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# Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach

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**This article addresses how mental disorder may be used in common law countries to negate the requirements of voluntariness and intention in serious criminal offences as well as to provide the basis for current versions of the insanity defence. The notion that mental disorder can cause conduct to become completely involuntary or unintentional is questionable, given current thinking in the behavioral sciences. This article argues that different forms of mental disorder should be subsumed within a separate defence of mental disorder. Providing that a range of dispositional options is available, the law in this complex area would be simplified and brought into line with current psychological notions of goal-directed behavior. Copyright © 2003 John Wiley & Sons, Ltd.**

Throughout the development of the common law notion of criminal responsibility, a distinction has always been made between deliberate and accidental conduct.[1] In the 17th century, Sir Edward Coke referred to the maxim *actus non facit reum nisi mens sit rea*,[2] which may be loosely translated as "an act does not make a person guilty of a crime unless that person's mind be also guilty."[3] This division into an act plus a guilty mind underlies the requirement that the prosecution bears the legal burden of proving that the criminal conduct was voluntary in addition to the accused having possessed the relevant fault element such as intention, knowledge, recklessness, or negligence.

Thus, the traditional view is that a serious offence consists of two elements: a physical (or external) element plus a fault element. For example, in most jurisdictions, murder is seen as consisting of a voluntary act causing death plus an intention

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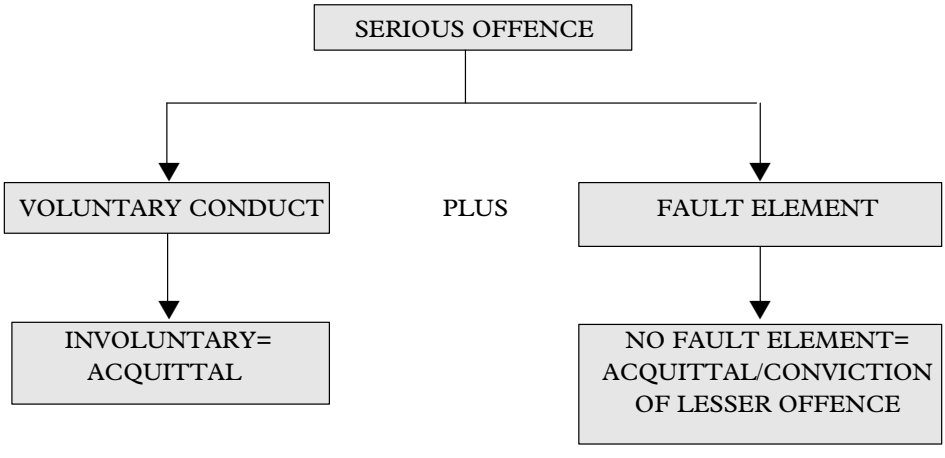
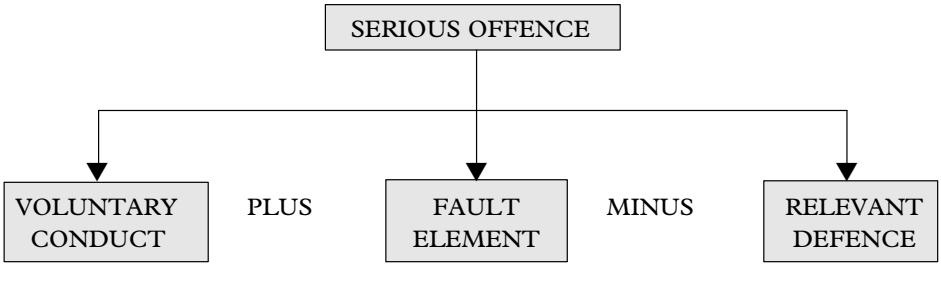
Samuel Hopper provided invaluable research assistance.
[1]P. Brett, An Inquiry into Criminal Guilt 38 (1963); S. Frankowski, *Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability* (*A Historical Perspective*) 63 University of Detroit Law Review 393–450 (1986).
[2]Coke 3 CO. INST. 6; 1 Inst. 247b (general statement); 3 Inst. 6 (treason); 107 (larceny). This maxim, however, seems to have existed prior to Coke's exposition: J. Hall, General Principles of Criminal Law (1960, 2nd ed.). 79–83.
[3]*Houghton v. Smith* (1975) A.C. 476 at 491–492 per Lord Hailsham (translation of maxim adopted).

to kill. Different jurisdictions may vary the fault element for murder (an intention to cause grievous bodily harm and/or some form of recklessness may also suffice), but this traditional notion of a physical element plus a fault element is well ingrained in the criminal law. If the prosecution fails to prove that the conduct was voluntary, the result is that the accused is acquitted. If the prosecution fails to prove the requisite fault element, the accused will be acquitted of the serious offence, but may still be held liable for a lesser offence. The traditional division can be visualised as follows:




More recent work has suggested that it is preferable to think of a serious offence as consisting of a physical element plus a fault element minus a defence.[4] Thus, murder may be defined as a voluntary act causing death plus an intention to kill minus acting in self-defence or as a result of provocation. This can be visualised as follows:




The attraction of this approach is that defences can be seen as separate from the physical and fault elements—there is no need to provide a rationale for defences as negating voluntary conduct or intention or other fault element because they exist in a separate realm of their own. As Finbarr McAuley and Paul McCutcheon write, "[t]hus viewed, the somewhat unnatural tension involved in explaining each operative defence in terms of negativing a defined element of the offence is

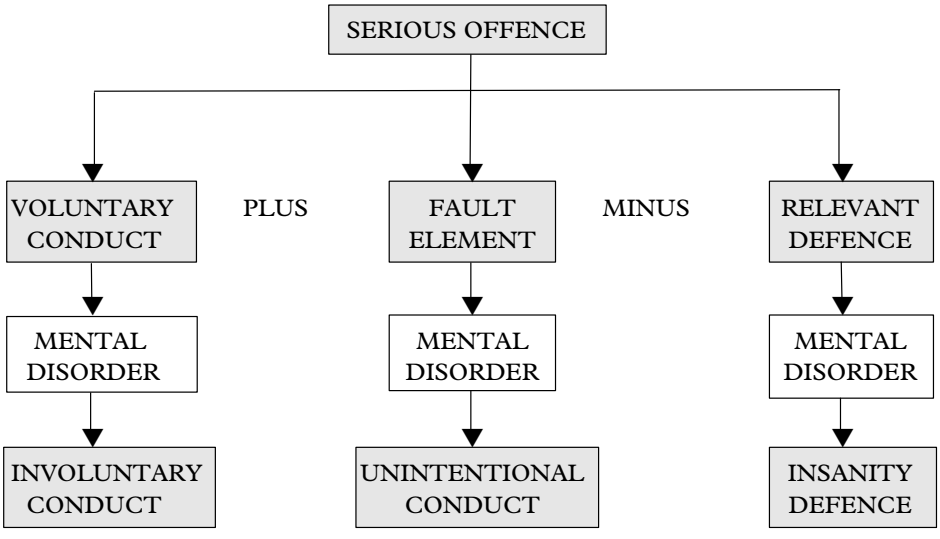
[4]See, for example, D. Lanham, *Larsonneur Revisited* Crim. L. R. 276–281 (1976).

eliminated and, coincidentally, the formulation of a general framework of criminal liability is facilitated''.[5]

How then does evidence of mental disorder ''fit'' within this latter framework? Stephen Morse has suggested that the legal concept of criminal responsibility in necessitating voluntariness and a fault element requires that the individual act rationally and without compulsion.[6] He suggests that irrationality is the primary excusing condition produced by mental disorder. On rare occasions, mental disorder may also help explain why an accused person did not possess the requisite fault element for a crime.

But what of mental disorder and involuntary conduct? Morse rightly points out that situations ''involving 'unconsciousness' from sleepwalking or similar dissociative states often cause confusion in the law''.[7] The case law in this area demonstrates that evidence of mental disorder has been used to show that the individual did not act ''rationally'' for the purpose of the traditional insanity defence as well as to show that the act was involuntary or was not intentional. This can be pictured as follows:




The following sections outline how evidence of mental disorder has been used to form the basis of a separate defence as well as to negate the requirements of voluntariness and intention. I will argue that the current state of the law is overly complex and confusing because mental disorder has been used to negate voluntariness and intention. The notion that mental disorder can cause conduct to become completely involuntary or unintentional is questionable given current psychological thinking. If different forms of mental disorder were subsumed solely within a separate defence of mental disorder, (providing that a range of dispositional options is available), the law in this complex area would be simplified and brought into line with current psychological notions of goal-directed behavior.

[5]F. McAuley J. P. McCutcheon, Criminal Liability 114–115 (2000).
[6]S. J. Morse, *Craziness and Criminal Responsibility* 17 Behavioral Sciences and the Law 147–164 (1999).
[7]*Id.* at 153.

## MENTAL DISORDER AND THE INSANITY DEFENCE

In thinking about mental disorder and the criminal law, the insanity defence is probably the first thing that springs to mind rather than involuntary or unintentional conduct. In the criminal law, the notion that children and those with some form of mental illness lack the ability to reason has long been found in laws excusing them from responsibility for criminal acts. This notion may be found in Roman law through Justinian's codification in the sixth century that "[a]n infant or a madman who kills a man is not liable under the *lex cornelia*, the one being protected by the innocence of his intent, the other excused by the misfortune of his condition".[8] The same conclusion was reached in Henrici de Bracton's first systematic treatise on the laws and customs of England, when he stated that the "lack of reason in committing the act" excused the madman and "the innocence of design" protected the infant from the boundaries of the criminal law.[9]

Modern conceptions of the insanity defence follow this tradition in that the defence generally serves to exculpate an accused from criminal responsibility because of the accused's inability to know the nature and quality of the conduct or that the conduct was wrong. In some jurisdictions, there is an added component of the mental disorder causing an inability to control the accused's conduct. Most jurisdictions follow along the lines of the traditional *M'Naghten Rules*.[10] These *Rules* arose out of the controversy surrounding the 19th century case of Daniel M'Naghten.

M'Naghten was tried for the murder of Edward Drummond, the private secretary of the Prime Minister of England, Sir Robert Peel. Evidence was led to show that M'Naghten suffered from the delusion that he was being persecuted by "the Tories" and that, in order to end this persecution, he shot and killed Drummond, whom he supposedly mistook for Peel. Lord Tindall C.J. instructed the jury that they could return a verdict of not guilty on the ground of insanity if they were of the opinion that the accused did not have the use of his understanding so as not to know that he was doing a wrong or wicked act.

M'Naghten was accordingly found not guilty on the ground of insanity by the jury. This led to a detailed debate that took place in the House of Lords concerning the question of whether or not the rules of law governing the defence of insanity were satisfactory. In June 1843, certain questions were placed before the common law judges on the existing law of insanity, with particular reference to the subject of delusions.

With one dissent, the judges agreed on the answers and these have become known as the *M'Naghten Rules*. The best known rule set out by Tindall C. J. on behalf of all the judges, save Maule J., states

> [T]o 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 defect of reason, from disease of the mind, as not to know the nature and quality of the act he [or

[8]The Digest of Justinian edited and translated by T. Mommsen, P. Krueger and A. Watson, Book Forty-Eight, 8.12 (1985).
[9]Henrici De Bracton, De Legibus et Consuetudinibus Angliae 135b quoted by F. B. Sayre, *Mens Rea* Harvard Law Review 974–1026 at 985–986 (1932).
[10](1843) 8 E.R. 718 at 722.

> she] was doing; or, if he [or she] did know it, that he [or she] did not know he [or she] was doing what was wrong.[11]

Many authors have criticised the emphasis in the *M'Naghten Rules* on cognitive (the effect on knowledge), rather than emotional and volitional factors (the effect on the ability to control conduct), which leads to the traditional insanity defence being very limited in its scope.[12] While most common law jurisdictions base the current defence of mental disorder on the *M'Naghten Rules*, some broaden the scope of the defence by including a volitional component.[13] In 1962 the American Law Institute recommended a broadened test of insanity in its *Model Penal Code* that included the capacity of the accused to control his or her behavior and this test became the majority test in the United States of America by 1980.[14] However, in the wake of public criticism of the insanity defence following the trial of John Hinckley for the attempted murder of President Reagan, Congress passed the federal *Insanity Defense Reform Act* (1984), which abandoned the control arm of the test.[15]

Just what conditions will constitute mental impairment for the purposes of this defence varies from jurisdiction to jurisdiction. The traditional *M'Naghten Rules* referred to a ''defect of reason'' arising from a ''disease of the mind.'' The latter is a problematic term in that it has no medical relevance and is purely a legal construct. Under the common law, conditions that have been held to fall within the insanity defence include psychotic disorders,[16] cerebral arteriosclerosis,[17] epilepsy,[18] and hyperglycaemia.[19]

There have been some statements that a disease of the mind simply means mental illness. In the South Australian case of *R v. Radford*, King C.J. stated[20]

> The expression ''disease of the mind'' is synonymous, in my view, with ''mental illness'' . . . The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental faculties called ''defect of reason'' in the *M'Naghten* rules, must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly

[11] *Id.*
[12] See, for example, S. J. Brakel, J. Parry, & B. A. Weiner, The Mentally Disabled and the Law 710 (1985, 3rd ed.); H. Fingarette, The Meaning of Criminal Insanity 144 (1972); A. Goldstein, The Insanity Defence 47–49 (1967); D. Hermann, The Insanity Defense 37, 138 (1983); F. McAuley, Insanity, Psychiatry and Criminal Responsibility 23 (1993).
[13] For example, s. 7.3(1)(c) *Criminal Code* (Cth.); s. 35(1) *Criminal Code* (N.T.); s. 27(1) *Criminal Code* (Qld.); s. 269C(c) *Criminal Law Consolidation Act* 1935 (S.A.); s. 16(1)(b) *Criminal Code* (Tas.); s. 27 *Criminal Code* (W.A.).
[14] American Law Institute, s. 4.01 *Model Penal Code* (1962); R. L. Spring, *The Return to Mens Rea: Salvaging a Reasonable Perspective on Mental Disorder in Criminal Trials* 21(2) International Journal of Law and Psychiatry 187–196 at 190 (1998).
[15] Many US states also altered their insanity defences after the trial of John Hinckley. For a full discussion see R. J. Simon and D. E. Aaronson, *The Insanity Defense, A Critical Assessment of Law and Policy in the Post-Hinckley Era* (New York: Praeger, 1988).
[16] ''[T]he major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind'': *Bratty v. Attorney-General for Northern Ireland* (1963) AC 386 at 412 per Lord Denning.
[17] *R v. Kemp* (1957) 1 QB 399.
[18] *R v. Cottle* (1958) NZLR 999; *R v. Sullivan* (1984) AC 156; *R v. Foy* (1960) Qd R 225 CA(Qld); *R v. Mursic* (1980) Qd R 482; CA (Qld); *R v. Meddings* (1966) VR 306; Youssef 50 A Crim R 1 (1990), CCA(NSW).
[19] *R v. Hennessy* (1989) 2 All ER 9; (1989) 1 WLR 287; (1989) 89 Cr App R 10.
[20] (1985) 42 SASR 266 at 274.

termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli.

This statement was accepted by the members of the High Court of Australia in *Falconer v. The Queen.*[21] What, however, is mental illness?

According to the *Oxford Textbook of Psychiatry*, ''most psychiatrists begin by separating mental handicap and personality disorder from mental illness... they diagnose mental illness if there are delusions, hallucinations, severe alterations of mood, or other major disturbances of psychological functions. In practice, most psychiatrists allocate psychiatric disorders to diagnostic categories such as schizophrenia, affective disorders, organic mental states, and others; by convention, they agree to group these diagnostic categories together under the rubric mental illness.''[22]

The modern psychiatric conception of mental illness views it as ''a pervasive inability to engage reality: as a failure of 'reality testing' to use the term of art favoured by psychiatrists.''[23] This is why psychotic disorders are generally distinguished from neurotic and personality disorders, neither of which involves an inability to engage reality.

In modern conceptions of the *M'Naghten Rules*, section 428N(1) of the *Crimes Act* 1900 (ACT) perhaps comes closest to the psychiatric conception of mental illness. This section uses the term ''mental dysfunction,'' which is further defined in s 428B as ''a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion.'' This is a broad definition, but it is flexible enough to accord with changing medical conceptions of mental disorders. It should be noted that there is a limitation placed on this definition of ''mental dysfunction'' for the purpose of the defence of mental illness in the Australian Capital Territory. Section 428N of the *Crimes Act* requires that the mental dysfunction resulted in the accused being incapable of knowing what he or she was doing, or incapable of understanding that what he or she was doing was wrong. This would mean conditions such as personality disorders and anxiety disorders would be highly unlikely to afford an accused a defence.

If, as I will argue later, the dispositional options for a modern defence of mental disorder are flexible and include the option to release the accused, then a broad definition such as the Australian Capital Territory definition may enable a wide range of mental disorders including dissociative states to be subsumed within this defence.

## MENTAL DISORDER, AUTOMATISM, AND INVOLUNTARY CONDUCT

In a criminal trial, the prosecution must prove beyond reasonable doubt that the accused's conduct was voluntary. This requirement is quite separate from any

[21](1990) 171 CLR 30 at 53 per Mason C. J., Brennan and McHugh J. J. at 60 per Deane and Dawson J. J. at 85 per Gaudron J.
[22]M Gelder, D Gath, R Mayou and P Cowen, *The Oxford Textbook of Psychiatry* (Oxford: Oxford University Press, 1996, 3rd edition) p. 57.
[23]F. McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Dublin: The Round Hall Press, 1993) p. 35.

consideration of a defence of mental disorder: the defence can raise evidence that the accused's conduct was involuntary in the absence of raising a defence of mental disorder. There is no legal definition as to what amounts to voluntary conduct. Rather, the case law has developed categories of involuntary conduct. The most problematic category concerns conduct performed whilst the accused was in a state of impaired consciousness.[24]

Automatism is the term generally used to refer at law to involuntary conduct resulting from some form of impaired consciousness. Whilst sometimes referred to as a separate "defence," in jurisdictions other than Canada, the accused only need raise evidence that the act was involuntary and then the prosecution must rebut that evidence beyond reasonable doubt. In Canada, however, a majority of the Supreme Court has held that the legal burden is on the defence to prove involuntariness on a balance of probabilities.[25] Evidence of automatism only began to be accepted in England in the 1950s as a way around the narrowness of the insanity defence and indefinite detention.[26] It has been used increasingly as an alternative to raising a separate defence of mental disorder because, if the evidence is accepted, the result is an acquittal.

The courts have accepted evidence of automatism as arising from a blow to the head, sleep disorders, the consumption of alcohol or other drugs, neurological disorders, hypoglycaemia, epilepsy, or dissociation arising from extraordinary external stress.[27] In Australia, evidence of dissociation has led to some questionable acquittals.[28] Dissociation will be discussed later in this article.

There are conflicting decisions relating to whether or not a degree of consciousness will defeat a claim of automatism. Some cases have equated automatism with a *complete* lack of consciousness.[29] This appears to be on the grounds that a lack of consciousness is more readily tested than a lack of volition and because of the "familiarity of consciousness as a test of liability."[30] However, other cases have suggested that because automatism is related to the concept of involuntariness rather than consciousness, a degree of awareness or cognitive function is not necessarily fatal to automatism being accepted by the trier of fact.[31] In *Ryan v. The Queen*,[32] Barwick C.J. stated

[24]R. F. Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility* (Cambridge: Cambridge University Press, 1991) p. 137.
[25]*R v. Stone* [1999] 2 SCR 290. This part of the decision has been criticized by R. Delisle, "*Stone*: Judicial Activism Gone Awry to Presume Guilt" (1999) 24 CR (5th) 91–96; D. Paciocco, "Death by *Stone*-ing: The Demise of Simple Automatism" (1999) 26 CR (5th) 273–285; B. McSherry, "Case Commentary: *R v. Stone*" 2000 7(2) *Psychiatry, Psychology and Law* 279–283.
[26]C. R. Williams, "Development and Change in Insanity and Related Defences" (2000) 24(3) *Melbourne University Law Review* 711–736 at 717–718.
[27]See S. Bronitt and B. McSherry, *Principles of Criminal Law* (Sydney: LBC, 2001) p. 225 and footnotes therein.
[28]B. McSherry, Automatism in Australia Since Falconer's Case (1996) December *International Bulletin of Law and Mental Health* 3–8; B. McSherry, "Getting Away with Murder? Dissociative States and Automatism" (1998) 21(2) *International Journal of Law and Psychiatry* 163–176.
[29]For example, *R v. Joyce* [1970] SASR 184; *R v. Burr* [1969] NZLR 734; *Broome v. Perkins* (1987) 85 Cr App R 321; *R v. Isitt* (1977) 67 Cr App R 4.
[30]D. O'Connor and P. A. Fairall, *Criminal Defenses* (Sydney: Butterworths, 3rd edition, 1996) p. 282.
[31]For example, *R v. Radford* (1985) 42 SASR 266 at 275–276 per King C. J.; *R v Burr* [1969] NZLR 736 at 745 per Turner J.
[32](1967) 121 CLR 205 at 217.

> [I]t is important ... not to regard [automatism] as of the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack of will which is the relevant determinant ... It is of course the absence of the will to act or, perhaps, more precisely, of its exercise rather than lack of knowledge or consciousness which ... decides criminal liability.

The law has become particularly complex in relation to automatism because the courts have divided certain conditions as falling within either ''sane'' automatism or ''insane'' automatism.[33] If an accused is acquitted on the basis of sane automatism, he or she is entitled to a complete acquittal because the criminal act is considered involuntary. If, however, the automatism arose from something ''internal'' to the accused, it is considered ''insane'' automatism and the accused generally becomes subject to detention in a psychiatric facility.

In the recent Canadian Supreme Court decision of *R. v. Stone*,[34] Bastarache J., who delivered the majority judgment, pointed out that the division between sane and insane automatism[35] depends upon whether or not the condition alleged by the accused is a mental disorder. He outlined how the law had developed two tests to establish whether or not the condition of automatism was a mental disorder: The ''internal cause theory'' set out by Martin J.A. in *Rabey v. The Queen*[36] and the ''continuing danger theory'' referred to by La Forest J. in *R. v. Parks*.[37] Bastarache J. found that *both* approaches are relevant factors in determining in which category a condition falls and other policy factors may also be taken into account to provide a ''holistic'' approach.[38]

In taking such an approach, Bastarache J. held that an ''objective'' test should be applied. That is, there should be a consideration as to whether or not a ''normal'' person would have experienced the state of automatism the accused suffered. He pointed out

> In cases involving claims of psychological blow automatism, evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to the trigger by entering an automatistic state ... (pp. 392–393).

Medical evidence is essential in categorising whether or not a condition will be considered to fall within the categories of sane or insane automatism. However, differing medical opinions have led to different outcomes. For example, sleepwalking has been considered to be a form of sane automatism in the Canadian case of *R. v. Parks*[39] yet was classified as insane automatism in the English case of *R. v. Burgess*.[40] Similarly, dissociation brought on by a traumatic marriage breakdown has been viewed as sane automatism in Australia, but insane automatism in Canada.[41]

[33]See further B. McSherry, 'Defining What is a ''Disease of the Mind''; The Untenability of Current Legal Interpretations' (1993) 1 *Journal of Law and Medicine*, 76–90.
[34][1999] 2 SCR 290.
[35]The Canadian Supreme Court preferred the terms ''mental disorder automatism'' and ''non-mental disorder automatism.''
[36](1977) 17 OR (2d) 1.
[37][1992] 2 SCR 871.
[38][1999] 2 SCR 290 at 396–398.
[39][1992] 2 SCR 871.
[40][1991] 2 QB 92; [1991] 2 WLR 1206.
[41]See B. McSherry, ''Getting Away with Murder? Dissociative States and Automatism'' (1998) 21(2) *International Journal of Law and Psychiatry* 163–176.

Dissociative states are particularly problematic in relation to the division between sane and insane automatism. Can mental health professionals really state when a "normal" person will experience dissociative automatism as a result of traumatic events? This will be taken up later in the section dealing with psychological conceptions of involuntary and unintentional behavior.

## MENTAL DISORDER AND LACK OF INTENTION

Stephen Morse has rightly pointed out that mental disorder may on rare occasions be relevant to the fault element of a crime.[42] This has been a relatively recent phenomenon and generally evidence of mental disorder has been raised to cast doubt on whether or not the criminal conduct was intentional. Like automatism, it appears that in practice, raising evidence of mental disorder to negate intention may increase because, if such evidence is accepted, an acquittal may result. There does not seem to be any case law as to whether or not evidence of mental disorder may be admissible in relation to recklessness or negligence. Ian Leader-Elliott, however, has argued that mental disorder may be relevant to these fault elements as well as intention.[43]

There have been a handful of cases in Canada and Australia dealing with this area. It has become much more of an issue in some American states that have abolished the defence of insanity.

In Australia, the leading case on this point is that of *Hawkins v. The Queen.*[44] On 27 October 1990, a 16 year old boy shot and killed his father. He stated that he had intended to commit suicide in his father's presence, but at the last moment, in a disturbed state of mind, he turned the rifle toward his father and pulled the trigger without intending to kill his father.

The accused was in fact tried three times for murder. At his first trial, the accused raised the defence of insanity, but the jury was unable to reach a verdict. At his second trial, the accused withdrew the defence of insanity and he was convicted of murder. The Tasmanian Court of Criminal Appeal, however, allowed an appeal from conviction and ordered a third trial.[45]

At the third trial, counsel for the defence sought to adduce evidence of "mental disease" not as a basis for a separate defence of mental disorder, but as a basis for showing that the accused did not possess the requisite intention for the crime of murder. Underwood J. conducted a voir dire to determine the relevance and admissibility of this evidence. The defence called two expert witnesses. One gave evidence that the accused was suffering from a diagnosable mental disease at the time of the shooting, which he labeled an "adolescent identity disorder." The other expert stated that the accused had been suffering from an "adolescent adjustment disorder," which could be regarded in law as a "mental disease."

[42]S. Morse, "Craziness and Criminal Responsibility" (1999) 17 *Behavioral Sciences and the Law* 147–164 at 161 ff.
[43]I. Leader-Elliott, "Case Note: Insanity, Involuntariness and the Mental Element in Crime" (1994) 18 Crim L. J. 347–357 at 355.
[44](1994) 179 CLR 500.
[45]*Hawkins v. The Queen* unreported, Serial No A105/1991, Supreme Court of Tasmania.

Underwood J. ruled that this medical evidence was inadmissible for any purpose other than the insanity defence. The Court of Criminal Appeal of Tasmania dismissed an appeal by the accused on the ground that the ruling that the evidence was inadmissible did not cause any miscarriage of justice.[46] The accused then appealed to the High Court.

In a joint judgment, the High Court agreed that evidence of mental disease should be excluded in determining the issue of the voluntariness of the criminal act. However, the High Court went on to say that there was no reason "for excluding evidence of mental disease in determining whether an act done by a person who is criminally responsible for the act was done with a specific intent."[47]

It said that since evidence of intoxication may be led to negate intention, "it would be anomalous to exclude evidence of other forms of mental abnormality in determining the same issue."[48] The High Court remitted the matter to the Court of Criminal Appeal of Tasmania to either make an order dismissing the appeal if it considered that no substantial miscarriage of justice had actually occurred or, alternatively, to consider substituting a conviction of manslaughter instead of ordering a new trial. The Court of Criminal Appeal by a majority of two judges to one subsequently ordered that there be a fourth trial of the matter.[49] The accused then pleaded guilty to manslaughter and was sentenced by Cox J. to six years imprisonment to date from 29 October 1990, when he had first been taken into custody.[50]

In its judgment, the High Court cautioned that the use of evidence of mental disease to negate intention can arise, "only on the hypothesis that the accused's mental condition at the time when the incriminated act was done fell short of insanity."[51] In reaching this conclusion, the High Court relied upon a series of Canadian cases in which mental disorder falling short of "insanity" has been held to negate the fault element.[52]

The Canadian cases, however, deal primarily with mental disorder as it relates to what was termed "capital murder." Prior to 1967, s. 202A(2)(a) of the Canadian *Criminal Code* defined capital murder as that which is "planned and deliberate." This definition was repealed in 1967[53] but revived in 1976, when the *Criminal Law Amendment Act (No 2)* 1976 divided murder into first degree and second degree murder. Section 214(2) defined first degree murder as planned and deliberate, a concept that survived revision in 1985. The distinction between first and second degree murder is now contained in s. 231 of the *Criminal Code.*

In *More v. The Queen*,[54] Cartwright J. pointed out that the requirement that the killing be "planned and deliberate" for capital murder meant something more than

[46]*Hawkins (No 2)* (1993) 68 A Crim R 1.
[47]*Hawkins v The Queen* (1994) 179 CLR 500 at 513.
[48]*Id.* at 514.
[49]*Hawkins v The Queen (No 3)* (1994) 4 Tas R 376.
[50]The accused was sentenced on 11 July 1995.
[51]*Hawkins v The Queen* (1994) 179 CLR 500 at 517.
[52]*More v The Queen* [1963] 41 DLR (2d) 380 at 382 SC of Can; *R v Lachance* [1963] 2 CCC 14 at 17 CA of Ont; *R v Kirkby* (1985) 21 CCC (3d) 31 at 61 CA of Ont; *R v Baltzer* (1974) 27 CCC (2d) 118 at 141 CA of NS; *R v Meloche* (1975) 34 CCC (2d) 184 CA of Que; *R v Browning* (1976) 34 CCC (2d) 200 at 202–203 CA of Ont; *R v Hilton* (1977) 34 CCC (2d) 206 at 208 CA of Ont; *R v Lechasseur* (1977) 38 CCC (2d) 319 CA of Que; *R v Allard* (1990) 57 CCC (3d) 397 at 401 CA of Que; *R v Stevenson* (1990) 58 CCC (3d) 464 at 488 CA of Ont.
[53]1967–1968, c 15, s 1.
[54][1963] 41 DLR (2d) 380 at 382.

simply intentional. The word deliberate he took to mean "considered, not impulsive." Most of the Canadian cases therefore deal with evidence of mental disorder in relation to whether the killing was planned and deliberate. However, the Quebec Court of Appeal has interpreted Cartwright J's words in *More's* case as meaning that mental disorder falling short of a separate defence may be used to cast doubt on the accused's ability to form a specific intent.[55] The Ontario Court of Appeal and the Nova Scotia Supreme Court have also referred to the admissibility of evidence of mental disorder "falling short of insanity" as being relevant to negate the specific intent for murder reducing the offense to manslaughter.[56] There may be a link between these Canadian cases and the fact that Canada has never had a defence of diminished responsibility, unlike England, Scotland, and the Australian jurisdictions of the Australian Capital Territory, the Northern Territory, New South Wales, and Queensland.

It is in the United States of America that evidence of mental disorder has been raised the most often in order to negate intention.[57] In 1976, Montana abolished the separate defence of insanity and evidence of mental disorder became relevant only to the question as to whether or not the accused acted with the requisite intention.[58] Idaho followed this example in 1982,[59] Utah in 1990,[60] and Kansas in 1995.[61] In *State v. Shackford*,[62] the Supreme Court of New Hampshire held that the "product" test of insanity (where the accused is not criminally responsible if the criminal act was the product or mental disease or defect) was really related to whether or not insanity negated criminal intent.

Raymond L. Spring has argued that the American approach to mental disorder as negating criminal intention is a step in the right direction, as eliminating a separate insanity defence, "should reduce substantially the opportunity for jury confusion."[63] However, evidence of mental disorder has not been generally accepted in relation to voluntariness in the United States of America. In other countries, abolishing the insanity defence and allowing evidence of mental disorder to be relevant to only voluntariness and intention may only lead to further confusion. This is particularly the case when the psychological approaches to voluntary and intentional conduct are taken into account. These approaches will be explored in the next section.

Spring argues that focusing on mental disorder and intention returns the law to its legitimate objectives because the most important section of the *M'Naghten Rules* was not intended to be a rule to cover all cases of mental disorder. However, that approach ignores the long history of excusing those who lack the ability to reason

[55]*R v Lechasseur* [1977] 38 CCC (2d) 319 at 320. See also *R v Allard* [1990] 57 CCC (3d) 397 at 406.
[56]*R v Baltzer* [1974] 27 CCC (2d) 118; *R v Browning* [1976] 34 CCC (2d) 200; *R v Stevenson* [1990] 58 CCC (2d) 464.
[57]For overviews of the law in the United States, see H. M. Huckabee, "Avoiding the Insanity Defense Strait Jacket: The Mens Rea Route" (1987) 15(1) *Pepperdine Law Review* 1–32; H. M. Huckabee, "Mental Disability: Evidence on Mens Rea Versus the Insanity Defenses" (1993) 20 *Western State University Law Review* 435–526.
[58]*Montana Code Ann.*, Stat. 46-14-102 (1979).
[59]*Idaho Code*, Stat. 18-207 (1982).
[60]*Utah Code Ann.*, 76-2-305 (1990).
[61]*Kan. Stat. Ann.* 22-3220 (1995).
[62]127 NH 695, 506 A 2d 315 (1986).
[63]R. L. Spring, "The Return to Mens Rea: Salvaging a Reasonable Perspective on Mental Disorder in Criminal Trials" (1998) 21(2) *International Journal of Law and Psychiatry* 187–196 at 194.

from criminal responsibility. It is a lack of reasoning capacities that was always the focus, rather than a lack of intention.

The abolition of the insanity defence in favour of mental disorder as negating intention also fails to take into account situations where an accused *does* intend to commit a criminal act, but this intention is the result of delusions. For example, in *R v. Hadfield*[64] the accused tried to kill George III. He was motivated by the belief that, by dying, he was destined to save the world. He knew that killing was illegal and punishable by death and he therefore shot at the king in order to be hanged. He fully intended to cause the King's death. If there were no separate defence assessing Hadfield's ability to reason, he would be held criminally responsible despite evidence of delusions.

It is interesting to note that the English Court of Appeal has recently rejected the argument that intention is relevant where both prosecution and defence agreed that the accused was suffering from a psychosis at the time he broke into a house.[65] This Court of Appeal reference followed a decision by a judge of the Crown Court to acquit the accused on the basis that the prosecution had not proved that the accused had intended to commit the crime charged. The judge found that if there is a lack of intention because of psychosis, the accused is entitled to a complete acquittal. The reference in this case was limited to the question as to what needs to be proved in determining whether or not the accused did the act. The Court of Appeal held that the Crown must prove that the accused caused a certain event, but once insanity was in issue, the accused's state of mind ceased to be relevant.

In commenting on this case, J.R. Spencer points out that while the Court of Appeal's decision clearly shows that the trial judge was incorrect in acquitting the accused, nothing further can be done about "a visibly dangerous defendant... wrongly acquitted."[66] On a broad level, this raises the issue that if mental disorder is accepted as negating intention, a complete acquittal may result in circumstances where some form of psychiatric detention may be more appropriate.

The High Court decision in *Hawkins* and a few of the Canadian cases refer to mental disorder "falling short of insanity." What that means is open to debate, but, more importantly, even mental disorder that is not considered serious enough to affect a person's ability to reason may need treatment. The traditional justification for detaining those found not criminally responsible because of insanity centres upon the notion of incapacitation to prevent further harm to the public. There is, however, a more modern justification for detention, and that is for treatment. Recent changes to the law in certain jurisdictions to enable a wider range of dispositional options other than preventive detention may help emphasise the treatment rationale. Acquitting those with some form of mental disorder because their conduct is "involuntary" or "unintentional" means that potentially recurrent disorders may go untreated. At least if conditions such as sleepwalking or dissociative states are brought within a separate defence of mental disorder, more flexible dispositional options may enable the individual to obtain treatment for the disorder.

This overview of how mental disorder may be relevant in criminal trials has highlighted problems concerned with using mental disorder to negate the

[64](1800) 27 St Tr 1281.
[65]*Attorney-General's Reference (No 3 of 1998)* [1999] 2 Cr App R 214.
[66]J.R. Spencer, "Insanity and Mens Rea", [2000] 59(1) *Cambridge Law Journal* 9–11 at 11.

voluntariness and intention requirements for serious offences. Using evidence of mental disorder to negate voluntariness and intention does not accord with current psychological thinking. This will be explored in the next section.

## VOLUNTARY AND INTENTIONAL CONDUCT: LESSONS FROM THE BEHAVIORAL SCIENCES

There are numerous ways of explaining human action. At the simplest level, there are bodily movements that result from the contraction or relaxation of muscles. Arthur Danto has referred to the ''basic actions'' such as waving, walking, picking up objects, and so on.[67] In relation to criminal conduct, the explanation for behavior becomes much more complex. Michael Moore writes that ''[s]ince in law and morals it is *persons* performing actions with which we are concerned, we may put aside the behaviorist sense of action, which reduces it without remainder to bodily motions.''[68]

Legal philosophers have struggled to explain what is meant by voluntary and intentional conduct, sometimes blurring the two. Generally, voluntary conduct is linked to the notion of control, rather than intention, but some theorists have talked about voluntary conduct as being purposeful or goal oriented. John Austin defined a voluntary act as one resulting from a willed muscular movement.[69] Similarly, North P. stated in *R. v. Burr*[70] that ''one cannot move a muscle without a direction given by the mind.'' This approach has been criticised as presupposing an element of deliberation that does not readily fit in with the ordinary experiences of life where most actions such as walking, eating, and gesturing are done in a quasi-automatic fashion.[71]

Herbert Hart posited that an act is voluntary if the individual believes he or she is doing the action.[72] For example, walking is something that is usually done in a quasi-automatic fashion, but an individual if asked, would say that he or she believed that he or she was walking. What Hart was concerned to place beyond the realm of voluntary action were acts occurring in a state of impaired consciousness such as during an epileptic seizure or whilst sleepwalking. Hart's theory, however, does not account for a reflex action in that it is ''unwilled'' but the actor is aware that it is occurring.

Another view is that an act is voluntary if it can be described as goal directed or purposeful.[73] A voluntary act is one that the actor sought to bring about. This approach breaks down the division between physical and fault elements in the sense that it appears to be another way of saying that a voluntary act is an intentional one.

[67]A. Danto, (1965) ''Basic Action'' (1965) 2 *American Philosophical Quarterly* 141–148.
[68]M. S. Moore, *Law and Psychiatry: Rethinking the Relationship* (New York: Cambridge University Press, 1984) p. 70.
[69]J. Austin, *Lectures on Jurisprudence* (London: John Murray, 1885, 5th edition), pp. 411–415.
[70][1969] NZLR 736 at 742.
[71]G. Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1983, 2nd edition), p 148.
[72]H. L. A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), p. 105.
[73]In the early 1930s, Hans Welzel developed in Germany the concept of action as intrinsically purposive rather than simply being an external manifestation of ''the will'': G. P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) pp. 433–439.

The Victorian Law Reform Commission took this approach when stating, ''[n]o practical distinction can be drawn between voluntary conduct and intentional conduct.''[74]

This is also the most common approach taken by psychologists in the social cognitive field. Mid-way through the 20th century, the Russian psychologists Lev Semenovich Vygotsky and Aleksandr Romanovich Luria posited a view of behavior as adapted to the current environment, but determined by an act of conscious choice.[75] This view remains dominant among theories of self-motivation. For example, Albert Bandura writes that ''[m]ost human behaviour, being purposive, is regulated by forethought.''[76] He defines intention as, ''the determination to perform certain activities or to bring about a future state of affairs.''[77] Intentional regulation of behavior is seen as being caused by the exercise of forethought as well as goal setting.

Another approach, posited by Finbarr McAulay and Paul McCutcheon,[78] is that the central issues in relation to voluntary and involuntary acts is whether or not the actor can be said to have controlled his or her act. Control does not have to be total, but substantial, and thus, conversely, an involuntary act is one where there is a substantial lack of control.[79]

While there is a lack of consensus as to what voluntary conduct means, there is perhaps even greater confusion as to the legal requirements for intentional conduct. Legal philosophers and judges, particularly in England, have struggled with the concept of intentional conduct, attempting to distinguish between general and specific intention and direct and oblique intention.[80] In *R. v. Mohan*[81]James L.J. defined intention as ''a decision to bring about [the proscribed result], insofar as it lies within the accused's power, no matter whether the accused desired that consequence of his [or her] act or not.''[82] However, Andrew Ashworth points out that appellate courts ''in most cases ... insist that intention is an ordinary word that needs no explanation, but on other occasions they adopt broader and narrower definitions and they have never offered a concrete definition of the term.''[83]

Perhaps the real crux of the problem of defining voluntary and intentional behavior from a legal perspective is the assumption that behavior is *either* voluntary or involuntary and intentional or unintentional. This does not accord with recent work in the behavioral sciences, particularly in the field of psychology.

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[74]Victorian Law Reform Commission, Report No 34, *Mental Malfunction and Criminal Responsibility* (Melbourne: LRCV, 1990) p. 67.
[75]L. S. Vygotsky, *Selected Psychological Investigations* (Moscow: Izd Akad Pedagog Nauk RSFR, 1956); L. S. Vygotsky, *Development of the Higher Mental Functions* (Moscow: Izd Akad Pedagog Nauk RSFR, 1960); A. R. Luria, *The Working Brain* (London: The Penguin Press, 1973).
[76]A. Bandura, ''Human Agency in Social Cognitive Theory'' (1989) 44(9) *American Psychologist* 1175–1184 at 1179.
[77]A. Bandura, *Social Foundations of Thought and Action* (Englewood Cliffs, NJ: Prentice-Hall, 1986) p. 467.
[78]F. McAuley and J. P. McCutcheon, *Criminal Liability* (Dublin: Round Hall Sweet & Maxwell) p. 127.
[79]See D. R. Stuart, *Canadian Criminal Law* (Toronto: Carswell, 1995, 3rd edition) p. 117.
[80]S. Bronitt and B. McSherry, *Principles of Criminal Law* (Sydney: LBC, 2001) pp. 175–177. For a modern debate about the meaning of intention, see N. Lacey, ''A Clear Concept of Intention: Elusive or Illusory'' (1993) 56(5) *Modern Law Review* 621–642; J. Horder, ''Intention in the Criminal Law—A Rejoinder'' (1995) 58(5) *Modern Law Review* 678–691; N. Lacey, ''In(de)terminable Intentions'' (1995) 58(5) *Modern Law Review* 692–695.
[81][1976] QB 1.
[82]*Id.* at 11.
[83]A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 1999, 3rd edition) p. 182.

 

Behaviorism as a psychological theory that emphasises the scientific study of observable behavioral responses[84] is limited in the assistance it can give to the complexities of criminal responsibility. The functionalist approach to the theory of behavior that tries to understand specific behavioral actions in terms of their adaptive functions is perhaps of more relevance given that it looks at sensory input, neural mechanisms, and resulting behavior as a complex set of interactions.[85] It also appears to have the most current support amongst cognitive psychologists and philosophers.[86]

In the psychological literature, automatism is the term used to explain compulsive repetitive simple behaviors usually associated with a psychomotor epileptic attack.[87] There is thus an immediate difference in the language used in this area by lawyers and psychologists.

A clear-cut distinction between involuntary and voluntary behavior and intentional and unintentional behavior is foreign to most philosophical and psychological thinking. For example, Joel Feinberg refers to voluntariness as "a variable concept, determined by higher and lower cut-off points depending on the nature of the circumstances, the interests at stake, and the moral or legal purposes to be served."[88]

In his work on epilepsy, John Hughlings Jackson posited that volitional and automatistic behaviors are not polar opposites, but part of a continuum.[89] It is therefore better to talk of the "most and least volitional, or least and most automatic."[90] The functionalist approach to the study of mind and behavior thus views behavior as much more complex than the legal concept of acts as either voluntary or involuntary, intentional or unintentional, these notions having their basis in Cartesian dualism.[91]

What does a functionalist approach have to say about dissociation, that problematic condition that highlights the problem in dividing impaired consciousness into sane and insane automatism? There is an assumption that when the dissociative state falls within the category of sane automatism, the accused is unable to control his or her conduct. Does this accord with current psychological thinking?

Dissociation is defined in the *Diagnostic and Statistical Manual of Mental Disorders* as "a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment."[92] In recent years, "dissociative states" have come to the fore in the psychological literature, particularly in the context of individuals recovering from traumatic events such as physical and sexual abuse.

[84]Behaviorism has been defined as "An approach within psychology, developed by Watson, that restricts investigation to overt, observable behavior": L. A. Pervin and O. P. John, *Personality: Theory and research* (New York: John Wiley & Sons Inc, 7th edition, 1997) p. 523. Behavior is now generally studied in its environmental context.

[85]P. Churchland, *Matter and Consciousness: A Contemporary Introduction to the Philosophy of the Mind* (Cambridge, Mass: MIT Press, 1988) p. 36.

[86]R. Dresser, "Culpability and Other Minds" (1993) 2(1) *Southern California Interdisciplinary Law Journal* 41–88.

[87]J. P. J. Pinel, *Biopsychology* (MA, Needham Heights: Allyn & Bacon, 1997, 3rd edition) p. 138.

[88]J. Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986) p. 117.

[89]J. Hughlings Jackson, "Evolution and Dissolution of the Nervous System" in J. Taylor (ed.)., *Selected Writings of John Hughlings Jackson* (London: Hodder and Stoughton, 1932) Vol. 2, pp. 45–63.

[90]E. M. Coles and S. M. Armstrong, "Hughlings Jackson on Automatism as Disinhibition" (1998) 6(1) *Journal of Law and Medicine* 73–82.

[91]R. Dresser, "Culpability and Other Minds" (1993) 2(1) *Southern California Interdisciplinary Law Journal* 41–88.

[92]American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington, DC: APA, 1994, 4th edition) p. 477.

 

Marlene Steinberg has categorised five core symptoms of dissociation: amnesia, depersonalization, derealization, identity confusion, and identity alteration.[93] She argues that all of these symptoms must be present before a diagnosis of dissociation can be made. She has also invented the *Structured Clinical Interview for DSM-IV Dissociative Disorders* which may be useful in diagnosing and assessing the presence and severity of these dissociative symptoms.[94]

Steinberg writes that ''[d]uring a dissociative episode, the mental contents that are dissociated from full consciousness remain on some peripheral level of awareness; from this perspective dissociation can also be defined as a fragmentation of consciousness.''[95] E. Michael Coles and S. M. Armstrong agree that goal-directed behavior can occur in states of impaired consciousness where some partial awareness exists. In their view only reflex movements or well learned ''habits'' such as those explored in experimental psychology under the term ''automaticity'' can truly be considered involuntary in the sense that they are not goal-directed behaviors.[96] Albert Bandura refers to ''automatization'' as not being akin to unconscious activity. He writes that ''[d]ifferent activities can be performed simultaneously, if they are regulated by different subsystems.''[97] John Bargh and Tanya Chartrand have also recently argued that there is a complex interaction between automatic perceptual activity and conscious judgments.[98]

The idea that involuntary and intentional behavior should be viewed as on a continuum casts doubt on the current acceptance of mental disorder as negating voluntariness and intention. If current psychological thinking is correct, behavior can still be purposeful or goal directed even when performed in states of altered consciousness. This point was recently in issue in the Supreme Court of Victoria decision in *R. v. Leonboyer*.[99] The defence called evidence from a psychiatrist and a psychologist that Leonboyer was in a dissociative state at the time of stabbing his girlfriend to death after she told him she had been seeing another man. In contrast, the two psychiatrists called by the prosecution gave evidence that ''any complex, directed and purposeful action is difficult to conceive as being carried out by someone whose mind is so disorganised that they cannot will their actions.''[100] Professor Paul Mullen gave evidence that the act of opening the knife, aiming, directing, and striking the victim numerous times all pointed to there being purpose, direction, and will behind those actions.[101] Leonboyer was convicted of murder and an appeal against conviction was dismissed by a majority of two judges to one.

[93]M. Steinberg, *Handbook for the Assessment of Dissociation: A Clinical Guide* (Washington: American Psychiatric Press, 1995) pp. 8–13.
[94]M. Steinberg, *Structured Clinical Interview for DSM-IV Dissociative Disorders* (Washington: American Psychiatric Press, 1994, revised).
[95]M. Steinberg, *Handbook for the Assessment of Dissociation: A Clinical Guide* (Washington: American Psychiatric Press, 1995) p. 23.
[96]E. M. Coles and S. M. Armstrong, ''Hughlings Jackson on Automatism as Disinhibition'' (1998) 6(1) *Journal of Law and Medicine*, 73–82.
[97]A. Bandura, *Social Foundations of Thought and Action* (Englewood Cliffs, NY: Prentice-Hall, 1986) p. 459.
[98]J. A. Bargh and T. L. Chartrand, ''The Unbearable Automaticity of Being'' (1999) 54(7) *American Psychologist*, 462–479.
[99][2001] VSCA 149, Unreported, 7th September 2001, Phillips C. J., Charles and Callaway, J. J. A.
[100]*Id.* at 18 per Phillips C. J.
[101]*Id.*

 

How then should mental disorder be treated in determining criminal responsibility? One alternative that is worth exploring is to move away from viewing acts committed when mentally disordered as ''involuntary'' or ''unintentional'' and instead bring them within the realm of the defence of mental disorder.

## AN ALTERNATIVE APPROACH

The Canadian Psychiatric Association has suggested that automatism be subsumed within the existing defence of not criminally responsible on account of mental disorder.[102] This suggestion was based on the view that automatism always involves some form of mental disorder. I suggest that this be carried further so that evidence of mental disorder that has been used in the past to negate intention also be subsumed within a broadened defence of mental disorder.

There are two main benefits to this approach. The first is that if conditions such as dissociative states, epilepsy, somnambulism or hyperglycaemia are seen as potentially affecting reasoning processes in a similar way to severe mental illnesses, the courts will no longer have to rely on unworkable and artificial tests of what are conditions stemming from internal or external causes.

The second main benefit of subsuming all forms of mental disorder within a general defence is that once a person has been found not criminally responsible, a range of dispositional options becomes available. At present, pursuant to section 672.54 of the Canadian *Criminal Code*, an individual who has been found not guilty on the ground of mental disorder may be discharged absolutely or on condition or may be detained in custody in a hospital. More flexible dispositional options apart from indefinite detention are gradually being enacted in Australian jurisdictions along with the introduction of a reformulated defence of mental impairment.[103] This means that those who have committed serious offences whilst, for example, suffering from a dissociative state can be assessed at the dispositional stage in determining whether or not they should be discharged absolutely or be subject to some form of medical treatment.

The main drawback to having a broad defence of mental disorder is the stigma that may attach to those found not guilty on this basis. Individuals whose automatism results from epilepsy, for example, may not wish to be labeled mentally disordered.[104] It may be that a change to the name of the defence to something like ''cognitive dysfunction'' may assist.[105]

It is nevertheless worthwhile considering how a defence could be worded to cover conditions such as dissociation and sleep disorders. A defence that encompasses a range of mental disorders might be established as follows:

[102]Canadian Psychiatric Association, Brief to the House of Commons Standing Committee on Justice and the Solicitor General, Subcommittee on the Reform of the General Part of the Criminal Code, 9th November, 1992.
[103]See, for example, *Criminal Code Act* 1995 (Cth); *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic); *Criminal Law Consolidation (Mental Impairment) Amendment Act* 1995 (SA); B McSherry, ''Criminal Detention of Those with Mental Impairment'' (1999) 6 *Journal of Law and Medicine* 216–221.
[104]B McSherry, ''Epilepsy, Automatism and Culpable Driving'' in R. Beran (Ed)., *Epilepsy and Driving* Tel Aviv: Yozmot Pub Ltd, 1999, pp. 51–72, especially endnote 57.
[105]*Id.*

 

> A person is not criminally responsible for an offence if he or she was suffering from a mental disorder at the time of the commission of the offence such that his or her ability to reason was substantially impaired.

Without going into detail about all the elements of such a defence, the important first step is to establish that the accused was suffering from some form of mental disorder. This could be defined as including mental illness, a severe intellectual disability, or a condition of severely impaired consciousness. The latter could be further defined as a condition in which an individual's awareness of him or herself, the environment, and the relation between the two is severely affected. Dissociative states may therefore fall within this category of mental disorder. The next step would then be for a jury to consider what effect the mental disorder had on the individual's ability to reason. This requirement would narrow somewhat the range of disorders that could afford an accused a defence.

At present, the outcome of criminal proceedings where evidence of dissociation is raised will largely depend upon the vagaries of medical evidence called at the trial. Having a defence of mental disorder that encompasses dissociative states will help avoid the problems associated with medical witnesses testifying as to the ultimate issue of whether or not dissociation falls within the categories of sane or insane automatism. The focus will simply be on whether or not the accused was suffering from a dissociative state at the time of the crime.

There are two fundamental questions that need to be addressed in considering mental disorder and criminal responsibility. The first question is whether or not the accused should be found criminally responsible if he or she was suffering from a form of mental disorder at the time of the crime. The fundamental principle of criminal law is that individuals must only be punished if they are able to reason for criminal actions that are ''willed'' in some way. Surely if the accused's ability to reason was substantially impaired because of some form of mental disorder, whatever the cause, he or she should not be found criminally responsible.

There is then a separate question that arises as to what should happen to someone who has caused the death or injury of another whilst suffering from some form of mental disorder. If there is evidence that the individual concerned was unaware that a dissociative state, for example, would occur, then perhaps an absolute discharge would be appropriate.

## CONCLUSION

The current model of criminal responsibility views serious offences as being constituted by a physical and a fault element minus a defence. In this model there is no need to provide a rationale for defences as negating voluntary conduct or intention or other fault element because they exist in a separate realm of their own.

The complexities of the current legal situation in relation to mental disorder and criminal responsibility stem from the admissibility of evidence of mental disorder to negate voluntariness and intention. Evidence of dissociative states has, for example, highlighted the problems associated with dividing conditions into sane and insane automatism. Modern psychological theories view behavior as on a continuum such that actions performed in altered states of consciousness may be goal directed. This

 

challenges the legal assumption that conduct is either voluntary or involuntary or intentional or unintentional.

It is clear that there is no easy solution to this difficult area of the law. However, a unifying test of criminal responsibility for those suffering from mental disorder at the time of committing a crime may be preferable to using evidence of mental disorder to negate voluntariness or intention. Providing there are flexible dispositional options including absolute discharge for those found not criminally responsible, a broad defence of mental disorder may help simplify the law and bring it into line with current psychological theories.

It is to be hoped that this article will spark off further debate on the topic. The words of Hunt J. in *R. v. Youssef*[106] should be heeded:

> The law [relating to dissociation] should not be in such a complicated state . . . The law is in urgent need of reform.[107]

[106](1990) A. Crim R 1.
[107]*Id.* at 11–12.

 