NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON: DEFENDANTS SUBMITTING TO PSYCHIATRIC OR OTHER MEDICAL EXAMINATION

Report No.36 – June 2012

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

The Hon Austin Asche AC QC Ms Hilary Hannam CM Ms Carolyn Richards Ms Megan Lawton Ms Peggy Cheong	Mr Nikolai Christrup Superintendent Sean Parnell Mr Steve Barlow Professor Les McCrimmon

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE DEFENDANTS SUBMITTING TO PSYCHIATRIC OR OTHER MEDICAL EXAMINATION SUB-COMMITTEE

The Hon Austin Asche AC QC Ms Hilary Hannam CM	Mr Nikolai Christrup Mr Jared Sharp

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TERMS OF REFERENCE

The Attorney-General has referred to the Northern Territory Law Reform Committee (the NTLRC) the following question:

> *Should Northern Territory courts have the power to require defendants to submit to psychiatric or other medical examination in certain circumstances and, if so, should that power be limited to:*
>
> - *Certain types of matters; and*
> - *A particular court of courts?*

To this Request the Attorney-General annexed the following Terms of Reference:

The Northern Territory Law Reform Committee (NTLRC) is asked to examine and make recommendations in relation to the following issue:

Should Northern Territory courts have the power to require defendants to submit to psychiatric or other medical examination in certain circumstances and, if so, should that power be limited to:

- **Certain types of matter; and**
- **To a particular court of courts**

The issue has arisen following the matter of *R v Trent John Pobar* (NT Supreme Court, Mildren J, 12 February 2010). In that case, the defendant was charged with rape and acquitted. The defence argued that the defendant was sleepwalking at the time of the incident. The defence provided expert evidence from a medical practitioner specialising in sleep disorders. The prosecution also provided evidence from a sleep specialist. The prosecution sleep specialist indicated that he needed to speak with the defendant and conduct tests on him. The defendant declined to speak to the prosecution expert.

In examining the issue, the following background information may be of assistance:

- **In the NT, a court can order a defendant to be examined by a psychiatrist or other expert if the defence of mental impairment is raised (section 43G(1)(b) of the Criminal Code) or if there is an investigation into whether a person is fit to plead (section 430(d) of the Criminal Code). These issues are to some degree inquisitorial and removed from the normal criminal trial where the Crown accuses and must prove its case and in which the proceedings are adversarial.**

- **Voluntariness, on the other hand, must be proved by the prosecution (sections 43AF and 43BR of the Criminal Code).**

- **Courts have found that cases involving claims of automatism can raise issues of mental impairment (also referred to as insane automatism) or can raise issues of voluntariness (also referred to as sane automatism).**

- **South Australia is the only jurisdiction in Australia in which a court is empowered to order a defendant to submit to psychiatric or other medical examination other than for the purpose of determining fitness to plead or mental impairment. The relevant provision is section 285BC(4) of the *Criminal Law Consolidation Act 1935 (SA).***

The NTLRC now presents its Report and suggested Recommendations pursuant to the Request and Terms of Reference.

1. INTRODUCTION

As Sir Henry Maine (Ancient Law) reminds us, criminal law, in the sense of a sovereign State seeking out and punishing offenders against peace and good order, simply did not exist in early or primitive societies. The individual was expected to protect himself or, in serious cases, to call on his family or clan to launch some form of blood feud with its usual retaliatory consequences.

Yet, even then, it was recognised that some persons were not responsible for their actions. The accepted explanation for such cases was that the person concerned had been possessed by demons or afflicted by witchcraft. In the former case, the remedy was to drive the demons out.[1] In the latter, the search was on to find the witch and kill him or her.[2]

Crude and cruel as these remedies were, they were at least an acknowledgement that some powerful force had overcome and taken over the will of the victim so that, to paraphrase a later test, he did not know what he was doing, or he did not know that what he was doing was wrong.

As the State took over the administration of what became known as criminal law and defined and forbade certain actions as "criminal", with appropriate sanctions for disobedience, it retained this recognition that in certain cases a person could not and

[1] One has some sympathy for the owner of the Gadarene swine.
[2] Sir Matthew Hale, Chief Justice of the Court of Kings Bench in the reign of Charles II was an enthusiastic believer in witchcraft. And, for a modern example see MBVIV Republic of Kenya (2008) reported in Commonwealth Law Bulletin Vol 35 at p.584.

should not be punished for actions otherwise criminal, but over which he had no control. The condition of "madness" or "insanity", involved either lack of intent or lack of knowledge of criminality, or both, and thus no crime. The difficulty lay in the boundaries. How much erratic behaviour did it take before a person could be deemed to have crossed the line between sanity and insanity, either temporary or permanently? In short, what tests should be applied.

2. THE QUEST FOR A TEST

Until 1843 it appears that no specific test for insanity was adopted. According to Radzinowicz & Hood – (History of English Criminal Law – Vol. 5 – p.682) "the insanity issue had been decided from case to case".

In 1843, indirectly as a result of the famous speech of Lord Erskine in defence of Hadfield, and directly as a result of public concern and debate after the acquittal on the grounds of insanity of one Daniel McNaghten [3] charged with murder, the judges, at the request of the House of Lords took the unusual step of convening, not as a Court of Appeal, but as an advisory body to determine what directions should be given to a jury in a criminal trial where the accused raised the defence of insanity.

The test then propounded has basically governed the law on the subject ever since, both in England and Australia (and many other common law countries), despite continual and often vehement criticism from both medical and legal sources.

[3] As to the various spellings of "McNaghten", see (1957) 1WLR 122

3. THE McNAGHTEN RULES

The McNaghten Rules are well known and provide that the defence of insanity is established, if at the time of the committing of the act, the 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 this), not to know that what he was doing was wrong; the onus of proof being on the accused on the balance of probabilities.

Such a definition may, and does horrify many psychiatrists, but it has the virtue of clarity for jurors who may more easily comprehend the evidence within the essentially pragmatic test supplied. Furthermore, although much of that evidence is supplied by psychiatrists, they can usually bring their expertise within the pattern, even if they regard that pattern as an over-simplification.

In Report NO 120 of December 2010, the New Zealand Law Commissioner made his comment on the M'Naghten rules.

"the M'Naghten rules, unchanged in England since 1843, are said to have endured constant criticism. Despite the fact that they have been "under sustained attack ever since their inception" in both English and American jurisprudence, they "still hold sway". Moreover, America offers a useful case study of many of the possible reform options, because so many of them were attempted in the various jurisdictions as part of the wave of reform in the years following the trial of President Reagan's would-be assassin John Hinckley with very little effect on outcomes. One explanation for this is that, regardless of what the rules may say, in the end, the questions jurors will put to

themselves when they retire is simply; "is this man mad or not?". Therefore, although problems with the insanity defence are not insignificant, we have not recommended its reform".

A verdict of not guilty on the grounds of insanity [4]did not mean that the accused went free, but that he was committed to an institution for an indefinite period, and this often amounted to a life sentence. Because of this, some accused preferred to plead guilty to a specific charge or face a trial where, if found guilty, he would be given a finite sentence which would, at least ultimately free him.

A verdict of not guilty on the grounds of insanity may now have less drastic effects than formerly because modern treatment emphasises the goal of returning the individual to society once he has satisfactorily responded to such treatment.

A further development has increased the scope of the defence because the expression "insanity" has been dropped from the legislation and the preferred expression is now "mental illness". Although still governed by the McNaghten Rules, the expression itself gives a wider scope for considering actions which might fit into the pattern and allows a greater range of psychiatric evidence.

[4] For many years, in England, the verdict was "guilty but insane". This was on the insistence of Queen Victoria who argued that, since the accused had done the act, he was obviously "guilty". Her Majesty's reasoning may have been a little astray; but understandable since her life had several times bee imperilled by lunatics.

Since the onus of proof is on the accused to prove "mental illness" or "mental impairment", it becomes necessary to call psychiatric or other expert evidence to this effect. Inevitably, therefore, the prosecution should have the right to call similar evidence in rebuttal; and inevitably, the prosecution should have the right to have the accused examined by experts called on its behalf. This is now statutorily recognised. (See NTCC s.43G(1)(b)).

4. NORTHERN TERRITORY LEGISLATION

The NT Criminal Code basically adopts the McNaghten Rules, (although the term "mental impairment" is used rather than "insanity"), but adds one controversial extension:

> ***43C Defence of mental impairment***
>
> *(1) The defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment:*
>
> *(a) He or she did not know the nature and quality of the conduct;*
> *(b) He or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or*

(c) He or she was not able to control his or her actions.

(2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

Subsection 1(c) appears to raise the defence of "irresistible impulse" which rather contradicts the standard McNaghten test that the accused did not know what he was doing, or, if he did know what he was doing, did not know it was wrong. Subsection 1(c), in contrast, postulates a condition in which the accused knew what he was doing, knew it was wrong, but acted under a force he could not control.

This "volitional" or "irresistible impulse" approach has many dangers, not least being that of the width of the term. It may be more appropriate to use evidence of this sort as part of the general picture leading to incapacity to control one's actions.

The subject is fully discussed in Bronitt & McSherry – "Principles of Criminal Law" – 3rd Edition – 2010 at pp248-251 and the learned authors here state that:

"In practice, the volitional arm of the defence of mental impairment has been used very rarely in the Australian jurisdictions in which it exists"

It is important to note subsection (2) of s.43C of the NTCC which directs a verdict of "not guilty because of mental impairment" if the defence is established and this, in turn, may lead to confinement by way of supervision. See s.43 I, subsection (2).

5. "MENTAL ILLNESS"

The NT legislation follows generally similar legislation in other States and Territories. The expression "mental illness" has replaced earlier references to "insanity", and that expression "mental illness" is included within the expression "mental impairment". S.43A. The defence of mental impairment must still fit the "McNaghten" pattern (s.43C) but the definition broadens the "McNaghten" expression "disease of the mind".

> *S.43A "Mental illness" means an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur)".*

So the definition includes both permanent and temporary states of mental illness, but also recognises that "a "temporary" condition may be either evidence of mental illness or may result from unwilled acts not arising out of mental illness.

A person is presumed not to be suffering a mental impairment until the contrary is proved, the onus of rebutting that presumption being on the party raising the defence and the standard of proof for discharging that onus is on the balance of probabilities. (s.43D, 43E).

If an accused person is found not guilty because of mental impairment, the court will usually declare that the accused person is liable to supervision, although the court has the power to order an unconditional release. S.43 1(2), (3) (3A). (And see Part IIA – Division 5 – Supervision Orders).

Otherwise, a person found not guilty simpliciter must be discharged. S.43 I(1)[5].

6. AUTOMATISM

Unsoundness of mind or mental illness does not cover every involuntary act which would otherwise be criminal. The law has long recognised that some acts may not be the result of mental illness, but rather an incapacity of a person's will to control his actions in certain circumstances. These actions can be characterised as automatism. They may occur in cases such as a person receiving a blow on the head rendering him not conscious of what he was doing, or a sudden uncontrollable muscular spasm or sleepwalking.

[5] Caution. This is not the number 431. It is the number 43 followed by the ninth letter of the alphabet in uppercase. "So may the outward shows be least themselves" (Shakespeare QC)

As the cases establish, the condition of automatism may arise either from a mental impairment, in which case the verdict must be not guilty because of mental impairment (s.43C(2); or from the unwilled act of a person not suffering from a mental impairment, in which latter case the verdict is simply not guilty, and the accused is discharged.

(Note that many authorities still refer to these situations in "McNaghten" terms, ie as "sane" or "insane" automatism. For convenience of reference or quotation, it is convenient to retain that terminology when cited, leaving it to the reader to comprehend it within the underlying concept of mental illness".)

The Criminal Code provides that conduct can only be a physical element if it is voluntary (s. 43AF(1) & s.43AE).

S.43 AF(2) states that "*conduct is only voluntary if it is the product of the will of the person whose conduct it is"*. Three "examples" of non-voluntary conduct are then given, although they are not to be taken as inclusive. The examples given are:

"1. A spasm, convulsion or other unwilled body movement;
2. An act performed during sleep or unconsciousness;
3. An act performed during impaired consciousness depriving the person of the will to act."

The defence of automatism therefore entails distinguishing between automatism arising out of mental illness and automatism occurring in a person not suffering from

mental illness. This creates difficulty because the onus is on the propounder to prove (on the balance of probabilities) automatism arising out of mental illness; but if the condition is not alleged as arising out of mental illness, then the onus remains on the prosecution to prove the case beyond reasonable doubt, and in particular to rebut beyond reasonable doubt the possibility that the acts of the accused were involuntary and not the product of his will at the time.

S.43G provides:

*"**Hearing of question of mental impairment by court etc.***

(1) If the defence of mental impairment is raised during the trial, the court:

(a) Must hear the evidence and representations as to the accused person's mental competence produced by the parties; and

(b) On application by the defence or the prosecution or on its own initiative – may require the accused person to be examined by a psychiatrist or other appropriate expert and the results of the examination to be reported to the court".

It is therefore clear that when the defence of mental impairment is raised, the prosecution, with the leave of the court, may have the accused examined by a psychiatrist. What almost inevitably happens in such cases, is that evidence is then given by psychiatrists called by both defence and prosecution; and to the extent that they agree or disagree so the jury applies the tests required by s. 43G(2).

However, if the defence is automatism, not caused by or arising out of mental illness, it appears that neither the prosecution nor the court has the right to have the accused person examined by a psychiatrist unless the accused consents. In these circumstances, the prosecution is limited to calling a psychiatrist to comment on the evidence of the psychiatrist called by the defendant, but with no opportunity for the psychiatrist called by the prosecution to otherwise examine the accused.

Leaving aside, for the moment, the accused's "right to silence", it does seem to place an extremely heavy burden on the prosecution to rebut beyond reasonable doubt the defence of an unwilled act, supported by psychiatric evidence from a defence witness who has examined the accused, when any psychiatric evidence called by the prosecutor is necessarily limited to comment only on the methods and procedures of the defence psychiatrist.

Whether the issue be – "has the defence discharged the requisite onus of proof that the accused's actions were the result of mental impairment", or "has the prosecution discharged the requisite onus of proof that the accused's actions were not voluntary", both issues are basically dependent on psychiatric or other scientific or medical evidence. A person trained in the scientific method would necessarily expect that the investigating body should have before it evidence as scientifically complete as possible from both sides; or to put it in another way, what justification can there be in permitting a full professional appraisal of the accused from both sides when the defence of mental impairment is raised, but restricting that appraisal if the defence is not mental impairment, but a non-voluntary act?

7. POBAR'S CASE

The difficulty plainly appears in the case of the Queen v Pobar 9-12 February 2010, before Mildren J & jury. In that case, the accused was alleged to have sexually assaulted a woman *"without her consent, and knowing about or being reckless as to the lack of consent"*. The facts alleged were, briefly, that the accused, having drunk a considerable quantity of alcohol, went to sleep in a room in a friend's house where the complainant was also sleeping in another room. Later in the early morning he entered the room where the complainant was sleeping and sexually assaulted her without her consent, and then returned to his own room and slept until awakened and attacked by the male friend of the woman he had assaulted. The accused did not deny the facts alleged because he said he had no recollection of them and must have been sleepwalking at the time.

On behalf of the accused a specialist physician was called who clearly enough established his qualifications and, in particular his expertise in sleep medicine and sleep disorders. He had examined the accused and taken a history from him of previous episodes in which he had, while sleepwalking, done things of which he had no recollection, but which were later related to him by those who had observed his actions, and which he therefore assumed he had done. His wife told the specialist, and later, the court, that she had herself observed such events.

The specialist was of opinion that the behaviour of the accused was consistent with a condition known as parasomnia or, in effect, sleepwalking.

This evidence clearly raised what the Criminal Code refers to as the "evidential burden of proof" s.43BT, s.43BU. That, in turn meant that the onus was then on the prosecution to prove beyond reasonable doubt that the accused's acts were voluntary, ie in this case, they were not the result of parasomnia.

The expression "evidential burden of proof" has been criticised by the House of Lords in the case of Jayasena v the Queen 1970 AC 618 at 624 where Lord Devlin, speaking for all members of the court, says:

> *"Their Lordships do not understand what is meant by the phrase "evidential burden of proof. They understand, of course, that in trial by jury a party may be required to address some evidence in support of his case whether on the general issue or the particular issues, before that issue is left to the jury…. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof".*

While their Lordships were concerned about the inexactitude of the expression "evidential burden of proof", they make it clear that there must be some evidence for the prosecution to negate. The Code reaches the same conclusion albeit using the expression disapproved by their Lordships, but *requiring "evidence that suggests a reasonable possibility that the matter exists or does not exist"*. (S.43BT)

In Pobar, the prosecution called an expert as equally qualified as the defence expert in the field of sleep study, but who had not examined the accused, presumably because the defence had not given permission for him to do so. The fact that the accused had refused this permission does not clearly appear in the transcript of the trial, but may be presumed for the purposes of this discussion – (see Appendix A)

The psychiatrist called by the prosecution was therefore confined to referring to certain other tests which could have been employed in determining whether the accused had suffered from parasomnia at the time, and to suggesting that the acts of the accused did not seem to fit in with the normal pattern of parasomnia and, in his opinion, would need closer study. But since he could not specifically rule out the findings of the defence expert, the acquittal of the accused became the only proper result because, clearly, the Crown could not rebut beyond reasonable doubt the conclusion that the accused's actions may have been the result of parsomnia.

At one stage it appeared that the expert witness called for the prosecution was about to say something to the effect that he would have himself wanted to examine the accused, but was prevented. At that stage, His Honour ensured that the witness said no more than that he had not examined the accused.

His Honour in our respectful submission was correct in this, because to say that the accused had refused to allow the prosecution psychiatrist to examine him would intrude on the accused's right to refuse. No case of mental impairment had been

raised; and to reveal that the accused had so refused would have had an adverse effect on the jury, which it should not have had since the accused was merely exercising the right he was entitled to.

8. THE RIGHT TO REFUSE PSYCHIATRIC EXAMINATION

The basic question is however, whether the accused should have such a right; or alternatively, whether the prosecution should have, in cases which are referred to as "non-insane automatism", the same right which it has in cases of "insane automatism" (s.43G(1)(b)).

If the defence of mental impairment is raised, it is clear that the prosecution may apply that the accused be examined by a "psychiatrist or other appropriate expert and the results of the examination be reported to the court". S.43G(1)(b). Consequently, in trials where mental impairment (which definition includes "mental illness") is raised, the usual and accepted procedure is that psychiatrists on both sides who have examined the accused are called to give their various opinions as to the sanity (mental illness) or otherwise of the accused; and it does not appear that any authority has suggested that this process is unfair to the accused.

Yet the same basic investigation takes place if the accused claims to be not mentally ill, but also not responsible for actions over which he claims to have no control. The original question – "did the accused do the acts for which he is charged?", has now been replaced by a very different question, dependent basically on expert evidence,

namely “Is the accused responsible for his actions”. (Responsible” here means, “aware of what he was doing and aware that what he was doing was wrong”).

The fact that a different standard and onus of proof is cast upon the prosecution and defence in the case of “insane” automatism and “sane” automatism does not seem relevant to the issue in either case of whether or not the accused was “responsible” and there seems no good reason why, in either case, both parties should not be permitted to seek all relevant expert evidence to put before the court, and if the action of one party prevents the other party from gathering a significant part of that evidence, then the party so prevented should at least have the right to comment on that refusal.

It is recognised that there are often considerable procedural difficulties when a question arises as to whether the defendant is suffering either from “insane automatism” or “sane automatism”. In the first case, the defence task is to prove the mental impairment on the balance of probability; in the second it is the prosecution’s task to prove beyond reasonable doubt that the actions of the defendant were voluntary (or not involuntary). The difficulty arises particularly in cases where the prosecution itself raises “insane automatism”, while the defence relies upon “non-insane automatism”. S.43F(1). Can the prosecution then apply under s.43(G)(1)(b) for the accused to be examined by a psychiatrist, and can the defence resist that application on “Pobar” grounds?

Their Honours of the High Court (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) in a joint judgement in Hawkins v R (1994) 179 CLR 500 at 509-510 comment:

> *"Where there are two available avenues of complete excuse for an incriminated act, one placing the onus of proof on the prosecution, the other placing the onus on defence, it is not surprising that great difficulties in theory and in practice have arisen".*

In R v Falconer (1990) 171 CLR 30 the High Court considered the difference betweens.23A & s.27 of the WA Criminal Code – s.23A provides that:

> *"A person is not responsible for an act or omission which occurs independently of the exercise of his will" (c.f. NTCC s. 31(1)).*

S. 27 of the WA Criminal Code provides that:

> *"A person is not criminally responsible for an act or omission on account of unsoundness of mind if, at the time of doing that act or omission he is in such a state of mental impairment as to deprive him of the capacity to understand what he is doing or to control his actions or of the capacity to know that he ought not to do the act or make the omission". (c.f. NTCC s.43C(1))*

Note also s. 26 of WA Criminal Code which provides that *"Every person is presumed to be of sound mind at any time which comes in question until the contrary is proved"*. (c.f. NTCC S.43D (1)).

Their Honours considered that the fundamental distinction between s.23 and s.27 was between the reactions of a healthy mind and the reactions of a person suffering from an underlying infirmity or mental disease.

> *"If the evidence raises the question whether an accused's acts were involuntary, not because of mental disease or natural mental infirmity, but because of the operation of events upon a sound mind, it is s.23 rather than s.27 which applies". (Deane & Dawson JJ at p.61).*

> *"Thus the inference, grounded in human experience, that an act done by an apparently conscious person is willed, is supported by a rebuttable presumption, created by statute, that the actor is of sound mind when the act is done. S.26 supplies what might otherwise be supplied by evidence and requires the jury to determine whether the act was willed on the footing that the accused was of sound mind when the act was done unless the accused establishes on the balance of probabilities that he was not of sound mind at the time. An accused bears no ultimate onus of proving that his act was unwilled, but he does bear an evidential onus of rebutting the presumption that he had the capacity to control his actions and, if he chooses to discharge that onus by showing that he was not of sound mind, he must prove that proposition on the balance of probabilities".* (Mason CJ, Brennan & McHugh JJ at p.42).

(Note that the High Court does not appear to have the same difficulty with the expression "evidential onus" as their Lordships had. The phrase flourishes under the Southern Cross.)

Following the comments of their Honours of the High Court in Falconer, it would seem that the conditions of sleepwalking could fall into the pattern of "insane automatism", as being a symptom of the accused's "mental illness", or "sane automatism" as being a condition peculiar to an accused otherwise of sound mind. Some authorities[6] have sought to distinguish between an "internal" functioning of the mind (insane automatism) or an "external" factor such as a blow on the head (sane automatism), but it is difficult to talk of an "external" factor causing sleepwalking unless one narrows the term "external" to mean "non internal".

In Canadian cases it would appear that, whereas in R v Parks (1992) 95 DLR 27 a condition of parasomnia was accepted as a case of "non insane" automatism, recent decisions seem to place emphasis on the conduct itself as prima facie indicating "insane" automatism. See: R v Luedecke 2008 ONCA (per Doherty JA) & R v Stone 1999 134 C.C.C. (3d) 353 (per Bastarache J). This may have the attraction of simplicity, but does not seem to chime in with the judgements of their Honours of the High Court in Falconer.

[6] See, for instance, Colin & McKechnie – "Criminal Law in Queensland & WA (5th Ed) at pp 414-5.

The present situation on automatism is summed up by Colvin and McKechnie in "Criminal Law in Queensland and Western Australia", 5th Edition at p414 (which observations would appear to cover also the position in the NT).

> *"Depending on the cause of the automatism any one of three different defence may be available:-*
>
> 1. *Automatism caused by mental disease or mental impairment is governed by the rules on insanity.*
>
> 2. *Automatism caused by ingestion of alcohol or other intoxicating substance is governed by the rules on intoxication. (c.f.s.7 and ss 43HR – AV of NTCC)*
>
> 3. *Automatism caused by a physical blow or by any other factor other than insanity or intoxication is governed by ordinary principles of criminal responsibility."*

Under the NTCC the defence of mental impairment can be raised by the defence, by the prosecutor on application, and by the court on its own initiative. (S.43F(1). A rather difficult situation might arise if the defence was relying on non-insane automatism, but the prosecutor applied for and was granted leave to raise the defence of mental impairment. The prosecution could then apply under s. 43G(1)(b) to require the accused to be examined by a psychiatrist or other expert and the results reported to the court. Presumably the defence would oppose the application on the basis that, if the application were granted, it would undermine the accused's

right to refuse any such examination; because the accused was not raising the defence of mental impairment. Whether such leave would be given would depend on the particular facts but it would seem at least likely that the court would take the view that it was entitled to have before it the most comprehensive evidence available.

It does not appear that such a situation has arisen in a NT court, but the example illustrates the point that the questions of insane and non-insane automatism may be inextricably intertwined to the point where the most rational approach and one that would be of most assistance to the court and, by logical extension, to society, would be an order for examination of the accused by psychiatrists or other experts chosen by both sides.

9. RIGHT TO SILENCE (PRE TRIAL)

This raises, in acute form, the question of the accused's "right to silence".

The expression is used in two situations. The first is the basic right condensed in the expression "nemo tenetur se ipsum accusare" and the latinity of the phrase indicates a long and traditional ancestry. "No one is bound to accuse himself". It has long been recognised that a person questioned about an alleged offence may, through confusion, fear. inability to express himself clearly, desire to placate his interrogator or escape as quickly as possible from an embarrassing situation – or any of a number of other causes, may say things he does not mean or cannot clearly convey. Or he may do so under an improper threat or promise, He therefore possesses the

undoubted right to say nothing and the further right that no adverse comment be made on his silence.

NT Law Reform Committee in Report no. 25 of March 2002 firmly upheld that right and emphatically rejected certain proposed legislation in another State which suggested certain encroachments to that right. This present NT Law Reform Committee expresses its full agreement with that earlier Report.

10. RIGHT TO SILENCE (AT TRIAL)

When the charges come before the court, what is called the accused's right to silence is really the accused's right to conduct his defence as he wishes, thereby determining when to reveal his defence and whether or not to call evidence. It is more a procedural privilege than an absolute right.

Thus, all Australian legislatures have recognised that a "right to silence" does not mean a "right to ambush" at least in the calling of alibi evidence at the trial, without giving the prosecution any opportunity to check the credentials of the witnesses so called.

By s.331 of the NTCC (& similar sections in other jurisdictions) it is provided that an accused, relying on an alibi, must give the DPP written notice of the alibi.

This provision, and similar provisions in other States and Territories does not seem to have caused any serious criticism, plainly because it is based on common sense.

11. REQUIREMENT TO NOTIFY IF RELYING ON EXPERT EVIDENCE

By s.331A, if the accused intends to adduce any expert evidence he must, by written notice to the court and the prosecution, give details of that evidence.

Similar provisions appear in Tasmania -"Criminal Justice (Mental Impairment) Act" s.32; in Queensland – "Criminal Code" s590B; in Western Australia – "Criminal Procedure Act 2004" s.96(3)(b); South Australia – "Criminal Law Consolidation Act 1935" s.285 BC(1); NSW – "Criminal Procedure Act 1986" s.151 (limited to notice of "substantial mental impairment")

As with alibi evidence, the aim is to prevent the prosecution being taken by surprise during trial and having no opportunity to assess the weight or relevance of the "expert" evidence.

This again seems to be a rule of common sense. It does not seem to be asking a great deal for the prosecutor to be informed whether the defence will call any scientific evidence and, if so, the nature of that scientific evidence, particularly when that evidence may range over a wide field and emphasise any of a number of different approaches. Modern studies in most scientific fields are continually

expanding so that the evidence presented to the court may range from studies almost universally accepted, to opinion accepted, by some but regarded by other as, at most, conjectural.

Hence, particularly where psychiatric evidence is to be called by the defence, the prosecutor should at least have an outline of the nature of the psychiatric evidence to be called so that he can make enquiries and consult appropriate experts on the relevant issues and not waste time chasing conjectural rabbits down conjectural burrows.

The present position in the NT is that if the accused seeks to call expert evidence he must give details of that evidence to the prosecutor. In these days of varied psychological approaches, this would seem essential. The question is whether one further step should be taken.

12. ON CURRENT NT LAW, "SANE" AND "INSANE" AUTOMATISM TREATED DIFFERENTLY

In Pobar, the prosecution was restricted to calling a psychiatrist to comment on the methodology of the psychiatrist called by the accused. But, without the accused's consent (which was not given), he was not permitted to examine the accused. Since psychiatric evidence was the main issue in the case, the psychiatrist called by the prosecution was obviously at a serious disadvantage. Nor was the prosecution allowed to comment on the accused's refusal to be examined by a different

psychiatrist because, obviously, this would have seriously impaired the "right to silence" upon which the accused was relying. Yet, ironically, this applied only to the defence of sane automatism. Had the defence or condition of insane automatism been raised, the position would have been otherwise.

13. THE SOUTH AUSTRALIAN AMENDMENT

South Australia has now taken what may be considered the logical and final step to ensure that, unless there are sufficient reasons to the contrary, an accused raising either sane or insane automatism may be ordered to undergo an examination by a psychiatrist chosen by the prosecution by leave of the court.

S.285B of the SA Criminal Law Consolidation Act provides, that *"If a defendant is to be tried or sentenced for an indictable offence, and expert evidence is to be introduced for the defence, written notice of intention to introduce the defence must be given to the Director of Public Prosecutions" (s.285 BC(1)).* The section goes on to provide that the notice must set out the name and qualifications of the expert and the general nature of the evidence. By subsection (3*) "the court may, on application by the defendant, exempt the defendant from the obligation imposed by his section".*

So far the legislation is generally similar to that in other jurisdictions previously mentioned.

Then follows what may be described as the logical extension of the earlier provisions:

> *"(4) If the defendant proposes to introduce expert psychiatric evidence or other expert medical evidence relevant to the defendant's mental state or medical condition at the time of the alleged offence, the court may, on application by the prosecutor, require the defendant to submit, at the prosecutor's expense, to an examination by an independent expert approved by the court".*

(Then follow various sanctions if the defendant does not comply.)

Now, although the court has a discretion to relieve the defendant from compliance with this provision, it would seem, from the general tenor of the legislation, that the object is to bring before the court all appropriate expert evidence either from defence or prosecution.

The circumstances in which the court would exercise its discretion and relieve the defendant from compliance with subsection (4) are not spelled out and it would be unwise to speculate too far. Possibly the court might take the view that the evidence of the defendant's psychiatrist was sufficiently complete as to render further examination unnecessary; or that the prosecution could sufficiently discharge its duty by seeking clarification in cross-examination; but the ambit of discretion is too wide to draw boundaries.

The question therefore is whether this provision impinges upon the accused's "right to silence" and, if so, to what extent; and, if it does, is it appropriate for reasons of public policy and full presentation of the case, to limit the rights, as has been done in the case of the defence of alibi?

If the defendant's "right to silence" is the right not to incriminate himself, then the peculiar nature of the defence of mental impairment or sane or insane automatism is that, if the defendant raises them, he necessarily must incriminate himself, since he thereby admits, or does not deny, that he did the acts alleged.

It is true that the issue can be raised also by the prosecutor or the court. (See s.43F(1)(b)&(c), but this would be unusual, since it would intrude upon the defendant's right to conduct his case as he wishes.

Similarly, if he relies upon sane automatism, he bears what the NTCC calls "the evidential burden of proof" (s.43BT of 43BU) and must raise sufficient material to sustain it. To do so necessarily involves an admission that the facts are as alleged by the prosecution. If the defence is sufficiently raised, the onus shifts to the prosecution to negate beyond reasonable doubt.

By ordinary rules of procedure, if a party raises a case, it is open to the other party to meet that case by any proper, appropriate and relevant evidence available. In cases

of sane or insane automatism it is the defence which must raise the case, which the prosecution may then answer. Since the mental condition of the accused is the matter at issue, it would seem reasonable for the prosecution to have the right to apply that the accused be examined by a psychiatrist or other expert chosen by the prosecution or by the court on the application of the prosecution. Otherwise the prosecution's duty to answer a matter raised by the defence would be severely hampered.

If the accused has a right to silence in court proceedings, he must necessarily himself break or forego that right to raise the question of sane or non-insane automatism.

Furthermore, in examining the final step taken by the SA Legislature, it is relevant to observe that the prosecution already has the right in the NT, in the case of insane automatism, to apply to have the accused examined by a psychiatrist and the results reported to the court (s.43G(1)(b)). There would seem no reason why, in the interest of allowing the court (and society) to have before it all relevant and available evidence, that the prosecution have a similar right to apply on the question of sane automatism, particularly, as already mentioned, the accused must himself break his right to silence in order to raise it.

It is also important to note that if the prosecution has the right to have the accused examined by an independent psychiatrist, this could well be to the benefit of the accused; because if that psychiatrist agreed with the conclusions of the accused's

psychiatrist on the question of sane automatism, the prosecution would no doubt file a Nolle Prosequi, or present no evidence and allow the accused to obtain a full acquittal. Conversely, if both psychiatrists agreed on the mental illness of the accused the parties could seek such a verdict without further proceedings. (See s.43H of the NTCC).

In summary, therefore, it would seem that where certain defences can be invoked by the defence it is not correct to talk of a "right to silence" in these circumstances. [7] Furthermore, as a matter of public policy in determining the mental state of the accused there does not seem any serious argument against the court having the opportunity to hear both sides present such evidence as may be relevant after both sides have had the opportunity to examine the accused and give opinions based on such examination.

14. ADVANCES IN PSYCHOLOGY

In R v Jolson (1889) 23 QBD 168 at 187, Stephen J commented:

> *"it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and insanity. To take an extreme illustration, can anyone doubt that a man who, though he may be perfectly sane, committed what would otherwise be a crime in a state*

[7] NSW legislation now contains a far more drastic interference with the accused's "right to silence" at trial. S.141-143 of the NSW Criminal Procedure Act provides that a court may order that a prosecutor give details of the prosecution case to the defence and that the defendant should reply, setting out the basis of the defence and the areas of dispute.

of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing".

In 1889 and in the state of psychological knowledge at the time, it was not surprising that His Honour considered somnambulism, or indeed any other defence based on automatism, as "an extreme illustration".

Various modern cases such as Pobar & Falconer, (previously cited) indicate that defences based on automatism are less "extreme" and depend upon psychiatric evidence of modern research already developed or in the process of developing. In Pobar, for instance, both physicians, accepted as experts in sleep disorders, referred to continuing research on the subject of parasomnia, and it is not being unduly prophetic to assume that research into various states of automatism may bring forth more positive diagnoses than can be relied upon at present. The probability is that the defence, supported by psychiatric or other relevant expert evidence, will become more frequent. It would therefore seem more appropriate, and scientific and in the interests of jurisprudence generally if both prosecution and defence were able to adduce such evidence using all proper means available including, if thought appropriate, a request by the prosecution that the accused be examined by experts called on its behalf; and aim being to allow the court the fullest opportunity to hear all relevant evidence.

The learned Director of Public Prosecutions (DPP) of the Northern Territory has made this additional comment, with which we agree.

"I do not believe it is appropriate to limit any extension of the Courts power to require defendants to submit to medical examination, only to those cases where issues of sane automatism arise.

Section 159 of the Criminal Code provides a partial defence to murder where a defendant establishes on the balance of probabilities that his or her mental capacity was substantially impaired at the time of the conduct causing death (diminished responsibility). There would seem to be no logical reason for allowing the prosecution to have an accused psychiatrically examined when a diagnosis of sane automatism is raised but not in a case involving diminished responsibility".

It is not the act or acts or the accused that are in issue; it is the mental state of the accused.

15. AMENDMENTS RECOMMENDED BY THIS COMMITTEE

This Committee would therefore recommend the adoption into the NTCC of a provision somewhat similar to that of s.285 B-C(4) of the SA Criminal Law Consolidation Act, but differing in certain respects, for reasons we now set out.

S.285BC(4) (SA) provides:

> *"(4) If the defence proposes to introduce expert psychiatric evidence or other expert medical evidence relevant to the defendant's mental state or medical condition at the time of the alleged offence, the court may, on application by*

the prosecutor, require the defendant to submit, at the prosecutor's expense, to an examination by an independent expert approved by the court".

Subsection (5) then provides:

"(5) If a defendant fails to comply with a requirement under the section –

(a) The evidence will not be admitted without the court's permission (but the court cannot allow the admission of evidence if the defendant fails to submit to an examination by an independent expert under subsection (47); and

(b) In the case of a trial by jury – the prosecutor or the judge (or both) may comment on the defendant's non-compliance to the jury".

This, in our view, may be too severe on the defendant; for if the court should "require" the defendant to submit to the examination, disobedience would be tantamount to contempt of court. This is recognised by subsections (8) & (9) of the SA section where, if it appears to the court that the disobedience is on the advice of a legal practitioner, that practitioner may be reported by the judge to the "appropriate professional disciplinary authority".

In other words, if the defendant refuses to be examined, after being "required" to do so by the court, he will be debarred from presenting the evidence of his own

psychiatrist, but also, if he has been so advised by counsel, that counsel may be reported to the appropriate authorities as being in breach of professional ethics.

This sanction is not an interference with the accused's "right to silence"'; on the contrary, it is an interference with his "right to speak", since it severely limits the accused in the evidence he can present on the most important and relevant part of his case. It is a serious breach of the accused's right to present his case, and the accused may well feel aggrieved that he has been so conclusively restricted.

In our view the court should not intervene so drastically. We consider that it should be sufficient if the court, on the application of the prosecutor give leave to him to request the accused to submit to an examination by a psychiatrist chosen by the prosecutor; and, in the event of the accused refusing, the prosecutor be permitted to announce that fact to the jury, to cross-examine the defendant (if he gives evidence) and any expert called on his behalf as to the reasons for the accused's refusal. Further, both the prosecutor and the court (if it so wishes) should have the right, in addressing the jury, to comment on that refusal.

This would leave the accused free to present his case even if he refused the examination, but it would put him at considerable risk. It would also leave to the jury (where in our opinion it should be left) to consider, as part of the case, the reasons given by the accused for refusal and whether they considered such reasons valid or vapid.

Since his refusal deprives the court of what we have urged is the proper process of hearing both sides fully, it is only rational that he should suffer the consequences by submitting himself and his witnesses to questioning on the basis for his refusal. Nevertheless we stress that if the case for the accused is one of sane automatism, the prosecutor still bears the onus of proving beyond reasonable doubt that his actions were voluntary.

We would therefore recommend the following amendments to s. 331 A of the NT Criminal Code.

"ss (5A)

If the accused proposes to introduce expert psychiatric or other expert medical evidence relevant to the accused's mental state or medical condition at the time of the alleged offence, the Court may, on application by a prosecutor, require the accused to submit, at the prosecutions's expense, to an examination by an independent expert approved by the Court, and the Court may, on the application of the prosecutor or the defence, allow such independent expert to be called to give evidence as to his examination of the accused, his findings and opinion arising therefrom.

Ss (7)(c)

The prosecution may cross-examine the accused person or any expert witness called by the accused person who gives evidence, as to the reason for the accused's refusal to submit to a medical or psychiatric examination".

ANSWERS TO TERMS OF REFERENCE

As to the questions raised in the Terms of Reference namely:

Q: "Should the NT Courts have the power to require defendants to submit to psychiatrists or other medical examination?

A: Yes

Q: In what circumstances?

A: In any circumstance in which psychiatric or other medical examination is relied on by the defence but subject to the court's discretion.

Q: What types of matter?

A: See answer above.

Q: In what particular court or courts?

A: Although the situation is more likely to arise in indictable offences, there seems no reason why a Magistrates Court should not have similar jurisdiction when psychiatric or other evidence is to be called by the defence but, again, subject to the discretion of the court.

Appendix A

The information given in the Reference seems slightly inaccurate

The reference is to *R v Pobar* before Mildren J. on 12/2/10.

The charge was rape, and the defence was that the defendant was sleepwalking at the time and had neither the knowledge nor the intent to commit the offence; or, to put it more precisely, that it could not be proved beyond reasonable doubt that he knew what he was doing and that he intended to do it.

The defendant did not contradict the evidence that he had moved from one room, opened the door to another, in which the victim was sleeping and had sexual intercourse with her without her consent and despite her resistance and culling upon him to stop; and that he had then returned to the first room. His evidence was that he had no memory of these events.

There was evidence, admitted by the defendant, that before the attack on the victim, he had consumed a great deal of liquor.

The Defence called, as expert evidence, the witness, Dr. Zappala, who clearly enough established his qualifications as an expert in sleeping disorders. Dr. Zappala gave his opinion, based on his examination of the defendant, the defendant's behaviour at the time of the alleged offence, and the previous history of the defendant as related by witnesses, of apparent sleep disorders and bizarre behaviour of the defendant while apparently sleepwalking. Dr. Zappala's opinion was that the defendant had a clinical history consistent with parasomnia, which may, for practical purposes be defined as sleepwalking; though both Dr. Zappala and Dr. Antic, (the expert called for the prosecution), emphasised the indefinite nature of the boundaries of that concept. In Dr. Zappala's view the defendant's behaviour on the occasion in question was consistent with parasomnia and, if that were the case, the defendant would have had no awareness of the incidents described. He conceded that he could not definitely exclude alcohol induced amnesia.

Dr. Antic, called for the prosecution, was as well qualified as Dr. Zappala to give evidence as an expert on sleep disorders. He was of an opinion that the defendant's behaviour was more consistent with alcohol intoxication was subsequent amnesia. But he conceded that what was described as "sleep sex" was a possibility. In the context, that expression obviously referred to the parasomnia or sleep – walking state referred to by Dr. Zappala.

Dr. Antic was of the opinion that further examination would be necessary to establish more clearly the state of the defendant at the time of the alleged offence.

Both doctors emphasised the uncertain nature of the present studies of sleeping disorders.

In effect, therefore, the conflict between the experts was whether the events which took place were the result of parasomnia, in which case the defendant would have had neither the knowledge or intent of what he was doing, or of alcohol intoxication with subsequent amnesia, in which case it was open to the prosecution to invite the jury to consider whether, on the evidence, the defendant had in fact the necessary intent and knowledge of what he was doing. In this respect s. 43AF (5) may have been relevant insofar as it proves that "Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary" But it would still have been incumbent on the prosecution to prove beyond reasonable doubt that the defendant had the necessary intent and knowledge.

In view of the evidence of Dr. Zappala that the defendant's action were consistent with parasomnia, and that Dr. Antic could not exclude that as a possibility, it seems inevitable that the prosecution could not prove the case beyond a reasonable doubt, and that the jury's verdict to that effect was the only proper one.

Returning to the Reference, it is there states that" the prosecution sleep specialist indicated that he needed to speak with the defendant and conduct tests on him. The defendant declined to speak to the prosecution expert."

Now, whatever may have occurred between counsel before the trial, this is not what appears in the transcript. Certainly, Dr. Antic indicated that more tests would have been preferable, but he does not say that he asked, (or "indicated") that he speak with the defendant and conduct tests on him. Nor does it appear that the defendant or his legal representatives refused any such request. All that appears on the transcript is that His Honour, at the request of the defendant's counsel, agreed that Dr. Antic could say that he had not interviewed the defendant, but should say no more than that.

In fact, when Dr. Antic reached a point in his evidence in which it appeared that he might be about to go a little further on this topic that was warranted, His Honour was quick to intervene and warn him that all he had to say whether or not he had interviewed the defendant, and he must say no more than that.

It would be dangerous to draw any inference from outside what appears in the transcript.

The significance of this is that I do not think we can rely on R v Pobar as establishing that a request was made that the expert witness for the prosecution interview the defendant and conduct tests on him, and that request was refused. Furthermore, no application was made to His Honour that he order or inquire of the defence that the

defendant make himself available to the prosecution expert for questioning or examination, and that, in the event of the defence refusing, or not satisfactorily justifying that refusal, he give leave to the prosecution to make this refusal known to the jury and to comment on that refusal; and further, or in the alternative, that His Honour himself should reveal this refusal to the jury, and, if he feels it appropriate, comment on it. Since no such application was made, obviously we do not have the benefit of any reasons or rulings given by His Honour. We have only a ruling given at the request of one counsel, and apparently with the consent of the other, that Dr. Antic say no more than that he had not interviewed the defendant.

For the reasons set out above I do not consider we should regard *R v Pobar* as authority for whether or not, in similar circumstances, the prosecution should have some defined right to have a defendant examined by an expert of the prosecution's choosing, and what should be the limits of such right, and what sanction should be imposed on the defendant should he refuse such examination.

It is therefore open to this Committee to pursue the Reference given and, and in particular, to note that its scope may be broader than the questions raised in *R v Pobar*.

AA