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Behaviour that underpins non-pathological criminal incapacity and automatism: Toward clarity for psychiatric testimony

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ABSTRACT

Psychiatric expert testimony is challenging in cases of violence when the accused person submits a defence that he or she was so overwhelmed by emotions triggered by an upsetting event that his or her violent behaviour was an uncontrollable consequence of the emotions. This defence is usually presented in terms of an automatism particularly not attributed to a mental disorder. Clouding testimony in these cases is the various definitions of both automatism and mental disorder—definitions by which the jurisprudential distinction is made between a sane and an insane automatism, or pathological and non-pathological incapacity (NPCI).

To avert testimony that is tainted from the very beginning by the lack of agreed definitions, this article proposes that psychiatrists focus in their assessment and testimony on particularly the behaviour as being distinct from the jurisprudential concerns whether that behaviour constitutes an automatism and whether it is (not) attributed to a mental disorder. This focus on the behaviour affords clarity by which the properties of the behaviour may be examined theoretically and clinically in terms of behaviour therapy, specifying accordingly its antecedents, consequences, topography, intensity, latency, duration, frequency, and quality.

So informed, the behaviour that underpins NPCI and automatism is described here as emotionally triggered involuntary violent behaviour about which testimony may be given distinct from whether the behaviour is (not) causally attributed to a mental disorder, and from jurisprudential concerns with accountability.

1. Introduction

Psychiatric expert testimony is challenging in cases of violent crimes, usually murder, for which the accused person submits a defence to the effect that he or she was so overwhelmed by emotions triggered by an upsetting event that a court of law should not find him or her guilty of an offence, because the behaviour was in some way or another involuntary owing to the uncontrollable effects of the emotions. Sometimes, these cases are referred to as crimes of passion. This defence goes hand in hand with the insistence that there had been no mental disorder at the time of the alleged offence.

This article is about testimony on the behaviour that is relevant to a defence generally known as that of "psychological blow automatism" (Bourget & Whitehurst, 2004; Campbell, 1980–1981; Livingston & Verdun-Jones, 2002–2003; Samuels, O'Driscoll, & Allnutt, 2007; Wells & Wilson, 2004). It highlights the apparently unresolvable divergences in definitions of both automatism and mental disorder in these cases—definitions by which the jurisprudential distinction is made between a sane and an insane automatism, or pathological and non-pathological incapacity (NPCI).

To avert confusion caused by the divergent definitions, this article proposes that psychiatrists focus principally in their assessment and testimony on particularly the behaviour as being distinct from the jurisprudential concerns whether that behaviour constitutes an automatism and whether it is attributed to a mental disorder. We argue that this focus, informed by behavioural theory, affords potentially crucial testimony that is not tainted from the very beginning by the lack of universally agreed definitions for both an automatism and a mental disorder. Furthermore, a clinical assessment focussed on the behaviour is suitably within the scope of psychiatric expertise, whereas it is for courts of law to decide whether the behaviour counts as a defence in terms of legal requirements for (if still important) an automatism, or other jurisprudential considerations.

Although arguably also relevant to other jurisdictions, this article is mainly based on the challenges South African psychiatrists experience when evaluating, reporting, and giving expert testimony in these

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cases. Hence, the South African jurisprudential provisions are described first, before highlighting different takes, affected by the jurisprudential concern with accountability, on what constitutes an automatism.

2. The "insanity" defence in South Africa and non-pathological criminal incapacity (NPCI)

Criminal courts in South Africa rely on psychiatric testimony for purposes of sections 78 and 79 of the Criminal Procedure Act No. 51 of 1977, as amended[2] (which will be referred to as the Criminal Procedure Act). These sections address whether the accused person was lacking in an appreciation of the wrongfulness of his or her behaviour at the time of the offence, or whether he or she could not act in accordance with an appreciation of wrongfulness. By this testimony, the court may find the accused not accountable and hence not guilty. Whether the accused poses a threat to others has no bearing hereto (contra *R v Luedcke*, 2008).[3]

The most commonly used Section 78(5)(a)(b) makes provision for lack of capacity owing to specifically "a mental illness or mental defect" that rendered an accused incapable of "acting in accordance with an appreciation of the wrongfulness of his or her act or omission". The less commonly used Section 78(5)(c) makes provision for lack of criminal capacity not caused by a mental illness or mental defect but "for any other reason". Whether rendered incapable by "a mental illness or mental defect" or "any other reason" has a major jurisprudential implication. The Criminal Procedure Act stipulates that when a court finds criminal incapacity caused by a mental illness or defect, the court must find the accused not guilty and has the option to order that the accused be detained under appropriate circumstances (usually a psychiatric hospital), but when an accused is found not guilty on grounds of incapacity owing to "any other reason" he or she is not only fully acquitted but also released back into society without any legal consequence. This pertains irrespective of the seriousness of a charge (Snyman, 2008: 56–57).

Relevant to Section 78(5)(c) is a South African legal term called non-pathological criminal incapacity (NPCI). This phrase was coined in the Supreme Court of Appeal in the case of *S v Laubscher* by Joubert JA (Joubert Justice of Appeal). By creating the term, NPCI, Joubert JA wanted to distinguish between a defence of incapacity not attributed to mental illness or immature age (Snyman, 2008: 162–169). The latter is also called a "sane automatism" (Snyman, 2008: 56) that is triggered by intense emotional distress. Other phrases that have been used in South African courts by mental health professionals and lawyers alike are "emotional storm" and "acute catathymic crisis",[4] "emotional flooding of the mind";[5] "non-pathological automatism" and "psychogenic automatism".[6]All of these phrases, refer to a defence that may elsewhere be better known as that of a "psychological blow automatism" (Bourget & Whitehurst, 2004; Campbell, 1980–1981; Livingston & Verdun-Jones, 2002–2003; Samuels et al., 2007; Wells & Wilson, 2004).

The term NPCI was intended to give clarity on matters regarding criminal incapacity not attributed to a mental illness or defect. Instead it caused confusion that was reflected in High Court decisions and academic writing. Navsa JA of the Supreme Court of Appeal described and criticised this state of affairs in *S v Eadie*.[7] Perturbed by the "misapplication" of decisions by the Supreme Court of Appeal, Navsa JA said, "The time has come to face up to the fact that in some instances our courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court [the SCA]."[8] He then clarified NPCI by insisting that it should be understood as an automatism.[9] However, he did not define an automatism, nor was it defined in the case of *S v Wiid* for which the defence of NPCI turned out to be successful.[10] Several expert witnesses have since testified inconsistently on what an automatism would be.[11]

3. Inconclusive state of affairs on what constitutes an automatism

A number of authors have described the inconclusive state of affairs in their review of definitions for automatisms (see for example Fenwick, 1990; Arboleda-Flórez, 2002; Yeo, 2002; Coles, 2000; McLeod, Byrne, & Aitken, 2004, and Campbell, 1980–1981). Arboleda-Flórez wrote that, "Automatism in law, therefore, is fraught with deep social and political implications, let alone scientific controversies about its existence outside of a narrow range of neurological and psychiatric conditions" (Arboleda-Flórez, 2002). In forensic psychiatry the confusion is expressed for example by Fenwick (1990), who writes "Where the professions [referring to the legal and medical professions] differ is on what constitutes automatism and what constitutes unconsciousness, and this remains a point of conflict".

Adding to these reviews in describing the inconclusive state of affairs, we compare four well-established psychiatric definitions of automatism, namely those of Briscoe et al. (1993:56–59); Simon (2005: 3969–3987), Kaliski,[12] and Sadock (2009, p 921). This serves the purpose to highlight the divergences as well as articulate the behaviour common to these definitions, that is, the behaviour that underpins automatism.

In summary, these four definitions of automatism make reference to behaviour that is done while consciousness is impaired; behaviour done without full awareness; behaviour about which one has no knowledge; behaviour that is not willed, planned, purposeful, that is not produced intentionally, and for which cognitive functions are absent.

Unconscious behaviour is a central requirement for behaviour to be considered an automatism according to Simon (2005: 3969–3987) and Briscoe et al. (1993: 56–59), but not so in the descriptions of Kaliski (2006: 107–108) and Sadock (2009 p. 921). The issue on what is meant by "unconscious" was evident during the trial of the Canadian case *R v Stone*[13] where "unconsciousness" meant "flat out on the floor" to a psychiatrist,[14] but for the lawyers it meant "not knowing what one is doing".[15] In some cases unconscious necessarily means impaired consciousness, such as is found during sleepwalking, concussion, and an epileptic seizure (Briscoe et al., 1993: 56–59; Bazil and Pedley (2010); Bratty v Attorney General of Northern Ireland, 1961;[16] *R v K*, 1970[17]). In other cases unconscious does not necessarily mean impaired consciousness, but may also involve dissociative states (Fenwick, 1990; Harding, 1993: 135; Bourget & Whitehurst, 2004; *R v Stone*[18]).

[2] *Criminal Procedures Act, No. 51 of 1977*, retrieved May 04, 2015 from http://www.justice.gov.za/legislation/acts/1977-051.

[3] *R. v. Luedecke*, 2008 ONCA 716 (CanLII). Retrieved on 2015-05-13 from http://www.canlii.org/en/on/onca/doc/2008/2008onca716/2008onca716.html.

[4] See for example *S v Nursingh* (2) SACR (D) 331 (1995).

[5] See for example *S v Smith* (1) SACR (A) 130 (1990).

[6] See for example *S v Henry* (1) SACR (SCA) 13 (1999). Retrieved on 2015-05-13 from http://www.saflii.org/za/cases/ZASCA/1998/109.html.

[7] *S v Eadie* 2002 (3) SA 719 (SCA) at paragraphs 52–61. Retrieved May 05, 2015 from http://www.saflii.org/za/cases/ZASCA/2002/24.html.

[8] *S v Eadie* supra at paragraph 61.

[9] *S v Eadie* supra at paragraph 70.

[10] *S v Wiid* 1990 (1) SACR 561 (A).

[11] For Kaliski's description of automatism see *S v Eadie* supra at paragraph 14. Also see *S v Potgieter* (1) SACR (A) 61 1994, pg. 84–85, and Kaliski, 2006:107–108.

[12] See footnote 11.

[13] *R v Stone*. Judgments of the Supreme Court of Canada. *R v Stone* [1999] 2 S.C.R. 290. Retrieved Jan. 22, 2015 from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1705/index.do

[14] *R v Stone* supra at paragraph 32.

[15] *R v Stone* supra at paragraph 32.

[16] *Bratty v Attorney General of Northern Ireland* [1961] UKHL 3 (03 October 1961). BALII. The whole case needs to be studied, but see especially Lord Denning's remarks p. 7–11. Retrieved March 14, 2012 from http://www.bailii.org/uk/cases/UKHL/1961/3.html

[17] *R v K Ontario High Court of Justice*. In: R. v. Stone supra at paragraph 31.

[18] *R v Stone supra*. The whole verdict is applicable, but see for example p. 44, 109–110, 115.