R. v. CARTER[1]

Criminal Law—Defence of post-traumatic automatism—Not necessarily a defence of insanity—Onus of proof—Defence available on dangerous driving charge

C was presented for trial on three counts: wounding S with intent to murder him, wounding S with intent to do him grievous bodily harm, and driving a motor car on a highway in a manner dangerous to the public. The Crown alleged that C deliberately drove a motor car at S, a pedestrian in a deserted street. C's defence was that at the time of the alleged offences, she was in a state of post-traumatic automatism, caused by an assault upon her by S about an hour earlier. At the conclusion of the evidence, and before counsel addressed the jury, Sholl J. gave a ruling on three important aspects of this defence.

His Honour first considered whether the defence amounted to a defence of insanity within the meaning of section 420 of the Crimes Act 1957,[2] requiring a direction in accordance with the M'Naghten Rules, with the consequence that, if the jury accepted the defence, the proper verdict would be 'not guilty on the ground of insanity', upon which the court should order that the accused 'be kept in strict custody . . . until the Governor's pleasure is known'.[3] He decided that the defence raised the issue of a lack of volition to commit the offences, rather than a 'defect of reason' within the meaning of the M'Naghten Rules; but even if the defence did involve a 'defect of reason', His Honour was not satisfied that the 'defect' under which C was said to be suffering arose from a 'disease of the mind'. He considered the meaning of the latter phrase to be bound up with the policy behind the practice established in 1800[4] of remanding to strict custody a prisoner acquitted on the ground of insanity, in order to protect the public from further violence by a person whose mental irresponsibility was liable to recur. In this light, His Honour thought it 'quite outside the policy of the law to extend the practice of section 420 to cases where there is no reason to fear any repetition of the crime and no evidence of any brain damage or disease which is likely to give rise to any such repetition'.[5] Accordingly, he held the defence raised by C to be distinct from the defence of insanity, with the corollary that, if the jury accepted it, the proper verdict would be one of acquittal.[6]

This ruling should not be taken to hold that all manifestations of automatism, however induced, should be dealt with independently of section 420 and the M'Naghten Rules. If automatism is induced by an abnormal condition of the mind, so that cognition as well as volition is affected, this would clearly come within the interpretation of 'disease of the mind' adopted by Sholl J., and an outright acquittal is unavailable. Thus, in *R. v. Kemp*,[7] K, who suffered from arteriosclerosis, had attacked

[1] [1959] V.R. 105; [1959] Argus L.R. 335; Supreme Court of Victoria; Sholl J.
[2] Now Crimes Act 1958, s. 420. [3] *Ibid.*
[4] Trial of Lunatics Act 1800 (Eng.).
[5] [1959] V.R. 105, 110; [1959] Argus L.R. 335, 340.
[6] As it transpired, C was acquitted on all three charges.
[7] [1956] 3 All E.R. 249. See comments in *Russell on Crime* (11th ed. 1958) i, 121-123.

his wife with a hammer. He was shown to have been in a state of unconsciousness, induced by his physical complaint, when he committed the act. Devlin J. held that K's ailment was a 'disease of the mind', and directed the jury that the proper verdict was 'guilty but insane'. In *R. v. Charlson*,[8] C, who was thought to be suffering from a cerebral tumour, had savagely attacked his son. Automatism was set up as a defence; no issue of insanity was considered. C was acquitted. Sholl J. considers that this case involved a 'disease of the mind' and required a direction as to insanity.[9] But, where the mind is affected by a transient malady, due to some external agency such as a violent blow (as alleged in the instant case), or the influence of drugs or other intoxication, no issue of insanity arises.

Such a view of the relationship between the defences of automatism and insanity is supported by recent cases[10] and by eminent writers.[11]

However, a much wider interpretation of the phrase 'disease of the mind' (and hence of the application of the defence of insanity) than that adopted by Sholl J., is taken by Sir Owen Dixon, who appears to include within its scope *any* temporary mal-function or disorder of the mind, however induced.[12] This interpretation, which allows no room for a separate defence of automatism, is based on the opinion that Sir

[8] [1955] 1 All E.R. 859. [9] [1959] V.R. 105, 107; [1959] Argus L.R. 335, 337.

[10] Devlin J. concisely enunciated this principle in *Hill v. Baxter* [1958] 1 All E.R. 193, 196:

'There are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If . . . there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. If, however, disease is present, the same thing may happen again, and therefore since 1800 the law has provided that persons acquitted on this ground should be subject to restraint.'

In *R. v. Cottle* [1958] N.Z.L.R. 999 the New Zealand Court of Appeal, in a thorough analysis of the implications of the defence of automatism, expounded the same principle.

In a recent Western Australian case, Wolff J. directed the jury that the defence of post-traumatic automatism, if accepted, entitled the accused to an acquittal. The case went on appeal on another point to the High Court; this aspect of the direction was noticed without comment: *Coates v. R.* (1957) 96 C.L.R. 353, 355.

Fullagar J., in *Re a Barrister* (1957) 31 *Australian Law Journal* 424, 431, severely criticized as 'fundamentally wrong' the direction of the presiding judge in a manslaughter trial that the accused's defence (which was similar to that in the instant case), amounted to a defence of insanity.

See also *R. v. Minor* (1955) 112 *Canadian Criminal Cases* 29 (Saskatchewan Court of Appeal).

[11] Glanville Williams, *Criminal Law: The General Part* (1953) 317; J. Ll. J. Edwards, 'Automatism and Criminal Responsibility' (1958) 21 *Modern Law Review* 375. Rupert Cross, *'Hill v. Baxter* and the Law of Evidence' [1959] *Criminal Law Review* 27, 31-33 appears to assume the validity of the principle—the article is mainly concerned with the question whether an onus of proof attaches to the defence when the issue of automatism is raised.

[12] 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255, 260 (a paper which His Honour prepared for the Tenth Australian Law Convention); *R. v. Porter* (1933) 55 C.L.R. 182, 188-189. Owen J., of the Supreme Court of New South Wales, also favours this interpretation: (1957) 31 *Australian Law Journal* 261-262.

The expression 'disease of the mind' has received little judicial attention; see the discussion by Norval Morris, 'Daniel M'Naghten and the Death Penalty' (1954) 6 *Res Judicatae* 304.

Nicholas Tindal, in framing his answers to the House of Lords in 1843, used the words 'disease of the mind' merely to exclude from his definition of insanity defects of reason due to 'drunkenness, conditions of intense passion and other transient states attributable either to the fault or the nature of man'.[13] It is submitted with great respect that a rigid application of this view would lead to unconscionable results.

For example: the legendary Reasonable Man is unfortunate enough to have an accident which produces 'a temporary eclipse of the consciousness while leaving him capable of exercising bodily movements'.[14] He performs an act which, but for his state of automatism, would be a criminal offence. He would be understandably surprised to find that he is excused from criminal liability 'on the ground of insanity'; his transient injury had no psychotic features, and on recovery his reasonableness is restored. To order him to be kept in strict custody serves no useful purpose from the viewpoint of public safety, and constitutes a denial of the right of an innocent, reasonable man to his freedom.[15]

It is therefore respectfully submitted that the ruling of Sholl J. in the instant case represents the preferable application of the law to this question.

The second question considered by Sholl J. concerned the onus of proof in cases where automatism is set up as a defence; he held that:

> Insanity is the only case in which, according to the highest authority, an onus is thrown on an accused person in the sense of a legal or ultimate onus. . . . Where automatism is raised the position is the same as in the case of drunkenness, provocation and other such matters. The Crown is not bound in the first instance to negative such possibilities. . . . It must be for the defence in the first instance genuinely to raise the issue . . . then the Crown, which of course may call rebutting evidence on the matter, is bound in the long run to carry the ultimate onus of proving all the elements of the crime including the conscious perpetration thereof.[16]

[13] (1957) 31 *Australian Law Journal* 255, 260.

[14] This is the definition of automatism adopted by Gresson P. in *R. v. Cottle* [1958] N.Z.L.R. 999, 1007.

[15] Judge F. R. Nelson criticizes Sir Owen Dixon's view on somewhat similar lines: (1957) 31 *Australian Law Journal* 263, 264.

[16] [1959] V.R. 105, 111; [1959] Argus L.R. 335, 341. The 'highest authority' to which His Honour refers is presumably *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462; *Mancini v. Director of Public Prosecutions* [1942] A.C. 1; *Chan Kau v. R.* [1955] A.C. 206.

The same view is taken by the New Zealand Court of Appeal in *R. v. Cottle* [1958] N.Z.L.R. 999, 1007-1008, 1014 *(per* Gresson P.), 1033 *(per* Cleary J.); by the New South Wales Court of Criminal Appeal in *R. v. Wakefield* (1958) 75 W.N. (N.S.W.) 66, and by Barry J. in *R. v. Charlson* [1955] 1 All E.R. 859. In *Hill v. Baxter* [1958] 1 All E.R. 193, 196-197, Devlin and Pearson JJ. agree that such a defence ought not to be considered until the accused has produced at least *prima facie* evidence, but reserve the question where the ultimate burden of proof lies.

However, the ultimate onus was held to lie on the defence in *His Majesty's Advocate v. Ritchie* [1926] S.C. (J.) 45, 48 (this was conceded by counsel for the defence), while Lord Goddard C.J., in *Hill v. Baxter* [1958] 1 All E.R. 193, 195, said that the onus of proof 'undoubtedly' rested on the defence: 'This is not only akin to a defence of insanity but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it.' This view is criticized by Cross, *'Hill v. Baxter* and the Law of Evidence' [1959] *Criminal Law Review* 27, 33-37.

His Honour re-asserted the opinion he expressed in *R. v. Bonnor*[17] that the general tendency of the modern criminal law is towards the principle that the onus should be on the Crown to prove all the elements of the crime.[18]

Acknowledging the possibility that his ruling may encourage attempts to raise unmeritorious or dishonest defences, His Honour conceded that if such practices do arise, legislation altering the onus of proof may be justified. To forestall such attempts, His Honour advocated legislation to the effect that, when the defence intends to rely on any matter involving the accused's mental state or capacity, notice should be given to the Crown before the trial, with an opportunity for examination of the accused by experts on behalf of the Crown, on pain of the exclusion of evidence as to the accused's mental state.[19]

The third matter on which Sholl J. ruled was a contention by the Crown Prosecutor that post-traumatic automatism cannot amount to a defence to the charge of dangerous driving, because that offence does not involve *mens rea*.[20] His Honour felt no difficulty in rejecting this argument; the fact that a guilty mind is not an element of the offence is quite distinct from the proposition that a complete lack of volition to perform the acts involved in the offence means that no offence is committed. A man cannot be criminally responsible for acts of which he is not conscious.[21]

Almost all the cases affecting the defence of automatism have arisen in the last decade. The instant case appears to be the first in Victoria in which the implications of this defence have been considered; it is submitted with respect that the decision of Sholl J., which covers two basic and controversial features of the defence, establishes a firm foundation for the administration of this novel aspect of the criminal law.

A. D. HAMBLY

MILDER v. MILDER[1]

Divorce—Private International Law—Formal validity of marriage—Failure to comply with law of place of celebration—Whether subjective test of intention displaces local law

The parties to this action went through a marriage ceremony in Breslau

[17] [1957] V.R. 222, 260 ff.; [1957] Argus L.R. 187, 220 ff. Noted, (1957) 1 *M.U.L.R.* 111. D. J. MacDougall, 'The Burden of Proof in Bigamy' (1958) 21 *Modern Law Review* 510, favours the dissenting opinions of Barry and Sholl JJ. in *R. v. Bonnor*, and strongly criticizes the decision of the majority (Herring C.J., Gavan Duffy and O'Bryan JJ.).

[18] [1959] V.R. 105, 112; [1959] Argus L.R. 335, 342. His Honour regards the onus of proof thrown on the accused who sets up insanity as a defence as 'contrary to the tradition and genius of the common law, urgently requiring legislative consideration': *ibid.*, 110-111. However, Devlin J. doubts whether an alteration in the law would make much practical difference: 'Criminal Responsibility and Punishment: Functions of Judge and Jury' [1954] *Criminal Law Review* 661, 675.

[19] [1959] V.R. 105, 112; [1959] Argus L.R. 335, 342.

[20] *R. v. Coventry* (1938) 59 C.L.R. 633; [1938] Argus L.R. 420; *Hill v. Baxter* [1958] 1 All E.R. 193.

[21] [1959] V.R. 105, 112-113; [1959] Argus L.R. 335, 342-343; *Hill v. Baxter* [1958] 1 All E.R. 193; J. Ll. J. Edwards, 'Automatism and Criminal Responsibility' (1958) 21 *Modern Law Review* 375, 381-382.

[1] [1959] V.R. 95; [1959] Argus L.R. 325. Supreme Court of Victoria; Smith J.