AUTOMATISM AND STRICT LIABILITY

The discussion that follows is an examination of the possibility of applying the defence of sane automatism to offences of which *mens rea* is not an element. Underlying the argument is the assumption that, even in the case of offences of "strict" or "absolute" liability (with a few possible exceptions[1])

> It is fundamental that quite apart from any need there might be to prove *mens rea*, "a person cannot be convicted of any crime unless he has committed an overt act prohibited by the law, or has made default in doing some act which there was a legal obligation upon him to do. The act or omission must be voluntary": 10 *Halsbury's Laws of England*, 3rd ed., 272. He must be shown to be responsible for the physical ingredient of the crime or offence.[2]

In other words, an offence of strict liability may be defined as an offence consisting only of an *actus reus*.[3] Automatism, it will be argued, goes to the 'voluntariness" of the *actus reus*.

THE DEFENCE GENERALLY

Although the defence of automatism has become much more popular in the past fifteen years its origins are considerably older;[4] Stroud, in his *Mens Rea* in 1914, appears to have been the first writer to use the term when he devoted part of his chapter on "Compulsion" to an analysis of the defence.[5] Automatism has been definied as " . . . action without any knowledge of acting, or action with no consciousness of doing what was being done".[6] A distinction has been drawn between the state of mind that gives rise to such action when it is caused by "disease" and that when it is not so caused.[7] When there is a "disease of the mind" the case is one of insanity and the verdict appropriate to

1. See infra, text above nn. 71 ff.
2. *Kilbride* v. *Lake* [1962] N.Z.L.R. 590, 591-592 per Woodhouse J; discussed by Sim, "The Involuntary Actus Reus" (1962) 25 M.L.R. 741. See also *Hardgrave* v. *The King* (1906) 4 C.L.R. 232 H.C. of A., *Snell* v. *Ryan* [1951] S.A.S.R. 59.
3. Howard, *Strict Responsibility* (1963), 1-2; Clark, *Defences to Offences of Strict Liability*, unpublished thesis, V.U.W., (1966), 10; Smith and Hogan, *Criminal Law* (1965), 58.
4. The early cases are discussed in Williams, *Criminal Law, the General Part*, (2nd ed., 1961), 482 ff. and Stroud, *Mens Rea* (1914) 193 ff.
5. Ibid. Most of the modern authorities and literature are referred to in Edwards, "Automatism and Criminal Responsibility" (1958) 21 M.L.R. 375; Prevezer, "Automatism and Involuntary Conduct" [1958] Crim. L.R. 361 and 440; Kahn, "Automatism, Sane and Insane" [1965] N.Z.L.J. 113 and 128. Sutton, "Automatism and the Drunken Sailor" (1966) 1 Otago L.R. 156.
6. *R.* v. *Cottle* [1958] N.Z.L.R. 999 C.A. at 1020 per Gresson P., cited with approval by Viscount Kilmuir L.C. in *Bratty* v. *A.G. for Northern Ireland* [1963] A.C. 386 at 402.
7. *Cottle's* case (supra), *Bratty's* case (supra).

that defence is required[8] but where there is no "disease" a defence of automatism gives rise to a complete acquittal. This article is concerned with automatism that arises without "disease". The reason for the distinction between the result of a successful defence of insane automatism on the one part and non-insane automatism on the other is one of public policy—a person who is in fact insane should be confined in the public interest (at least where a crime of violence is involved) and a verdict of not guilty on the ground of insanity normally means that the accused will be confined until the pleasure of the Minister of Justice is known,[9] but it is reasonable to expect that a person who is not insane will not be likely to do harm again.

Automatism without "disease"

It is not clear from the decisions what constitutes a "disease of the mind" so as to bring the case within the insanity rules and the question usually turns on the medical evidence. This has led to some distinctions that are not always easy to follow. In *R.* v. *Charlson*[10] a possible cerebral tumour was not regarded as a disease while in *R.* v. *Kemp*[11] and *R.* v. *Holmes*[12] arteriosclerosis was so regarded. Again, in the epilepsy cases, a variety of results has been reached.[13] However,

8. The term "disease" has its origin in the *McNaghten* rules. The N.Z. statute, Crimes Act 1961, s.23, refers to "natural imbecility or disease of the mind" which may have a slightly different effect from the common law formulation, but there are no authorities in point: *R.* v. *Cottle* [1958] N.Z.L.R. 999 C.A. per Gresson P. at 1010.
9. Mental Health Act 1911, s.31 as amended by the Mental Health Amendment Act 1957, s.19(1)(b).
10. [1955] 1 W.L.R. 317.
11. [1957] 1 Q.B. 399.
12. [1960] W.A.R. 122. Cf a case noted in (1958) 22 J.Crim.Law (Eng.) 181 where "malignant hypertension caused by disease of the cerebral arteries" was apparently not regarded as a disease of the mind. Similar variations occur in the cases involving hypoglycaemia. See cases referred to in Williams, loc. cit., 488 and 561. In two more recent cases, *Watmore* v. *Jenkins* [1962] 2 Q.B. 572 D.C. (where the defence failed on the facts) and a murder case heard at assizes which is noted in (1965) 33 *Medico-Legal Journal*, 72 (in which the defendant was acquitted), a defence of automatism based on hypoglycaemia was treated as being a complete defence. In the latter case, however, there was other evidence of automatism in the form of emotional shock and a long fast.
13. In *R.* v. *Perry* (1919) 14 Cr.App.R. 48 C.C.A. and *R.* v. *Foy* [1960] Qd.R. 225 a defence of epilepsy gave rise to an insanity verdict; *R.* v. *Cottle* [1958] N.Z.L.R. 999 contains strong dicta that epilepsy constitutes a disease of the mind see esp. North J. at 1026-1029 and Cleary J. at 1035; in *Bratty* v. *A.G. for Northern Ireland* [1963] A.C. 386, *R.* v. *Ditto* (1962) 38 C.R. (Canada) 32 and *R.* v. *O'Brien* (1965) 56 D.L.R. (2d) 65 psychometer epilepsy was treated as a disease. On the other hand in *Hill* v. *Baxter* [1958] 1 Q.B. 277 Lord Goddard C.J. at 283 and Pearson J. at 286-287 apparently accepted that epilepsy could give rise to a verdict of non-insane automatism; in another case noted in [1962] 1 B.M.J. 196 a doctor " . . . gave evidence that in his opinion Lavendor had a petit mal attack at the time of the accident. He was not prepared to say that Lavendor was suffering from a disease of the mind. There was a total loss of reasoning at the time of the accident but not a defect of reason"; see also a similar case in [1960] 2 B.M.J. 318. Much the same confusion exists in the American cases: Fox, "Physical Disorder, Consciousness, and Criminal Liability", (1963) 63 Colum.L.R.645, 658.

there are a number of conditions that have been held unequivocably to give rise to a defence of non-insane automatism—sleepwalking,[14] unconsciousness brought about by a blow from some other person[15] or thing,[16] carbon monoxide poisoning,[17] some sudden illness such as a stroke[18] or pneumonia[19] and even extreme emotional upset.[20]

Application to offences of strict liability

There can be no doubt on the basis of the authorities that automatism leads to a complete acquittal in appropriate cases and that unlike the defence of insanity no persuasive burden is cast on the accused—he must, however, provide a "proper foundation" for the defence.[21] But the question arises whether the defence applies in cases of strict liability. If it does the most fruitful field of operation is likely to be in respect of a number of minor traffic offences.[22]

The bulk of the decided cases involved offences of which *mens rea* is an element although the offences themselves cover a wide range.[23] In *R.* v. *Cottle*,[24] the only reported New Zealand case, the accused was appealing[25] against conviction on charges of 1. breaking and entering a warehouse and committing theft, 2. mischief, and 3. having in his possession certain implements of housebreaking. The prosecution must prove a specific intent in each of the first two offences while in the case of the third[26] *mens rea* is an element in the sense that it is a defence if the person charged proves that he has a lawful excuse for having the instruments in his possession. It is possible to infer from some of the remarks in *R.* v. *Cottle* that automatism applies only to cases where some sort of intent is in issue. Thus Gresson P.[27] said:

14. *Fain* v. *Commonwealth* (1879) 39 Am.Rep.213 and other authorities cited by Williams, loc. cit., 483 nn. 1 and 2.
15. *R.* v. *Minor* (1955) 21 C.R. (Canada) 377; *Coates* v. *R.* (1957) 31 A.L.J. 34; *In Re a Barrister* (1957) 31 A.L.J. 424; *Cooper* v. *McKenna* [1960] Qd.R. 406; *Bleta* v. *R.* (1964) 48 D.L.R.(2d) 139 (S.C. of Canada).
16. *Hill* v. *Baxter* [1958] 1 Q.B. 277 at 286 per Pearson J. (stone thrown up by passing traffic); *R.* v. *Budd* [1962] Crim.L.R. 48 C.C.A. (earlier collision).
17. *H.M. Advocate* v. *Ritchie* 1926 S.C. (J) 45.
18. *Hill* v. *Baxter*, supra n. 13, per Lord Goddard C.J. at 283.
19. *Police* v. *Beaumont* [1958] Crim. L.R. 620.
20. *R.* v. *Carter* [1959] V.R. 105. A defence of emotional shock failed on the facts in *R.* v. *Sibbles* [1959] Crim. L.R. 660 and *R.* v. *Tsigos* [1964-5] N.S.W.R. 1607 C.C.A. (see esp. Moffitt J. at 1630-1631). See also case in (1965) 33 *Medico-Legal Journal* mentioned in n. 12 ante.
21. *Bratty* v. *A.G.* for Northern Ireland, supra n. 13 at 405 and 413; *R.* v. *Sell* [1962] Crim.L.R. 463 C.C.A.
22. See the suggestions made infra, text above nn. 66 ff.
23. Howard, loc. cit., 200 n. 20.
24. [1958] N.Z.L.R. 999 C.A.
25. Although the appeal was allowed on other grounds the case contains a very thorough discussion of automatism.
26. Crimes Act 1908, s.282; Crimes Act 1961, s.244.
27. [1958] N.Z.L.R. at 1007; see also North J. at 1027-1028, Cleary J. at 1033 (" . . . the relevance of such a plea is to negative intent".). And see Devlin J. in *Hill* v. *Baxter* [1958] 1 Q.B. 277, 284.

> Where a particular intent or state of mind is a necessary ingredient of an offence, and where prima facie proof of the existence of the intent or state of mind has been adduced, its absence may be shown in several ways, e.g. accident, mistake or ignorance, in which ordinarily there is no alteration of the normal functioning of the mind; it may, too, be absent through drunkenness, sleep-walking, automatism or insanity . . . .

The analogies drawn by the learned President with cases of mistake, ignorance, drunkenness (and possibly accident) suggest that he had in mind a defence that negatives *mens rea.* However, that the defence is not so limited is made clear from a number of cases[28] in which it has been used successfully in respect of driving offences where negligence had to be shown by the prosecution. The most fully reported of these cases is *R.* v. *Minor*[29] where the appellant had been convicted of motor manslaughter after the trial judge had refused to leave his defence of "blackout" to the jury; Minor had claimed that the "blackout" had followed a blow in a scuffle. His appeal to the Saskatchewan Court of Appeal was allowed on the ground that the defence ought to have been left to the jury. Martin C.J.S., speaking for the Court remarked[30] that "By blackout I understand is meant a condition of unconsciousness, inability to form an intent, the lack of *mens rea*". At first sight this supports the view that automatism is related solely to *mens rea.* But the offence charged in *Minor's* case was not one of *mens rea;* it had been held by the Supreme Court of Canada many years before[31] to involve the same objective liability as in tort. In a number of civil cases it had been held that a person is not liable for what viewed objectively is negligence if he is unconscious through a sudden illness or epilepsy. For example, in *Slattery* v. *Haley,*[32] which was referred to in *Minor's* case it was said:[33]

> He must have done that which he ought not to have done, or omitted that which he ought to have done as a conscious being. Failing this the occurrence is "a mere accident", "a pure accident" or, as is often, but not accurately put, "an inevitable accident".

This principle was regarded as applicable to the facts in *R.* v. *Minor* and the result of the decision, although not of all its dicta, can only

28. *R.* v. *Minor* (1955) 21 C.R. (Canada) 377 (motor manslaughter); cases noted in (1958) 22 J.Crim.Law (Eng.) 181 (dangerous and careless driving); *Police* v. *Beaumont* [1958] Crim.L.R. 620 (due care and attention); *R.* v. *Carter* [1959] V.R. 105 (dangerous driving); *Cooper* v. *McKenna* [1960] Qd.R. 406 (dangerous driving); cases noted in [1960] 2 B.M.J. 318 (dangerous driving) and [1962] 1 B.M.J. 196 (dangerous driving causing death); *R.* v. *Budd* [1962] Crim.L.R. 49 C.C.A. (dangerous driving).
29. (1955) 21 C.R. (Canada) 377.
30. Ibid., 380.
31. *McCarthy* v. *R.* (1921) 59 D.L.R. 206.
32. [1923] 3 D.L.R. 156; see also *Gootson* v. *R.* [1947] 4 D.L.R. 568. It is arguable whether automatism (sane *or* insane) is a defence in *civil* cases in New Zealand in the light of *Donaghy* v. *Brennan* (1900) 19 N.Z.L.R. 289 C.A.
33. [1923] 3 D.L.R. at 161.

be that automatism can have the effect of rendering the defendant not responsible for an *actus reus*, just as it can render him incapable of the appropriate *mens rea*.

Much the same result emerges from the reasoning of the Divisional Court in *Hill* v. *Baxter*[34] although the defence was, in that case, unsuccessful on the facts. The respondent had been acquitted by justices on charges of dangerous driving[35] and failing to conform to a "Halt" sign[36] on the ground that he had been in a state of automatism at the time when the offences were committed. The Divisional Court, after discussing the general principles of the defence, remitted the case to the justices with a direction to convict on the ground that the defence was not supported by the evidence. Lord Goddard C.J.[37] noted that

> . . . the Road Traffic Act, 1930, contains an absolute prohibition against driving dangerously or ignoring "Halt" signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say: "I did not mean to drive dangerously" or "I did not notice the 'Halt' sign".

The statement that both offences contain an "absolute prohibition" is slightly misleading. In the case of dangerous driving it must be proved that the defendant did not conform to the standard of the reasonable man[38] while in the case of the "Halt" sign it is sufficient to prove merely that he did not stop. Despite this possible distinction the court regarded the defence of automatism as applicable in both cases. While the judges did not use the words *"actus reus"* they spoke as if the defence prevented any "act" from being the "act" of the defendant. Lord Goddard C.J.[39] said that " . . . there may be cases where the circumstances are such that the accused could not really be said to be driving at all". Pearson J.[40] remarked that " . . . if he is unconscious in the full sense, he is not driving . . . " and that the real question at issue was " . . . whether he was driving the car".

The reasoning in *Hill* v. *Baxter* was referred to with approval by Sholl J. in the Victorian decision *R.* v. *Carter*.[41] The defendant, a woman, was charged on three counts relating to injuries caused when she had allegedly driven her motor car over a man with whom she had an emotional relationship and who had assaulted her earlier the same day. Two of the charges involved unlawful wounding and the third was

34. [1958] 1 Q.B. 277.
35. Road Traffic Act 1930 (U.K.) s.11.
36. Ibid., s.49.
37. [1958] 1 Q.B. at 282.
38. *R.* v. *Evans* [1963] 1 Q.B. 412, 416 C.C.A. (defendant guilty even if he is " . . . doing his incompetent best."); *R.* v. *Ball and Loughlin* [1966] Crim.L.R. 451 C.C.A. (competent best may not be enough!).
39. [1958] 1 Q.B. at 283. See also *R.* v. *Budd* [1962] Crim.L.R. 49, 50 C.C.A. and the distinction drawn by Edwards, supra n. 6, (1958) 21 M.L.R. at 381 between the *act of driving* which involves volition and the *manner* of driving which is judged objectively.
40. Ibid., at 286.
41. [1959] V.R. 105.

one of dangerous driving. In his discussion of the defence of automatism Sholl J.[42] remarked that

> My brother Lowe has suggested that the defence of automatism, at any rate in a case like this, really goes to a question which arises at an earlier stage than the question to which the defence of insanity goes, that is to say, that it goes to the question whether the accused has committed a voluntary act. It may be that His Honour is right in that view . . .

Later in his judgment,[43] when he was speaking of the applicability of the defence to the dangerous driving charge, the learned judge referred to the fact that the offence had to be judged by an objective standard but quoted *Hill* v. *Baxter* in support of the " . . . availability of the defence in relation to the question of the accused's volition to do the physical acts involved . . . " Miss Carter was acquitted on all three charges.[44]

The view that automatism operates to prevent the defendant from being responsible for the *actus reus* was again expressed, obiter, in *Bratty* v. *A.G. for Northern Ireland*.[45] That was a case of murder but three of the Lords made remarks that are illuminating in the present context.[46] Viscount Kilmuir L.C., whose remarks were primarily directed to the question of burden of proof, said:[47]

> But if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary *mens rea*—if indeed the *actus reus*—has not been proved beyond reasonable doubt.

Lord Denning was even more to the point. After emphasizing that automatism meant that there was no "voluntary act" he referred[48] to *Hill* v. *Baxter* and three other dangerous or reckless driving cases[49] as authority for the proposition that:

> . . . even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was an involuntary act in the sense that he was unconscious at the time and did not know what he was doing . . . .

42. Ibid., at 109. A defence of *insane* automatism in fact goes to the question of a voluntary act: *R.* v. *Cottle* [1958] N.Z.L.R. 999 CA. per Gresson P. at 1009; *R.* v. *O'Brien* (1965) 56 D.L.R. (2d) 65 esp. per West J. A. at 88.
43. Ibid., at 112-113.
44. The writer is indebted for this information (which does not appear from the report) to the Crown Solicitor, Melbourne.
45. [1963] A.C. 386.
46. The point has significance even in a case of murder. If automatism goes only to *mens rea* a person relying on the defence could still be convicted of manslaughter. If it goes to *actus reus* he must also be acquitted of manslaughter if the defence applies on the facts.
47. [1963] A.C. at 407.
48. Ibid., at 410.
49. *H.M. Advocate* v. *Ritchie* 1926 S.C. (J) 45; *R.* v. *Minor* (1955) 21 C.R. (Canada) 377; *Cooper* v. *McKenna* [1960] Qd. R. 406.

Finally Lord Morris[50] said that " . . . the act in question could not really be considered the act of the person concerned at all."

The same principles must, it is submitted, apply to cases of "absolute prohibition" even where no element of negligence is involved and what authority there is, is thus strongly in favour of applying the defence to cases of strict liability.

THE BOUNDARIES OF THE DEFENCE

The remainder of this discussion deals with the boundaries of the defence.

The defence does not apply in all cases of unconsciousness

Earlier in this discussion[51] we noted Gresson P.'s definition of automatism in *R.* v. *Cottle*[52] as " . . . action without any knowledge of acting or action with no consciousness of doing what was being done." At another point in his judgment in the same case[53] His Honour described the defence in these words:

> Automatism, which strictly means action without conscious volition, has been adopted in criminal law as a term to denote conduct of which the doer is not conscious—in short doing something without knowledge of it, and without memory afterwards of having done it—a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements.

The effect of the word "action" in these descriptions must now be considered and a convenient way to begin the discussion is to look at a set of facts suggested by Elliott and Wood[54] in another context:

> A leaves his car parked on the roadway. On January 1 he must renew the road fund licence and the insurance. He has a stroke on December 29 and is in a coma for two weeks.

A would be charged in England with an offence under section 201 of the Road Traffic Act 1960 which makes it an offence to "use" a motor vehicle " . . . unless there is in force . . . such a policy of insurance . . . " Now it is straining language to its utmost to describe A's "use" of the vehicle or his failure to renew the licence and insurance as " . . . action without any knowledge of acting . . . " and the fact is that such a situation is not one that has occurred because A has suffered " . . . a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements." A should not, of course, be convicted but not because he can be said to be in a state of automatism within the meaning of the cases. He will

50 [1963] A.C. at 415.
51. See text above n.6 ante.
52. [1958] N.Z.L.R. 999, 1020 C.A.
53. Ibid., 1007.
54. *A Casebook on Criminal Law* (1963) 49. The example is given in the context of the writers' discussion of the defence of "impossibility".

be acquitted either because his "act" (the use of the car) was accidental[55] or because his failure to act (obtain a licence etc.) was because it was impossible for him to do so.[56] It is, indeed, implicit in all the cases in which the defence of automatism has been discussed that it applies only to cases in which there has been some actual movement of the defendant's body that can be described as involuntary.

Acts and omissions?

It follows from what has just been said that there are some offences of strict liability in respect of which the defence has no possible application. There are a few offences in which liability is imposed merely because of a failure to act. Perhaps the clearest example was the offence created by section 40(4) of the Electoral Act 1902.[57]

> In every case where a Registrar fails to enrol any person making application for enrolment, he shall, unless there is a valid objection to such application, be liable to a fine not exceeding ten pounds.

In *Lawson* v. *King*[58] Cooper J. held that proof of *mens rea* was not required to obtain a conviction under the section and that the defendant should be convicted even though he had been "honestly attempting to perform his duty". Another possible example[59] of liability merely for failure to act is contained in section 18(11) of the Transport Act 1962 which relates to the notification of a change of ownership of a motor vehicle:

> . . . every person commits an offence who, with respect to any motor vehicle, fails to comply with any of the provisions of this section . . . .

From the very nature of these offences it is not physically possible for the *actus reus* to be brought about because the Registrar or the vendor of a motor car was in a state of automatism—at most he might be in a coma like the defendant in the Elliott and Wood example but this would be a case of pure inaction not one of action without consciousness.

It does not, however, follow that the defence of automatism can never apply to an offence of omission. In fact the motoring cases in which the defence was discussed were all, in a sense, cases of omission. True, they all involved "action" in the sense of "doing" something—driving the car—but the defendant was also accused of failing to do something—failing to act as a reasonable man or, as in the case of the second charge in *Hill* v. *Baxter*[60], failing to obey a "Halt" sign. Auto-

55. The case thus comes within the principle of *Kilbride* v. *Lake* [1962] N.Z.L.R. 590, supra n.2.
56. Clark, loc. cit., n.3, 176.
57. S.69 the only similar section in the Electoral Act 1956, contains the words "wilfully and knowingly".
58. (1903) 22 N.Z.L.R. 706, 708.
59. Failure to comply with a common law duty to repair a road may be another: *R.* v. *Bamber* (1843) 5 Q.B. 279.
60. [1958] 1 Q.B. 277 D.C.

matism has in these "doing plus failing" cases been regarded as relating primarily to the "doing" or "driving" part of the offence[61] and it follows (subject to what is said in the next section about the problem of causation) that when an offence, even one of omission, can be analysed as containing an element of "doing" the defence will apply. If this is so there are very few offences of strict liability, other than those which have just been mentioned, to which the defence will not apply since nearly all can be analysed as involving either a simple "act" or "doing plus failing". Of the four cases in which strict liability has been imposed for criminal omissions, given by Graham Hughes in his comprehensive discussion of criminal omissions[62], three[63] are "doing plus failing" cases while the fourth is a case of vicarious liability.[64]

The question of offences of vicarious liability and status offences will be discussed in a later section.[65]

Application beyond the Halt sign cases

In view of the large number of driving cases in which automatism has been discussed[66] it appears that the most practical field of operation for the defence is in respect of a number of minor traffic offences.[67] Apart from a "Halt" sign case like *Hill* v. *Baxter*[68] there are a number of similar offences in the Traffic Regulations 1956 for which it would be possible to excuse a driver in a state of automatism for failing to do what was required of him. Some examples are: failing to keep as far as practicable to the left of the road,[69] failing to yield the right of way to a vehicle approaching from the right,[70] failing to stop at a tram stop.[71]

But how far is it practical to extend the same principles outside this rather narrow field? Consider first a slightly different traffic offence

61. See text above nn.39, 40 and 41.
62. "Criminal Omissions" (1958) 67 Yale L.J. 590, 595-596.
63. *Provincial Motor Cab Co.* v. *Dunning* [1909] 2 K.B. 599 D.C. (aiding and abetting the use of a vehicle with improper lighting); *City of Hays* v. *Schueler* (1930) 193 Pac. 311 (driving vehicle without a rear light); *State* v. *Ferry Line Auto Bus Co.* (1917) 168 Pac. 893 (use of auto stage without a licence).
64. *Quality Dairies (York) Ltd* v. *Pedley* [1952] 1 K.B. 275 D.C. (failure to ensure that milk bottles were in a thorough state of cleanliness).
65. Infra, text above nn.77 ff.
66. See e.g. those mentioned in n.28 ante.
67. It should be noted that two classes of people who are likely to get into a state of automatism, diabetics and epileptics, may not obtain a driver's licence in N.Z.: The Motor Drivers Regulations 1964 (S.R. 1964/214), reg. 4 and Form 1; but one who becomes a diabetic or epileptic (or finds out about his state) does not automatically become liable to lose his licence; it appears that a revocation of his licence may take place only following a medical examination carried out pursuant to reg. 31 of the Regulations.
68. [1958] 1 Q.B. 277 D.C. The N.Z. legislation relates to "Stop" signs: Traffic Regulations 1956, reg. 12.
69. Ibid., reg. 6.
70. Ibid., reg. 11. This is probably, however, a case where liability depends upon negligence: *Green* v. *Police* [1964] N.Z.L.R. 1011.
71. Ibid., reg. 13.

which appears to be one of strict liability,[72] the offence of driving a motor vehicle without displaying a rear light. At first sight it appears that the *Hill* v. *Baxter* reasoning could be applied literally to such a case in something like the following fashion: D was in the driver's seat of a motor car which was proceeding down the street not displaying a rear light; he was in a state of automatism; therefore he was not "driving"[73] and may not be convicted of the offence. But there is a flaw in the reasoning. In a case where the driver fails to stop there is a clear relationship of cause and effect between the automatism and the failure to stop; but for his state the "driver" would have stopped. That a similar statement may not be made in all cases of drivers without tail lights showing on their cars appears from a comparison of the following distinct situations:

> Driver X is just an ordinary driver—he would not have noticed the burnt out light awake or asleep unless someone had pointed it out to him.
>
> Driver Y is super-cautious. He has had a device rigged up which tells him instantly if one of his tail-lights goes out. He carries spares for use on such an occasion.

It is only in the second case that it can be accurately said that but for the state of automatism the "driver" would not have continued without the tail-light.

The same type of reasoning may have to be applied to this example suggested by Jackson:[74]

> If, for instance, a butcher in a state of somnambulism exposes tainted meat for sale in his shop, presumably he will not be liable for that offence, because the act is not considered in law to be imputable to him.

The offence that Jackson had in mind was presumably that of "exposing tainted meat for sale" and the "act" that of "exposing". But there are difficulties in excusing the butcher in all cases. It could be that if he had been wide awake he would immediately have realized that the meat was tainted and would certainly not have displayed it. But what of the case[75] where no examination that he was likely to have made, if awake, would have disclosed the state of the meat? A decision that the butcher was not responsible for the act of exposing would relieve him in either case. But there is a clear distinction between the two; it is only in the former that it can be said that "but for his automatism he would not have displayed tainted meat."

Again, consider the effect of automatism in the following example suggested to the writer by Professor I. D. Campbell:

If the owner of an automatic cigarette-vending machine becomes

72. *Transport Department* v. *Haywood* (1961) 10 M.C.D. 229.
73. See the explanation of the defence given in the text above nn.39 and 40.
74. "Absolute Prohibition in Statutory Offences", in Turner ed., *The Modern Approach to Criminal Law* (1945) 262, 270.
75. Like *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471 C.A.

> unconscious (e.g. goes to sleep quite normally at night) is there a "sale" when I put in my coin and take the cigarettes? If you say there is, consider the case where, unknown to him they were contaminated and selling contaminated cigarettes was an offence of strict liability. Would he commit an offence? Would it be relevant whether or not he was asleep?

In such a case, quite apart from the fact that the "unconsciousness" in the example is not "automatism" as the term is understood in the context of the "defence of automatism",[76] there is no relationship of cause and effect either between the automatism and the "sale" or between the automatism and the contamination; exactly the same thing could have happened if the owner had been wide awake sitting in his office in another part of town. That he was asleep must therefore be quite irrelevant. But what, to take a variation on these facts, if the owner in a state of somnambulism had filled his machines with cigarettes which, if he had been awake, he would have known to be contaminated? In that case the "act" of filling the machine—the last relevant act by the defendant leading up to the sale—would have been involuntary and, it is submitted, excusable. In such a case there is a relationship of cause and effect between the automatism and the *actus reus* (at least so far as the contamination, and perhaps also as far as the "sale" is concerned).

If the distinctions made in the preceding paragraphs are meaningful it is possible to draw the conclusion from them that at least in the normal cases of strict liability (unlawful sales, driving offences and the like) the defence will apply where it can be said that if the defendant had been acting voluntarily his conduct would have been different—he would not have gone through the stop sign; his car would not have continued without a rear light; his machine would not have contained contaminated cigarettes.

Offences of vicarious liability and status offences

It has already been mentioned[77] that there are some cases in which the defendant may be convicted although he has not been physically responsible for the *actus reus*. These exceptions fall broadly into two categories, "offences of vicarious liability" and "status offences". The essence of an offence of vicarious liability is that the person in control of an enterprise is made criminally liable for the conduct of his servant even when the conduct is without his knowledge and contrary to his express instructions.[78] There are two distinct varieties of offence

76. Cf. *Foster* v. *Aloni* [1951] V.L.R. 481 F.C. (the fact that the defendant was asleep at the relevant time may not excuse him if his electrical appliance contravenes the regulations).
77. See text above n.1 ante.
78. Burns, "Vicarious Liability in the Criminal Law" (1966) 1 Otago L.R. 134; Aikman and Clark, "Some Developments in Administrative Law, (1966)", (1967) 29 N.Z.J.P.A. 48.

described as "status offences"[79] which appear from some authorities to dispense not only with the question of mental processes but also with the need for an act. The first of these varieties occurs where the defendant is charged with "being" or "being found" in a particular physical situation—being an alien to whom leave to land had been refused who was found in the United Kingdom,[80] being found drunk in a public place,[81] or being in charge of a motor-vehicle whilst under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle,[82] or being on a motorway.[83] The second type of status offence is that where the defendant is not responsible personally or through his servants for doing or failing to do something but is responsible for the activities of his animals[84] or children,[85] or, in one case,[86] his ship.[87]

In the present state of the English and New Zealand authorities[88] it is extremely difficult to import the requirement of a "voluntary act" into the definition of these offences and it seems unlikely that the defence of automatism has any practical application in this area.

Knowledge of oncoming automatism

A final possible limitation of the defence arises in the situation where a person continues with his activities although he has noticed an approaching "attack" of automatism.

This limitation appears from the discussion in some of the driving cases. A typical situation is that of the driver who feels himself becoming drowsy but nevertheless continues driving, falls asleep and commits an offence. If he does not stop, his sleep will be no defence to a charge involving negligence. On the other hand, if sleep comes suddenly, without warning, it will provide a defence. In *R.* v. *Scarth*[89] the defendant fell asleep while driving along a country road late at night and his car collided with three men, killing them. He was convicted of manslaughter but on appeal a new trial was ordered. Scarth's counsel had argued at the trial that being asleep when the accident happened was a complete defence. The trial judge directed the jury that sleep of itself was no defence and this direction was held to be

79. Howard, *Strict Responsibility*, (1963), 46ff.
80. *R.* v. *Larsonneur* (1933) 24 Cr. App. R. 74 C.C.A.
81. Police Offences Act 1927, s.41.
82. Transport Act 1962, s.59; *Purdie* v. *Maxwell* [1960] N.Z.L.R. 599; *Stoop* v. *Police* [1961] N.Z.L.R. 320.
83. The Motorways Regulations 1950, (S.R. 1950/230), reg.3.
84. Dogs attacking persons, rushing at vehicles, frightening stock (Dogs Registration Act 1955, s.24); Straying Cattle (Impounding Act 1950, s.33); and see *Police* v. *Taylor* [1965] N.Z.L.R. 87.
85. Failing to attend school, (Education Act 1964, s.120).
86. *Helleman* v. *Collector of Customs* [1966] N.Z.L.R. 705.
87. Fitted with a smuggling device, (Customs Act 1913, s.216; Customs Act 1966, s.250).
88. See authorities in nn.78-86, but cf. in the case of status offences *Snell* v. *Ryan* [1951] S.A.S.R. 59 and *O'Sullivan* v. *Fisher* [1954] S.A.S.R. 33.
89. [1945] St.R.Qd. 38 C.C.A. See also *People* v. *Decine* (1956) 2 N.Y. 2d. 133 (knowledge that subject to epilepsy).

insufficient. He ought to have explained to the jury that the important point was whether the circumstances under which Scarth fell asleep *before* the accident amounted to an answer to the charge:

> When a *prima facie* case of criminal negligence has been proved against the driver of a motor vehicle, evidence which showed that the driver of the motor vehicle was asleep at the relevant time, but showed nothing more than this, would not, in my opinion, destroy or weaken the *prima facie* case against him. On the contrary it would strengthen it. But if a driver of a motor vehicle fell asleep at the wheel without any prior warning of his inability to keep awake, and in circumstances where a reasonably careful driver would not have been aware that he was likely to fall asleep, and as a result of his so falling asleep personal injury or death was caused to some other person, no criminal liability would, in my opinion, attach to the driver of the motor car . . . [90]

Lord Goddard C.J. in *Hill* v. *Baxter*[91] made the same point very neatly with reference to a charge of dangerous driving: "If a driver finds that he is getting sleepy he must stop." The same rule must apply to the driver who finds some illness coming on, or who is feeling the effects of a blow on the head. The best way to explain this principle is that while the defendant may not have been "driving" (and thus not driving dangerously) at the stage when he was in a state of automatism, he was driving at the stage when he felt himself becoming sleepy and to continue driving at that stage was negligent. Where the charge is not simply one of dangerous or negligent driving but is one of, say, negligent driving causing death there is a theoretical gap in causation because at the time of the impact the defendant is not "driving" although shortly before that he was both "driving" and "driving negligently". The courts[92] have shown themselves prepared to ignore any theoretical difficulties concerning the "gap" and relate the negligent driving *before* automatism to the death *after*. There is no case which clearly states the reason for doing so but perhaps the concept of foreseeability provides the key—one who feels himself becoming sleepy must reasonably be able to foresee that if he does fall asleep injury may ensue to some other road user.

Does the same reasoning apply in cases of strict liability? There is no authority in point, but suppose that the defendant is charged, like the defendant in *Hill* v. *Baxter*,[93] with failing to stop at a "Halt" sign. The evidence is that he had suffered a blow on the head, felt dizzy, but decided to take a chance. He lost consciousness just before the sign. There is no doubt that he could be convicted of an appropriate driving

90. Ibid., 42. See also *Kay* v. *Butterworth* (1945) 61 T.L.R. 452,453 per Humphreys J.: " . . . the driver must have known that drowsiness was overtaking him."
91. [1958] 1 Q.B. 277, 282; see also *R.* v. *Sibbles* [1959] Crim.L.R. 660,661 per Paull J.; *Watmore* v. *Jenkins* [1962] 2 Q.B. 572 D.C.
92. See esp. *R.* v. *Scarth*, supra n.89 and *R.* v. *Sibbles*, supra n.91.
93. [1958] 1 Q.B. 277 D.C.

charge involving negligence[94] because he was certainly driving at the stage of his carelessness i.e. when he felt dizzy but took a chance. Now, if the reasoning in *Hill* v. *Baxter* is applied literally to the present facts the defendant must be acquitted unless it is possible to argue that his negligence at the earlier stage can be used to fill the "gap" between his "driving" just before the sign and his "non-driving" at the sign. Perhaps it is possible to relate his failure back to the earlier point of time by arguing that he ought to have foreseen that if he continued driving he might go through a "Halt" sign or commit some other offence against the traffic laws and that he has therefore negligently committed the offence. Such reasoning is undoubtedly tortuous but it is submitted that it could well be the route followed by the courts when faced squarely with the present problem.

It should be added that the person who negligently "carried on" is likely in practice to make an appearance in those offences of strict liability that are found in the motoring field. There appears to be no other context in which such problems could arise in any practical sense.

R. S. CLARK.

94. In N.Z. probably using a motor vehicle carelessly: Transport Act 1962, s.60.