's epileptic automatism should be classified as sane rather than insane.

By way of contrast, the Ontario Court of Appeal reached a different conclusion in the sleepwalking case of *R v Luedecke*,[17] where it reversed a finding of non-mental disorder or sane automatism. It did so on the basis that the trial judge had made an error of law in reaching the conclusion that the accused's condition was not a disease of the mind. He did so by misapplying the principles in *Stone*. Doherty JA summed this up as follows:

> I am satisfied that the trial judge failed to appreciate . . . the significance of the strong likelihood of the recurrence of the events that triggered his sexsomnia. The trial judge also failed to appreciate that Dr. Shapiro's medical opinion . . . was largely irrelevant to the determination of whether, for policy reasons, the condition should be classified legally as a disease of the mind.

As a result, a new trial was ordered which was limited to a determination of whether the respondent's automatism should result in a verdict of not guilty or an 'insanity' verdict. At the retrial, the defendant was found 'insane' as a result of all parties agreeing that that was the appropriate verdict. The case was then considered by the Ontario Review Board with a view to an appropriate disposal. The Board ordered a full risk assessment, which concluded that Mr. Luedecke was no longer a significant threat to public safety, and so the Board granted Mr. Luedecke an absolute discharge. Had this evidence as to lack of 'continuing danger' been available to the Ontario Court of Appeal, might it have altered the court's conclusion that the automatism in question was of the insane variety? The court certainly drew heavily on this factor, but whether an up-to-date risk assessment such as that presented to the Review Board would have influenced the court to reach an alternative conclusion is difficult to say.

Nevertheless, the more nuanced approach of the Canadian courts towards the problem of how to classify particular forms of automatism seems preferable to the limitations of the 'external factor' doctrine in English law, as it enables the judiciary to take account of a whole range of different factors in assessing whether to classify conditions as sane or insane.

Conclusion

Few would deny that the current law on automatism in England is incoherent and in need of reform. This is the clear view of the Law Commission in its Discussion Paper on Insanity and Automatism where it states that:

> The principal problem is that the distinction between 'sane automatism' and 'insane automatism' does not make sense. It depends on a crude distinction based on whether the cause of the loss of control is due to a factor that is 'external' or 'internal' to the accused. (para 5.38)[18]

The Commission concludes that this distinction not only results in arbitrary classifications but also leads a mismatch between law and medicine as 'the internal/external categorisation is not one that is recognised by the medical profession' (para 5.45). As a result of these and other criticisms of the present law of automatism, the Commission provisionally proposes a radical overhaul of both insanity and automatism. In essence, what is proposed is to replace insanity with a new defence of 'not criminally responsible by reason of recognised medical condition', the scope of which includes physical conditions as well as mental conditions. This new defence would require that D wholly lacked a relevant criminal capacity at the time of the alleged offence because of a qualifying condition. The relevant capacities being rationally to form a judgment, to understand the wrongfulness of the act or omission, or to control his or her physical acts in relation to what D is charged with having done. Importantly, the Commission makes it clear that the existing prior fault principles would apply to the new defence, with the effect that it would not be available in some circumstances where D had culpably caused the lack of capacity. As a result, in respect of a case such as *Coley* discussed above, the likely outcome would be the same, as the new defence would operate within the policy framework of the voluntary intoxication rule which expressly excludes 'acute intoxication' as a qualifying condition. In addition, the new defence would have the merit of ridding the law on automatism of the 'external factor' doctrine but at the expense of reducing the scope of sane automatism to very few cases, namely those where a total lack of capacity to control conduct was not the result of a recognised medical condition. The Commission's justification for this approach is that, for example, in cases of diabetic automatism, there is as much need for some degree of control over a hypoglycaemic defendant such as *Quick* as there is over a hyperglycaemic defendant such as *Hennessy*. Hence, both would qualify for the new defence, as diabetes would constitute a 'qualifying recognised medical condition' irrespective of the role played by an 'external factor' such as an insulin injection.

There is much to be said for simplifying the law on automatism in the manner suggested, an additional aspect of which is that the Commission also proposes that the burden of proof should be the same for both the new defence of 'not criminally responsible by reason of recognised medical condition' and automatism. Thus, unlike the approach in Canada discussed above, the Commission proposes that for both defences the burden of proof should remain on the prosecution. Doubtless, this together with the overall radical nature of these proposals will generate much discussion and debate. However, it is to be hoped that this important reform initiative may in due course result in the law relating to sane and insane automatism being overhauled, thus making it simpler and more coherent.

Funding

This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

Note

[a]The Rules state: 'that to establish a defence on the ground of insanity, it must be clearly 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'.[19]

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