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Sexsomnia – excusable or just insane?

Colleen Davis*

In a number of recent cases, people charged with sexual offences have raised sexsomnia as a defence. Sexsomnia is a variant of sleepwalking, and the gist of the defence is that the accused's conduct was involuntary, carried out while in an automatistic state. The law recognises two types of automatism: sane and insane. The former results in a complete acquittal whereas the latter leads to a special verdict of not guilty on the grounds of insanity or mental illness/impairment/disorder. Judges in Canada, England and Australia have relied on tests such as the internal/external and continuing danger tests to determine whether automatism is caused by a disease of the mind, and therefore insane. However, these tests are unhelpful in sexsomnia cases and the outcomes have been inconsistent. The recent Canadian Court of Appeal case of R v Luedecke provides a useful model for future sexsomnia cases.

INTRODUCTION

There have been several cases in recent years in which defendants charged with rape or sexual assault have raised sexsomnia as a defence. Sexsomnia is a form of sleepwalking,[1] and in cases where sexual conduct during sleepwalking results in criminal charges, many defendants argue that their acts were involuntary; that is, that they were in an automatistic state.

The law recognises two types of automatism: sane, which results in complete acquittal if pleaded successfully; and insane automatism, which leads to the special verdict of not guilty on the grounds of insanity.[2] It is not always easy to distinguish between the two, and judges have relied on a number of tests to determine whether automatism in a particular case is the product of mental disease, and therefore insanity. The two main tests are the internal/external approach, in which automatism is sane if it is caused by some external factor, and the continuing danger approach, in which a cause that is likely to recur also points to insane automatism. The sane/insane automatism distinction, as well as the tests used to differentiate between the two, have been criticised by doctors and lawyers alike. This article argues that the tests are particularly unhelpful in sexsomnia cases, and that the challenges these cases pose for the law highlight the need for reform of automatism in Australia and England. The current Canadian approach to sexsomnia cases provides a useful model in this respect.

The article begins with an explanation of sexsomnia before turning to an analysis of how the disorder has been used as a criminal law defence in Canada, England and Australia. It will look at how the internal/external and continuing danger (referred to in Australia as "recurrence") tests have been applied in cases to come to different conclusions about the legal status of sexsomnia. It then turns to the 2008 case *R v Luedecke*,[3] in which the Ontario Court of Appeal sets out a revised approach to sexsomnia cases that addresses concerns about the tests and that has resulted in a more consistent and coherent approach in later Canadian sexsomnia cases. In England, the Law Commission in 2013 released a Discussion Paper about proposed reform of the insanity and automatism defences, and some of the proposals mirror the current Canadian approach.

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[1] Xu M, "Sexsomnia: A Valid Defense to Sexual Assault?" (2009) 12 *Journal of Gender, Race and Justice* 687 at 689.

[2] In Canada, the insanity defence has been replaced with a defence of "not criminally responsible on the grounds of mental disorder". Some Australian jurisdictions have replaced the word "insanity" with terms such as "mental illness," "mental disorder", and "mental impairment". These reforms will be discussed below.

[3] *R v Luedecke* 2008 ONCA 716; (2008) 93 OR (3d) 89.

WHAT IS SEXSOMNIA?

Sexsomnia is a variant of sleepwalking, which in turn is a parasomnia.[4] Parasomnias are disorders in which the brain's sleep-wake systems function in an unco-ordinated manner, where behaviour is performed during sleep, or in the transition between sleep and wakefulness. The brain is not fully awake: some parts that should not be active are active, but others that should be deactivated are not. Some physiological systems are activated at inappropriate times, but the parts of the brain responsible for creating memories and consciousness are impaired. A sexsomniac is not consciously aware and has no memory of what happened.

Sexsomnia is classified as a type of sleepwalking because it comes out of non-rapid eye moment sleep (NREM) sleep.[5] There are two different states during sleep – NREM and rapid eye movement sleep. The body alternates between these different states during sleep, and research shows there is extensive re-organisation of central nervous system activity during the transition from one to the other.

Behaviour during parasomnic episodes can be quite complex. According to Fenwick, sleepwalkers can negotiate around obstacles, carry out searching movements with their eyes, and appear to be highly responsive to the environment.[6] A range of sexual behaviour can occur during sexsomnia, including masturbation, fondling, anal and oral sex, heterosexual and homosexual intercourse, sexual or sexualised moaning, vocalisation (dirty talk), and sexualised body movements, such as pelvic thrusting. The behaviour is often present in peculiar or bizarre circumstances.[7] A sexsomniac's sexual preferences and behaviour can differ from those engaged in while awake.[8] There have been cases where people are heterosexual when awake, but engage in homosexual sexsomnia. The nature of a person's sexual behaviour can also change. A person is sometimes more enthusiastic, carefree or experimental, but can also be more gentle and affectionate, or aggressive and violent. Some females find their partners' sexsomnic behaviour frightening.

The term "sleep-sex" was first described by a group of Canadian psychiatrists in 1996.[9] In 2003, this group came up with the term "sexsomnia" to describe the "new clinical entity".[10] It is also described occasionally as "somnambulistic sexual behaviour".[11] There are sporadic earlier reports in the medical literature, including a 1955 paper about the acquittal of an 18-year-old boy who committed homosexual assault while sleepwalking.[12] A few cases were reported in academic literature in the 1980s,[13] including a 1987 report about a homosexual assault by a sleepwalking airman on a colleague. The case was dismissed. By October 2012, about 50 cases had been reported,[14] but

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[4] Shapiro CM, Trajanovic NN and Fedoroff JP, "Sexsomnia – A New Parasomnia?" (2003) 48(5) *The Canadian Journal of Psychiatry* 311. See also Xu, n 1; Pressman MR, "Common Misconceptions about Sleepwalking and Other Parasomnias" (2011) 6(4) *Sleep Medicine Clinics* xiii; Trajanovic NN, Mangan M and Shapiro CM, "Sexual Behaviour in Sleep: An Internet Survey" (2008) 42(12) *Social Psychiatry and Psychiatric Epidemiology* 1024 at 1025; Bourget D and Whitehurst L, "Amnesia and Crime" (2007) 35(4) *Journal of the American Academy of Psychiatry and the Law* 469 at 473; Fenwick P, "Somnambulism and the Law: A Review" (1987) 5(3) *Behavioral Sciences & the Law* 343.

[5] Pressman, n 4, p xiv. See also Mahowald MW and Schenck CH, "Parasomnias: Sleepwalking and the Law" (2000) 4(4) *Sleep Medicine Reviews* 321 at 322, 326.

[6] Fenwick, n 4 at 346.

[7] Trajanovic et al, n 4; Mangan MA and Reips U, "Sleep, Sex, and the Web: Surveying the Difficult-to-Reach Clinical Population Suffering from Sexsomnia" (2007) 39(2) *Behavior Research Methods* 233; Buchanan PR, "Sleep Sex" (2011) 6(4) *Sleep Medicine Clinics* 417.

[8] Buchanan, n 7; Ariño H et al, "Sexsomnia: Parasomnia Associated with Sexual Behaviour During Sleep" (2014) 29(5) *Neurologia* 146 at 150.The difference in behaviour is reported by the person's sexual partner.

[9] Badawy RS, "Sexsomnia: Overcoming the Sleep Disorder Defense" (2010) 22(4) *National Centre for Prosecution of Child Abuse Update* 1.

[10] Shapiro et al, n 4 at 312.

[11] Buchanan, n 7.

[12] Langeluddeke A, "Delite in Schlafmstande" (1955) *Der Nervenarzt*, 26 at 28-30, discussed in Fenwick, n 4 at 353.

[13] Mangan and Reips, n 7 at 233; Buchanan, n 7; Fenwick, n 4 at 353.

[14] Ariño et al, n 8.

researchers suggest the condition is more frequent than initially suspected.[15] For example, a Norwegian study found that 7.1% of 1,000 randomly selected adults reported sexual acts during sleep.[16] Other studies suggest the incidence is considerably less. Sleepwalking affects between 2% and 4% of adults, and sexsomnia is less common.[17]

Sexsomnia is not widely reported, partly because people are surprised, ashamed and humiliated. However, it has come under medical and legal attention in recent years, partly because of the potentially serious legal consequences and marital repercussions.[18] Because sexsomnia is becoming used increasingly in child abuse cases involving sexual assault,[19] writers such as Badaway caution that prosecutors and investigators must understand and be able to distinguish intentional abuse from legitimate sexsomnia.[20]

The legal fraternity traditionally has been cautious of any defence in which it is claimed the accused has no recollection of the offence. Because automatism is easy to raise and difficult to disprove, judges have urged that the defence be viewed with some scepticism. In the Queensland case of *Cooper v McKenna*, Stable J said automatism is a defence that must be closely scrutinised, because blackout "is one of the first refuges of a guilty conscience and a popular excuse".[21] Similarly, in the Canadian case of *R v Szymusiak*, Schroeder JA stated that automatism "is a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel".[22]

It is therefore not surprising that some people take a cynical view of sleepwalking defences, and sexsomnia in particular.[23] However, it is not, as Shanoff points out, "utter nonsense dreamed up by defence lawyers with the help of psychiatrists".[24] The condition was recognised in 2005 in the International Classification of Sleep Disorders (ICSD) as a variant of the NREM parasomnias.[25] The difficulty is that it is impossible to diagnose sexsomnia definitively[26] or to prove retrospectively that a person was sleepwalking when sexual acts were performed.[27] Pressman suggests that a "perfect

[15] Shapiro et al, n 4.

[16] Bjorvatn B, Grønli J and Pallesen S, "Prevalence of Different Parasomnias in the General Population" (2010) 11(10) *Sleep Medicine* 1031 at 1586.

[17] Editorial, "Sexsomniacs Puzzle Medical Researchers", *ABC News* (online) (26 October 2006); Ohayon MM et al, "Prevalence and Comorbidity of Nocturnal Wandering in the US Adult General Population" (2012) 78(20) *Neurology* 1585 say older studies report that about 2.5% of adults sleepwalk but recent studies suggest the incidence is higher, about 3.5%.

[18] Badawy, n 9; Béjot Y et al, "Sexsomnia: An Uncommon Variety of Parasomnia" (2010) 112(1) *Clinical Neurology and Neurosurgery* 72; Ariño et al, n 8 at 151.

[19] Many Canadian cases in which sexsomnia has been raised have involved child victims. They include a father who was acquitted of sexually touching his nine-year-old daughter; a 32-year old man who was acquitted of sexually assaulting a young girl; a 35-year-old who was convicted of sexually assaulting a 12-year-old girl (see Shapiro et al, n 4); a 26-year-old man with a personal and family history of sleepwalking but no prior criminal or paedophilic history who was acquitted in 1996 of sexually assaulting a four-year-old girl because he "was not conscious of what he was doing" (see Schenck CH, Arnulf I and Mahowald MW, "Sleep and Sex: What Can Go Wrong? A Review of the Literature on Sleep Related Disorders and Abnormal Sexual Behaviors and Experiences" (2007) 30(6) *Sleep* 683 at 697); and a 49-year-old man who was found guilty in 2004 of sexually assaulting a 14-year-old girl, even though his girlfriend testified that he often initiated sex with her while sleeping (see Bourget and Whitehurst, n 4 at 474).

[20] Badawy, n 9 at 1-2.

[21] *Cooper v McKenna; Ex parte Cooper* [1960] Qd LR 406 at 419.

[22] *R. v Szymusiak*, [1972] 3 OR 602 at 608.

[23] See, for example, Jamieson A, "Victim Speaks Out After Man Cleared of Rape While Sleepwalking", *Daily Telegraph* (15 November 2008).

[24] Shanoff A, "Sexsomnia Verdict Appealed", *Toronto Sun* (9 November 2008).

[25] Schenck et al, n 19 at 683; Buchanan, n 7; Ariño et al, n 8 at 149.

[26] Badawy, n 9 at 4.

[27] Mahowald and Schenck, n 5 at 322.

storm" of three factors is needed to produce an episode of sleepwalking: a genetic predisposition (family history), priming or trigger factors (such as sleep deprivation and situational stress), and provoking factors (for example, noise or touch).[28]

Almost all adults who experience parasomnias report a history during childhood, and about 80% of sleepwalkers also have a family history of parasomnic disorders.[29] Sleepwalking runs in families and has a genetic basis. Late onset sleepwalking is rare, and experts are suspicious where an episode of sleepwalking in an adult is said to be the first episode.[30] A personal and family history of parasomnias is therefore an important consideration in distinguishing genuine from feigned sexsomnia.

A significant number of participants in a 2008 sexsomnia study reported suffering from psychiatric disorders, mainly depression, anxiety and bi-polar disorder.[31] A second study, four years later, confirmed that people with alcohol dependence, or major depressive or obsessive-compulsive disorder are more likely to sleepwalk.[32]

Badawy suggests that investigators should scrutinise the actions of an accused both before and after the offence, particularly in cases involving sexual assaults on children. For example, did the accused pull up the child's pants after the assault, apologise to the child, tell the child not to tell anyone or try to conceal the behaviour from others?[33] In *US v Harvey*, a sexsomnia defence was rejected based on this type of evidence.[34] A father, who sexually assaulted his 12-year-old daughter, had pulled her panties down, and then back up when she woke up, and he apologised to his daughter later in the day, saying "it'll never happen again". In genuine sexsomnia cases, the accused typically has no memory of what happened, and makes no attempt to conceal the incident. Almost always the behaviour is out of character.[35] Badawy suggests that if the abuse was not intended, an accused may seek immediate treatment or counselling.[36]

There are various recognised trigger factors for sexsomnia, including excessive fatigue, sleep deprivation and stress. However, the role of alcohol as a trigger for sleep sex episodes is unclear: sleep disorder experts disagree strongly.[37]

As far as provoking factors are concerned, physical contact with another person in bed appears to be an important precipitant of sexsomnia, present in 64% of cases in one study.[38]

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[28] Pressman, n 4, p xv.

[29] BPAC NZ, "Sleep Disturbances: Managing Parasomnias in General Practice" (2012) 48 *Best Practice Journal* 17; Trajanovic et al, n 4 at 1026; Bourget and Whitehurst, n 4 at 473; Badawy, n 9 at 5.

[30] Ebrahim IO, "Somnambulistic Sexual Behaviour (Sexsomnia)" (2006) 13 *Journal of Clinical Forensic Medicine* 219 at 222.

[31] Trajanovic et al, n 4 at 1027.

[32] Ohayon et al, n 18 at 1586.

[33] Badawy, n 9 at 5.

[34] *US v Harvey* 66 MJ 585 (AF Ct Crim App, 2008) at 586-587, discussed in Badawy, n 9 at 5.

[35] Ebrahim, n 30 at 221.

[36] Badawy, n 9 at 5.

[37] According to Pressman MR et al, "Alcohol, Sleepwalking and Violence: Lack of Reliable Scientific Evidence" (2012) (Oct) *Brain* 1, alcohol is not a precipitant. However, Ebrahim, n 30 at 222 argues that alcohol has a unique effect on sleep, with increased deep sleep in the first half of the night. The conflicting opinions were at the forefront of an October 2013 Canadian case, in which Shapiro, who is credited with coining the term "sexsomnia", testified that alcohol triggered a man's sexual assault of his young daughter, but Pressman rejected this. The former conceded that a "heavyweight champion" had yet to be crowned in the divisive debate but agreed with the prosecutor that there had not yet been a definitive clinical study linking alcohol consumption to incidents of parasomnia. See Spears T, "Academics Clash Over Sexsomnia Defence in Sexual Assault Trial", *Ottawa Sun* (8 October 2013). This research would appear to be important given that excessive alcohol consumption is present in many sexsomnia cases, including 14 of the 18 known cases in England since 1996.

[38] Schenck et al, n 19 at 685.

Some sleep experts claim that the cause of sexsomnia can often be identified after clinical and polysomnographic (PSG) evaluations, and can then be effectively treated.[39] A study by Shapiro et al showed features of parasomnia on PSG in all nine participants.[40] However, others say there are no PSG findings that conclusively indicate a person is prone to sleepwalking.[41]

SEXSOMNIA AS A CRIMINAL LAW DEFENCE

Cases in which sexsomnia has been raised as a defence have been reported in the media from several countries, including Canada, England, Australia, the United States,[42] and Scandinavia.[43] Because trial decisions rarely appear in legal reports, and there are only a handful of appeal decisions (which are reported), the legal reasoning is difficult to discern. In some cases, it seems that judges and juries have come to the conclusion that the accused was malingering, despite medical evidence about sexsomnia, and have returned a guilty verdict. In other cases, courts appear to have accepted medical evidence that the accused suffered from a sleep disorder and the accused was acquitted. There is little mention of the legal concept of automatism, and apparently scant consideration of whether sexsomnia is sane or insane automatism.

In cases where sexsomnia is raised as a defence to a rape or sexual assault charge, the plea essentially is that the conduct of the accused was involuntary because he or she was in an automatistic state at the time the offence was committed. It is a fundamental principle of criminal law that an accused cannot be convicted and punished for an act that is involuntary.[44] Automatism is one type of involuntary conduct,[45] and is particularly relevant in the context of sleepwalking and other sleep disorders, such as sexsomnia. A widely accepted legal definition is that of Viscount Kilmuir in *Bratty v Attorney General for Northern Ireland*: "it means unconscious, involuntary action, and it is a defence because the mind does not go with what is being done".[46]

Some jurisdictions (such as Canada and England) use the term "involuntary", whereas others refer to "unwilled", such as s 23(1)(a) of the Queensland *Criminal Code*. However, the terms have the same meaning. Voluntariness requires that "the physical act of the accused must be the conscious product of a freely operating will. It is an act that the accused was aware he or she was doing and meant to do".[47] "Unwilled" has been defined as "a choice, consciously made, to do an act of the kind done".[48] These and other judicial definitions of unwilled or involuntary conduct focus on lack of consciousness. If this approach is correct, it could be argued that sleepwalking falls outside automatism because

[39] Schenck et al, n 19 at 685.

[40] Bourget and Whitehurst, n 4 at 471.

[41] Mahowald and Schenck, n 5 at 332.

[42] In 2009, a Georgia man was charged with molesting a seven-year-old girl. He successfully pleaded sexsomnia and was acquitted. The man had a history of sleepwalking and bizarre behaviour during sleepwalking episodes. See Editorial, "Jury Takes Less than Two Hours to Acquit Defendant", *Lake Oconee* (4 September 2009). In 2007, a Texas man was acquitted of sexually assaulting a 12-year-old: Tompkins J, "Sleep-Sex Defense Leads to Acquittal", *The Facts* (2007). A 45-year old man sexually assaulted his daughter's friend, who was on a sleepover, and was charged with sexual battery. He was a chronic sleepwalker: see Rosenfeld DS and Elhajjar AJ, "Sleepsex: A Variant of Sleepwalking" (1998) 27(3) *Archives of Sexual Behavior* 269 at 272. In 2014, a jury convicted a man charged with molesting a child, despite his sexsomnia plea: Zennie M, "Child Molester Claims He Can't Be Held Responsible for Abusing Girl, Seven, because Suffers from 'Sexsomnia' and Attacked Her in His Sleep", *Colorado Newsday* (22 August 2014).

[43] Reilly J, "Sleeping Swede Who Raped Woman after Drunken Night in Cabin Claims He's Not Guilty because He's Got 'Sexsomnia'", *Daily Mail* (24 March 2012); Editorial, "'Sexsomnia' Sleep Disorder Gets Denmark Man Acquitted of Molestation Charges", *Huffington Post* (4 November 2013).

[44] Yeo S, "Putting Voluntariness Back into Automatism" (2001) 21 *Victoria University of Wellington Law Review* 387.

[45] Tasmania Law Reform Institute, *Intoxication and Criminal Responsiblity*, Final Report No 7 (August 2006) p 18.

[46] *Bratty v Attorney-General for Northern Ireland* [1960] AC 386 at 401.

[47] Tasmania Law Reform Institute, n 45.

[48] *R v Falconer* (1990) 171 CLR 30 at 40 (Mason CJ, Brennan and McHugh JJ).

sexsomniacs are not completely unconscious but rather their consciousness is impaired, and that person has no control over his or her actions, though he or she may appear goal-oriented.[49]

However, some academics and judges take issue with this, saying the key focus in automatism should not be on the state of consciousness or unconsciousness, but rather on whether the conduct was voluntary.[50] If a person is not conscious, that conduct will be involuntary, but lack of consciousness is not required for conduct to be involuntary.[51] As Barwick CJ put it in *Ryan v The Queen*, "it is of course the absence of the will to act or, perhaps, more precisely, of its exercise rather than lack of knowledge or consciousness which … decides criminal liability".[52] The Canadian Supreme Court takes a similar approach.[53]

Sleepwalking is problematic in the context of involuntariness in law, regardless whether the definition focuses on lack of consciousness or lack of voluntariness. Medical research suggests that sleepwalking is "neither obviously voluntary, not obviously involuntary".[54] Sleepwalkers' movements are directed by their own actions, not some external impetus.[55] Therefore, sleepwalking may not meet the legal requirement for complete rather than partial involuntary conduct. Likewise, those definitions of involuntary conduct that focus on unconsciousness require a complete lack of conscious awareness – sleepwalking does not meet this requirement because it is a state of impaired consciousness rather than complete unconsciousness.[56]

Sleepwalking also presents problems for the medico-legal fraternity in the context of automatism, which is one type of involuntary conduct recognised in law. The medical view of automatism is straightforward: automatism is complex behaviour in the absence of conscious awareness or volitional intent,[57] "an involuntary piece of behaviour over which an individual has no control".[58] The behaviour is usually inappropriate, out of character and can be apparently purposeful and directed. There is severe or complete amnesia for the episode.

The legal concept of automatism is more complex, in that the law recognises two types of automatism – sane and insane. Doctors regard these two categories as "lawyer speak" that make little medical sense.[59] The distinction is important in a legal sense, for a number of reasons, not the least of which is that a successful plea of sane automatism results in a complete acquittal, whereas insane automatism leads to a qualified acquittal on the grounds of insanity.[60] A key consideration in determining whether automatism is sane or insane depends on whether the condition was caused by a "disease of the mind".[61]

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[49] Xu, n 1 at 698.

[50] Law Commission, *Criminal Liability: Insanity and Automatism, A Discussion Paper* (23 July 2013) p 96, http://lawcommission.justice.gov.uk/docs/insanity_discussion.pdf.

[51] Law Commission, n 50, p 207; Yeo, n 44 at 405.

[52] *Ryan v The Queen* (1967) 121 CLR 205 at 214.

[53] In *Stone v The Queen* [1999] 2 SCR 290 at 401, Bastarache J said "voluntariness, rather than consciousness, is the key legal element of automatic behaviour".

[54] Horn M, "A Rude Awakening: What to Do with the Sleepwalking Defense?" (2004) 46 *Boston College Law Review* 156.

[55] Horn, n 54 at 172.

[56] Shapiro et al, n 4.

[57] Ebrahim IO and Fenwick P, "Sleep-Related Automatism and the Law" (2008) 48 *Medicine, Science and the Law* 132; Mahowald and Schenck, n 5 at 132.

[58] Fenwick P, "Automatism, Medicine and the Law" (1990) *Psychological Medicine Monograph Supplement* 1 at 4.

[59] Ebrahim I et al, "Violence, Sleepwalking and the Criminal Law: Part 1: The Medical Aspects" (2005) (Aug) *Criminal Law Review* 601 at 603.

[60] Other reasons include the burden of proof, which lies with the prosecution in sane automatism, but with insane automatism it lies with the defence. Also, if an accused raises sane automatism, the prosecution may be unable to compel the accused to be examined by prosecution psychiatrists. This was an issue in *R v Pobar* (unreported, NTSC, Mildren J, 12 February 2010). Both the defence and the prosecution provided evidence from sleep specialists. However, Pobar refused to speak to the prosecution expert. In cases where mental impairment is raised as a defence, the court can compel the accused to be examined by a psychiatrist. However, if the defence is sane automatism, neither the court nor the prosecution could require the defendant to be

Disease of the mind

There is a lack of consensus – medical and legal – whether sleepwalking and sexsomnia are diseases of the mind. In earlier Canadian sexsomnia cases, such as *R v Granger* and *R v Luedecke*, experts in sleep disorders testified that sleepwalking is not a disease of the mind or a medical disorder, opinions that were accepted by the courts.[62] Likewise, in *R v Parks*, and the earlier case of *Rabey v The Queen*, it was held that sleepwalking was not a disease of the mind; and therefore gave rise to a defence of automatism. In *R v Parks*, it was held that "it was not sleepwalking which created the state of mind in which the respondent found himself at the time of the incident, but sleep; and sleep is a normal condition".[63] However, other sleep experts disagree. According to Coles:

> (d)espite the courtroom testimony in *Parks*, the consensus of the scientific community is that it is *sleeping* that is normal: *sleepwalking* is abnormal… it is a condition for which treatment is both sought and successfully applied.[64]

Australian sleep experts, such Deputy Director of Psychiatry at Royal Brisbane Hospital Dr Jill Redden, also regard sleepwalking as a sleep disorder. It is:

> not normal phenomena found during sleep … Sleep disorders are included in the major classificatory schemes in psychiatry and commentary on sleep disorders appears extensively in the psychiatric literature and in most standard textbooks … in my view, a sleep disorder would fit within the meaning of mental disease.[65]

In the recent Victorian case of *Coulson v The Queen*, forensic psychiatrist Professor Patrick Mullen described sleepwalking as "a disorder of sleep".[66]

It appears then that medical thinking has shifted in recent years. Although medical experts testified in earlier cases that sleepwalking was not a disease of the mind, the more accepted view in recent cases is that sleepwalking does fall within this concept. Nonetheless, in English and Australian cases where a plea of sexsomnia was successful, the outcome has been an outright acquittal, suggesting that sexsomnia is sane rather than insane automatism, and therefore not a disease of the mind. The same applies to non-sexual offences committed by sleepwalkers, with earlier cases in Canada,[67] England,[68] Australia,[69] and elsewhere[70] finding that sleepwalking is sane automatism. A notable exception is Lord Lane in *R v Burgess*, who said sleep is a normal condition, but the evidence in the instant case indicates that sleepwalking and particularly violence in sleep, is not normal.[71] In Canada, however, judicial thinking in recent years has become aligned with medical opinion, and sexsomnia is now regarded as a recognised disease of the mind.[72] In England and Australia, the

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examined by the prosecution's psychiatrist. The prosecution psychiatrist can only comment on evidence given by the defence's psychiatrist. The Law Committee proposed amendments to the Code to overcome this. The Northern Territory and South Australia are the only Australian jurisdictions in which courts can compel psychiatric examination for purposes other than determining fitness to plead or mental impairment.

[61] Yeo S, "Clarifying Automatism" (2002) 25(5) *International Journal of Law and Psychiatry* 450.

[62] *R v Granger* 1996 8424 (BC SC); *R v Luedecke* 2008 ONCA 716 at [51].

[63] *R v Parks* [1992] 2 SCR 871 at 880-881 (Lamer CJ). See also *Rabey v The Queen* (1977) 37 CCC (2d) 461 at 471 (Martin JA), affirmed by the Supreme Court: *Rabey v The Queen* [1980] 2 SCR 513.

[64] Coles EM, "Scientific Support for the Legal Concept of Automatism" (2000) 7(1) *Psychiatry, Psychology and Law* 33 at 39.

[65] Ridgway P, "Sleepwalking – Insanity or Automatism" (1996) 3(1) *Murdoch University Electronic Journal of Law* at [38].

[66] *Coulson v The Queen* [2010] VSCA 146 at [82].

[67] See *Rabey v The Queen* [1980] 2 SCR 513; *R v Hartridge* [1967] 1 CCC 346.

[68] *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 at 409 (Lord Denning); *R v Tolson* (1889) 23 QBD 168; Law Commission, n 50, p 110.

[69] *Ryan v The Queen* (1967) 121 CLR 205; *R v Falconer* 1990) 171 CLR 30 at 61.

[70] *R v Ngang* [1960] 3 SALR 363; *R v Cottle* [1958] NZLR 999.

[71] *R v Burgess* [1991] 2 QB 92 at 100.

[72] McIntyre M, "Sexsomnia Voids Criminal Case", *Winnipeg Free Press* (29 June 2013).

position remains unclear, and the focus is simply on medical evidence to determine whether the accused was sleepwalking or not at the time the offence was committed.

There is no doubt that medical evidence is important in cases of automatism. As Devlin J pointed out in the English case of *Hill v Baxter*, "there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent".[73] Medical experts are therefore called upon to provide "medical opinion as to how the mental condition in question is viewed or characterized medically".[74] However, because "disease of the mind" is a legal concept, a trial judge should not rely blindly on medical opinion and must determine what mental conditions are included within the term. In Canada, England and all Australian jurisdictions, it is accepted that it is for the judge to determine what a disease of the mind is in law.[75] The trial judge also has to determine there is any evidence that the accused suffered from an abnormal mental condition that amounts to a disease of the mind.[76] In cases of automatism, determining whether automatism is a disease of the mind, and therefore insane automatism, or whether it is sane automatism, can be difficult.

The two tests

Judges have relied on two tests – the internal/external test, and the recurrence or continuing danger test – to help distinguish between sane and insane automatism. There is an overlap between these two tests, in that the rationale for the former is that automatism arising internal causes is more likely to recur.[77] However, the two tests have treated separately. A third test used in Australia is the sound/unsound mind test.[78] The next part of this article examines how these tests have been applied in Canada before the 2008 Court of Appeal decision in *R v Luedecke*, England and Australia to produce inconsistent outcomes in sexsomnia cases.

Canada

In Canada, there is a clear judicial elucidation that the legal aspect of automatism has two parts: the first is the extent to which an accused should be exempt from criminal responsibility because of mental disorder, and the second relates to public protection in light of the serious harms caused by a person in a mentally disordered state.[79] In assessing the second aspect, the public policy aspects of automatism, Canadian judges have relied on the "internal cause" and the "continuing danger" approaches.[80] Canadian courts refer to the "continuing danger" test, rather than the "recurrence test" but the two are essentially the same. An accused poses a continuing danger if the conduct is likely to recur.[81]

The two tests were applied by the Canadian Supreme Court in the key sleepwalking case of *R v Parks*. The court concluded that sleepwalking is not insane automatism. The decision accorded with

[73] *Hill v Baxter* [1958] 1 QB 277 at 285.

[74] *R v Parks* [1992] 2 SCR 871.

[75] See *R v Parks* [1992] 2 SCR 871 at 879 (La Forest J); *Bratty v Attorney-General for Northern Ireland* [1960] AC 386 at 412 (Lord Denning); *R v Falconer* (1990) 171 CLR 30 at 74 (Toohey J).

[76] *R v Parks* [1992] 2 SCR 871 at 873.

[77] Yannoulidis S, *Mental State Defences in Criminal Law* (Ashgate, 2012) p 39.

[78] Victorian Law Reform Commission (VRLC), *Defences to Homicide, Final Report* (2004) p 245, http://www.lawreform.vic.gov.au/sites/default/files/FinalReport.pdf. The "sound/unsound" mind test evaluates the reactions of an individual to a particular stress or trauma. If an ordinary person could have withstood it, then the conduct is a result of insane automatism. However, the trauma or context is something the ordinary person would not have withstood, then the behaviour will be regarded as a consequence of sane automatism. This test has been used particularly in cases if dissociative behaviour and psychological trauma. See *R v Falconer* (1990) 171 CLR 30 at 55, where Mason CJ, Brennan and McHugh JJ said that, in psychological blow cases, the "standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane". The test does not appear to have been used in sleepwalking cases and will therefore not be discussed further in this article.

[79] *R v Parks* [1992] 2 SCR 871 at 882 (Lamer CJ)

[80] *R v Parks* [1992] 2 SCR 871 at 900 (La Forest J).

[81] *R v Parks* [1992] 2 SCR 871 at 901 (La Forest J).

cases over the preceding 100 years, in which jurists and academics had accepted without question that sleepwalking and other parasomnias were sane automatism.[82] In 1987, Parks drove 23 km to his parents-in-law's house where he killed one and seriously injured the other while they were both asleep in bed. He then drove to a nearby police station. In applying the internal cause factor, the court accepted unanimous expert evidence that sleepwalking was "not an illness, whether physical, mental or neurological",[83] that sleep is a normal condition, and the involuntary conduct was caused by this normal condition.[84]

Sane automatism was raised as a defence in the first reported sexsomnia case, *R v Granger*.[85] Granger was charged with sexual assaulting a four-year-old girl, who had crawled into her parents' bed where Granger happened to be sleeping. Her aunt found her, next to a sleeping Granger. She was crying and said without prompting that he had put his finger in her vagina. A psychiatrist acknowledged as an expert in sleep disorders testified that Granger was suffering from parasomnia when he removed the child's underwear and fondled her genitals. The court held that the psychiatrist's opinion was supported by factors such as disorientation on awakening, amnesia, trigger factors (stress and excessive fatigue), no attempt to conceal the crime, and the conduct was out of character. The court then considered whether the sexsomnia was sane or insane automatism. The judges accepted psychiatric evidence that the risk of recurrence was small, and that the episode was triggered by external causes. Granger was found not guilty.

The next reported Canadian case in which sexsomnia was raised as a defence is *R v Luedecke*. Luedecke attended an annual croquet party in Toronto in 2003. He consumed a lot of alcohol and some magic mushrooms. He was awake for 22 hours before he fell asleep at about 4.00 am. He woke to find he was in the middle of non-consensual sex and the woman was screaming. The woman said Luedecke looked "completely incoherent", and Luedecke said he was "completely dazed and in shock".[86] When he learned later that day that police were looking for someone in connection with a sexual assault, he contacted the police and gave a voluntary statement.

The trial judge Otter J followed *R v Parks* in concluding that somnambulism is not a disease of the mind[87] but made no mention of *R v Granger*. His Honour accepted that Luedecke's conduct was triggered by the external factors outlined by a defence sleep expert, including excessive sleep deprivation, alcohol, genetic predisposition factors, and stress.

Otter J referred to *R v Rabey*, in which the Supreme Court adopted the internal cause theory, but drew on the judgment of La Forest J in *R v Parks* to hold that this theory, which was developed in the context of psychological-blow automatism, did not apply to sleepwalking cases.[88]

As far as the second test (continuing danger) is concerned, Otter J concluded the risk of recurrence was minimal because the defendant had voluntarily embarked on a plan of sleep hygiene, modest alcohol consumption, and the taking of medication. His Honour was satisfied that the defence of sane automatism had been made out and acquitted Luedecke.[89]

However, on appeal, the Ontario Court of Appeal set aside the acquittal and ordered a new trial.[90] The Court of Appeal decision, which clarifies whether sleepwalking is a disease of the mind as well as the relevance of the two tests, will be examined later in this article.

[82] *R v Parks* 2008 ONCA 716 at [64] (Doherty JA, Borins JA and Lang JA agreeing).

[83] *R v Parks* [1992] 2 SCR 871 at 885 (Lamer CJ).

[84] *R v Parks* [1992] 2 SCR 871 at 881 (Lamer CJ).

[85] *R v Granger* 1996 8424 (BC SC).

[86] Shanoff, n 24; *R v Luedecke* 2005 ONCJ 294 at [3].

[87] *R v Luedecke* 2005 ONCJ 294 at [51]

[88] *R v Luedecke* 2005 ONCJ 294 at [44]-[45] referring to *R v Rabey* [1980] 2 SCR 513

[89] *R v Luedecke* 2005 ONCJ 294 at [52]-[53].

[90] *R v Luedecke* 2008 ONCA 716 at [142].

England

Courts in England have focused only on the external factor approach to determine whether involuntary conduct is sane or insane automatism.[91] If there is an internal malfunctioning of the mind, the involuntary conduct is insane automatism, regardless whether it is likely to recur.[92] Despite the widely held medical view in England that sleepwalking is a disease of the mind, and therefore the product of an internal cause, sexsomnia in England has been treated as sane automatism.[93]

Of 18 known rape cases in which sexsomnia was pleaded as a defence in British courts from 1996 to 2011, 12 ended in acquittals, one Scottish case was found "not proven" and the accused was acquitted, and five ended in guilty verdicts.[94] Nine of the 18 cases occurred between 2009 and 2011.[95] The acquittals include the 2005 case of James Bilton, who was charged with three counts of rape.[96] Bilton had a personal and family history of sleepwalking. In 2007, a British RAF mechanic, Ken Ecott, was cleared of raping a 15-year-old girl. Ecott also had a history of sleepwalking and even had a T-shirt made with "Night Rider" printed on it. The same year, David Pooley, a RAF NCO, was acquitted of rape after the court heard he had a history of sleepwalking and sleep-related behaviour.[97] In 2009, a jury took just an hour to acquit Nick Walker of rape.

In three recent cases, the defence was unsuccessful. Zack Thompson was convicted of rape in 2012 after his plea of sexsomnia failed.[98] In 2013, Simon Morris was sentenced to eight years' in jail after the judge said Morris, an actor, had told "an endless number of glib lies".[99] In a second case in 2013, businessman Gary Forbes pleaded sexsomnia when he was charged with raping a woman while on bail for an almost identical attack. He later dropped the defence and pleaded guilty.[100]

The key issue in the English cases therefore appears to be whether or not the sexsomnic episode was genuine. If the court accepts that it is, a complete acquittal follows. There does not appear to be an examination of whether the automatism is sane or insane. The position seems to be the same in Australian sexsomnia cases.

Australia

In Australia, both the internal-external and recurrence tests, as well as a third test – the sound/unsound mind test[101] – have been used to distinguish between sane and insane automatism. In *R v Falconer*, a case in which psychological blow automatism was at issue, Mason CJ, Brennan and McHugh JJ set out an approach that included all three tests. They said automatism will be insane unless the

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[91] Law Commission, n 50, p, 8.

[92] Law Commission, n 50, p 105. Some judges have tried to incorporate the likelihood of recurrence into their definition of insane automatism. See Lord Denning in *Bratty v Attorney-General for Northern Ireland* [1960] AC 386. The other judges did not share his views.

[93] Law Commission, n 50, p 110.

[94] Salkeld L, "Jailed for Rape, Actor Who Claimed that he had Sexsomnia: Eight Years for Attack on Teen", *Daily Mail* (26 February 2013).

[95] Editorial, "Are Men Getting Away with Rape by Pretending They Were Asleep? Rising Number of Attackers are Trying Extraordinary Defence that They Had 'Sexsomnia'", *Daily Mail* (29 December 201).

[96] Mohanty M, "Sleep, Dreams and Sleepwalking: The Medico-Legal Importance" (2011) 5(1) *Darlington and County Durham Medical Journal*, 17; Stokes P, "Sleepwalker Cleared of Three Rapes", *The Telegraph* (20 December 2005).

[97] Mackay RD and Reuber M, "Epilepsy and the Defence of Insanity – Time for Change?" (2007) *Criminal Law Review* 791; Editorial, "Rape Accused RAF Man 'Was Sleepwalking'", *Daily Mail* (12 January 2007); Ramber C, "RADA Graduate Walks Free Over 'Sleepwalk Rape'", *Daily Mail Australia* (21 October 2009).

[98] Furness H, "Rapist Jailed after 'Sleepwalking' Claim Rejected in Legal First", *The Telegraph* (30 March 2012).

[99] Salkeld, n 94.

[100] Kelly K, "Jail for Rapist Businessman Who Claimed He Was Sleepwalking When He Attacked Woman", *Sunderland Echo* (25 June 2013).

[101] The sound/unsound mind test assesses the reactions of an individual to a specific stress or trauma. If an ordinary person would have withstood the trauma, the cause of the conduct is insane automatism. On the other hand, if an ordinary person would not have withstood the trauma, sane automatism arises. The sound/unsound mind test has been used in cases involving psychological blow and dissociative states and will not be discussed further in this article.

malfunction of his mind was:

(1) transient

(2) caused by trauma, whether physical or psychological, which the mind of an ordinary person would be likely not to have withstood and

(3) not prone to recur.[102]

The first factor – transience – was mentioned in earlier English and Canadian cases,[103] but appears to have been subsumed in the internal/external test in Canada and disregarded as a relevant factor in England.

On an application of the test set out in *R v Falconer*, sexsomnia appears to be fall within insane rather than sane automatism: it is likely to recur and could be classified as an internal condition.[104] However, as in England, cases in which sexsomnia has been pleaded successfully have resulted in complete acquittals. However, there is no mention in either of the two reported Australian cases or newspaper reports of the trial cases of the internal/external or recurrence tests, or of the combined test set out in *R v Falconer*. It appears from media reports that testimony from medical experts – and the medical view that sleepwalking is not a disease of the mind – was determinative, and that the only issue was whether the offence was committed while sleepwalking – resulting in an acquittal – or not (that is, the defence was spurious) – resulting in a guilty verdict.

An example is the 2008 Northern Territory case of *R v Spencer*, the first Australian case in which a defence of sexsomnia succeeded. In the Northern Territory, in cases where automatism arises from a mental impairment, the verdict "must be not guilty because of mental impairment".[105] However, Leonard Spencer was acquitted by a Northern Territory jury, after an hour's deliberation, of gross indecency and sexual intercourse without consent. A woman, who was staying with her boyfriend in Spencer's house testified she had risen early to take her boyfriend to work and they had gone back to sleep. She woke at about 7.20 am to find Spencer having sex with her.[106] A psychiatrist had testified that Spencer was a regular sleepwalker. Southwood J told the jury they were entitled to accept the expert evidence that it was possible that the accused suffered from sexsomnia.

This was not the first time a plea of sexsomnia resulted in an acquittal in the Northern Territory. In 2010, another Northern Territory man, Trent Pobar, who had a history of sleepwalking, was acquitted of rape.[107] However, a jury appears to have rejected the defence in the 2006 case of Darryl Lotz,[108] even though a sleep specialist had given evidence that it was highly probable Lotz was asleep at the time. Lotz said he was sleepwalking when he got into bed between a woman and her boyfriend and started having sex with her. Lotz was convicted and sentenced to five years.

In 2010, the Victorian Court of Appeal overturned on procedural grounds the conviction of Dean Coulson, who also had a history of sleepwalking and who had argued that the digital rape of a woman sleeping in a bedroom of his house was an unconscious and involuntary act. However, he was convicted after a second trial in 2011.[109] Sexsomnia was raised in a 2010 South Australian case, in

[102] *R v Falconer* (1990) 171 CLR 30 at 56.

[103] In *R v Rabey* (1977) 79 DLR (3d) 414 at 430, Martin JA said transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind. This statement was extracted in *R v Luedecke*, but transience was not discussed. However, Lord Diplock in *R v Sullivan* [1984] AC 156 at 172 said it is irrelevant whether an impairment is temporary or permanent in determining whether an accused had a disease of the mind.

[104] Law Reform Commission of Western Australia, *Review of the Law of Homicide, Final Report, Project 97* (2007) p 143, http://www.lrc.justice.wa.gov.au/P/project_97.aspx. See also *R v Falconer* (1990) 171 CLR 30 at 75 where Toohey J said sleepwalking stems from internal malfunctioning and yet has traditionally been treated as sane automatism.

[105] Section 43C(2) of the *Criminal Code* (NT) discussed in Northern Territory Law Reform Committee, *Report on Defendants Submitting to Psychiatric or Other Medical Examination* (2012) p 14.

[106] Toohey P, "Jury Acquits Sex-Sleep Man in an Hour", *The Australian* (10 May 2008).

[107] *R v Pobar* (unreported, NTSC, Mildren J, 12 February 2010).

[108] Toohey P, "Sex-Sleep Acquittal a Curious Precedent", *The Australian* (16 May 2008).

[109] Editorial, "'Sleepwalk' Rapist Gary Alan Coulson may be free by Christmas", *Herald Sun* (1 April 2011).

which a man was charged with indecent assault of a minor. A doctor testified that he could not rule out sexsomnia, but Kelly J held that the evidence overwhelmingly supported an inference that the touching conscious and intentional.[110]

The focus in the Australian sexsomnia cases appears to be only on whether or not the accused was genuinely sleepwalking at the time the offence was committed. In *Coulson v The Queen*, for example, Neave and Harper JJA, said:

> The only real issue at the trial was whether the appellant was sleepwalking when, as he accepts, he inserted his finger into the complainant's vagina while she lay asleep in a bedroom near his.[111]

There was no mention in the case of the next step for consideration: whether sleepwalking is sane or insane automatism.

Discussion

The cases discussed above show that the distinction between sane and insane automatism, and the two main tests used to determine this, do not lead to consistent outcomes and are not particularly helpful in sexsomnia cases. Both tests seem to point to sexsomnia being insane rather than sane automatism. However, the outright acquittals in cases in Australia and England suggest courts take the opposite view.

Although the internal/external test is the main one used in England, and is also important in Australia and earlier Canadian cases, it has been criticised as "fundamentally flawed"[112] because it can lead to incongruous results,[113] as not an effective way of protecting the public from future offences, and is not recognised by the medical profession.[114] Sleepwalking and sexsomnia cases amplify the difficulties, in particular because internal and external factors can be at play simultaneously.[115]

In order to qualify as sane automatism, the cause of the malfunction of the mind has to be external. Yet one of the factors used to distinguish a sleepwalking episode from malingering is a personal history of parasomnias, which in turn suggests a genetic predisposition, or an internal factor. On the other hand, external triggers are important, as doctors point out and as judges recognised in *R v Luedecke*.[116] Indeed, the presence of both an "internal genesis"[117] (a personal history) and external factors (known triggers) are crucial in distinguishing a genuine sleepwalking episode from feigned episode.

A second problem with reliance only on the external-internal distinction in sexsomnia cases is that it is "a highly imperfect tool" for achieving the policy objective of protecting the public. As the Law

[110] *Brodie v Police* [2010] SASC 173 at [10], [25]. However, the doctor thought intoxication-related amnesia was the more plausible explanation.

[111] *Coulson v The Queen* [2010] VSCA 146 at [54].

[112] Clarkson CMV, Keating HM and Cunningham S, *Criminal Law: Text and Materials* (7th ed, Sweet & Maxwell, 2010) p 382, discussed in Law Commission, n 50, p 39.

[113] An oft-used example to illustrate this is hyperglycaemia and hypoglycaemia. Law Commission, n 50, p 9 explains that: "Diabetics may suffer excessively high blood sugar (hyperglycaemia) or excessively low blood sugar (hypoglycaemia), and both states may be caused by 'external factors' (alcohol or insulin) or 'internal factors' (lack of food or insufficient insulin) … The upshot is that a diabetic who, without fault, fails to take insulin and then commits an allegedly criminal act would be treated as insane. In contrast, a diabetic who took insulin in accordance with a medical prescription would be acquitted if he or she was an automaton at the time of committing an allegedly criminal act, whether that was because he or she had an unexpected reaction to the insulin or because having taken the insulin he or she failed to eat through no fault of their own."

[114] Law Commission, n 50, pp 106-107.

[115] Law Commission, n 50, p 9.

[116] *R v Luedecke* 2008 ONCA 716 at [43]-[46].

[117] Fenwick, n 4 at 350.

Commission for England and Wales points out, some people who are classified as insane pose little or no continuing danger to the public, whereas others who have been acquitted may react in the same way again.[118]

A third problem with the internal/external test in a sexsomnia context is that the distinction makes little sense medically or psychiatrically,[119] and particularly when applied to sleepwalking.[120] As Fenwick points out, it is illogical that a sleepwalker who kills someone and pleads automatism can be completely acquitted, yet an epileptic in a post-ictal confusional state who kills a person and pleads automatism is confined in a psychiatric hospital for many years.[121] The external/internal test is also unable to accommodate the subtleties involved in the concept of mental disease,[122] developments in medical understanding of sleep disorders[123] or the complexity of sleepwalking, which results from a combination of physical, genetic and environmental factors, and not a single factor. For example, a concussion after a blow to the head is regarded by lawyers as sane automatism because it caused by an external factor. However, from a medical perspective, the external blow to the head only produces automatism it disrupts the functioning of the neurones in the brain – an internal cause.[124]

It is therefore not surprising that some judges in Canada and Australia have criticised the internal/external approach as artificial[125] and have rejected its utility as an "all encompassing test".[126]

As far as the recurrence/continuing danger tests are concerned, an important consideration in sexsomnia cases is a personal history of sleepwalking, that is, the episodes have happened many times, which clearly meets the requirement for recurrence. However, in some cases, medical experts have testified that the particular offence committed is not likely to recur even though an accused has a history of sleepwalking. Therefore, a key question in sexsomnia cases is whether it is the risk of recurrent sleepwalking or the risk of the offending conduct that should not be likely to recur. Lord Denning in *Bratty v Attorney General for Northern Ireland* seemed to suggest that it is the internal cause that is likely to recur: "[I]t seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind."[127] If this is the correct interpretation of the recurrence requirement, sleepwalking and sexsomnia could only be regarded as insane automatism. However, focusing on the likelihood of recurrence of sleepwalking, rather than the commission of a sexual offence, is problematical because there may not be a connection between the recurrence of the condition and the danger posed by an accused.[128] Sleepwalking is not uncommon yet the incidence of criminal offences committed while sleepwalking is low. Further, some conditions that are likely to recur can be treated by medication or other forms of health management.[129]

An application of either of the two main tests used by courts to distinguish between sane and insane automatism leads to a conclusion that sexsomnia is insane, rather than sane, automatism. This in turn points to a verdict of not guilty by reason of insanity. While such a verdict may be preferable to a conviction, it carries with it the stigma of being labelled "insane". The fact that insanity in law

[118] Law Commission, n 50, p 106.

[119] Rolnick J and Parvizi J, "Automatisms: Bridging Clinical Neurology with Criminal Law" (2011) 20(3) *Epilepsy & Behavior* 423 at 424.

[120] Fenwick, n 4 at 350.

[121] Fenwick, n 4 at 355.

[122] *R v Falconer* (1990) 171 CLR 30 at 76 (Toohey J).

[123] Law Commission, n 50, p 107.

[124] Ebrahim et al, n 59 at 603.

[125] See Law Commission, n 50, p 240; *Stone v The Queen* [1999] 2 SCR 290 at 333 (Binnie J); *R v Falconer* (1990) 171 CLR 30 at 76 (Toohey J).

[126] *R v Parks* [1992] 2 SCR 871 at 902 (La Forest J).

[127] *Bratty v A-G for Northern Ireland* [1963] AC 386 at 412.

[128] Yannoulidis, n 77, p 38.

[129] Yannoulidis, n 77, p 38.

serves only to recognise people who are not criminally responsible for their conduct because of a mental or physical condition,[130] and does not reflect the psychiatric understanding of the word, does not overcome the stigma attached by lay people to the term and a criminal verdict of insanity. According to Ashworth, it is unfair to label people as insane so that judges have the power to protect the public.[131] It seems to be particularly anomalous to label sleepwalkers as insane. Indeed, as Mahowald points out, if sleepwalking is insane automatism, it would follow that up to 10% of the adult population is insane on the basis of sleepwalking alone.[132] On the other hand, there has been a backlash by victims' families and sectors of the public to complete acquittals in sexsomnia cases.[133]

Further, a determination of insane, rather than sane automatism, in the past has carried with it the added stigma of incarceration in a psychiatric facility. It has been suggested that judges have preferred to regard sleepwalking as sane automatism in jurisdictions to avoid mandatory detention.[134] However, in England, judges have had a discretion in cases of special verdicts since 1991: the *Criminal Procedure (Insanity and Fitness to Plead) Act 1991* (UK) provides for order absolute discharges, supervision orders, or orders for detention in a hospital.[135] There has been similar legislative reform in all Australian jurisdictions[136] apart from Queensland,[137] and in Canada.[138] It is difficult therefore to rely on judicial reluctance to commit sleepwalking offenders to mandatory detention as an explanation for the acquittals, presumably based on sane automatism, in recent English and Australian cases.

The Canadian reform of the insanity defence is discussed in the Court of Appeal decision in *R v Luedecke*. This decision provides much-needed clarification about the role of the two tests in sexsomnia cases, and also whether sleep disorders are a disease of the mind in law. The simplified approach in *R v Luedecke* has been applied consistently in later Canadian cases, and provides a model that would be useful in Australia.

The current Canadian approach – R v Luedecke

The decision of the trial judge in *R v Luedecke* was appealed, and the Court of Appeal for Ontario set aside the acquittal and ordered a new trial, limited to a determination whether Luedecke's automatism should result in a verdict of not guilty or a verdict of not criminally responsible on the grounds of mental disorder.[139]

The judgment reflects two key changes in Canadian law of automatism and insanity after *R v Parks*: the decision in *R v Stone*,[140] and the new legislative approach to dealing with mentally disordered offenders.

R v Stone effects two changes in how judges should distinguish sane from insane automatism. The first requires a trial judge to start from the premise that automatism is caused by a disease of the mind

[130] Law Commission, n 50, p 13.

[131] Ashworth A and Horder J, *Principles of Criminal Law* (6th ed, OUP, 2009) p 143.

[132] Mahowald and Schenck, n 5 at 329.

[133] See Jamieson, n 12. Labour MP Harry Cohen introduced a Private Members' Bill to highlight the problems with sexsomnia acquittals. He said: "a rape is a rape and should be treated as such." His comments followed the acquittal of Jason Jeal of rape after insisting he had been asleep and had no idea what he was doing.

[134] Fenwick, n 58 at 17; Weiss K et al, "Parasomnias, Violence and the Law" (2011) 39(2) *Journal of Psychiatry & Law* 249 at 261; Horn, n 54 at 166.

[135] Law Commission, n 50, p 8.

[136] Bronitt S and McSherry B, *Principles of Criminal Law* (3rd, Lawbook Co, 2010) p 254; s 20BJ of the *Crimes Act 1914* (Cth); ss 308, 323-324 of the *Crimes Act 1900* (ACT); s 43I of the *Criminal Code 1983* (NT); s 39 of the *Mental Health (Forensic Provisions) Act 1990* (NSW); ss 269F-269G, 269O of the *Criminal Law Consolidation Act 1935* (SA); ss 21-22, 24 of the *Criminal Justice (Mental Impairment) Act 1999* (TAS); ss 23, 24A of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); ss 20-22 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

[137] Section 647 of the *Criminal Code 1899* (Qld).

[138] Section 672.34 of the *Criminal Code* RSC 1985 C-46.

[139] *R v Luedecke* 2008 ONCA 716 at [142].

[140] *R v Stone* [1999] 2 SCR 290.

and to look to the evidence to determine whether it is convincing that the condition is not a disease of the mind,[141] that is, there is no longer a presumption of sanity. (In *R v Parks*, one reason that a plea of sane automatism succeeded was that the Crown failed to prove that the condition was caused by a disease of the mind.)[142] Otter J concluded that Luedecke was in an automatistic state medically characterised as sexsomnia, and that he had established on the balance of probabilities that his actions were involuntary.[143] In accordance with *R v Stone*, Otter J adopted the position that the automatism was insane and then determined whether the evidence suggested otherwise,[144] and applied the two tests.

The second change in *R v Stone* is a shift in emphasis from the internal/external test to the continuing danger aspect, and a refinement of the test in that judges are required to "not limit their inquiry to the risk of further violence while in an automatistic state" but rather to "examine the risk of the recurrence of the factors or events that triggered the accused's automatistic state".[145] A recurrent and key theme of the decisions in *R v Stone* and *R v Luedecke* is the need to protect the public.

In *R v Stone*, the Canadian Supreme Court held that the continuing danger test must be qualified to recognise that "while a continuing danger suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of a disease of the mind".[146] The court also said that the internal/external cause test was not suited for analysing sleepwalking cases. And although this theory had been the dominant approach in Canadian jurisprudence, and should therefore be used "only as an analytical tool and not as an all-encompassing methodology".[147]

Bastarache J therefore developed a test applicable to all automatism cases, drawing on both tests as well as policy concerns raised in cases such as *R v Rabey* and *R v Parks*. Because there will be cases where these two tests do not provide a conclusive answer to whether there is a disease of the mind, for example where the cause of the automatism cannot be classified as internal or external, and there is no continuing danger of violence, Bastarache J said judges must also be allowed to consider other valid policy concerns. The key issue is whether society needs to be protected from the accused.[148]

A second change in the law after *R v Parks* was the introduction in 1992, the Parliament of Canada implemented a new regime for dealing with mentally ill offenders. The year before, the Supreme Court of Canada had held that the automatic detention of insane offenders at the discretion of the lieutenant governor violated sections of the *Canadian Charter of Rights and Freedoms*.[149] Under the reforms, the verdict of not guilty by reason of insanity was changed to "not criminally responsible on account of mental disorder" (NCR-MD).[150] The NCR-MD verdict involves neither a conviction nor an acquittal, and allows judges and review boards to work together to come up with appropriate and necessary dispositions for mentally disordered offenders, taking into account the paramount need for public safety but also considering the accused's needs.[151] The options include absolute discharge where the accused does not pose a threat to public safety, discharge subject to conditions, and detention in a hospital. These reforms address the problems associated with special verdicts, in particular the stigma of the insanity label as well as the mandatory incarceration of offenders.

[141] *R v Stone* [1999] 2 SCR 290 at [90].

[142] *R v Parks* [1992] 2 SCR 871 at 908-909.

[143] *R v Luedecke* 2008 ONCA 716 at [43].

[144] *R v Luedecke* 2005 ONCJ 294 at [43].

[145] *R v Luedecke* 2008 ONCA 716 at [91].

[146] *R v Stone* [1999] 2 SCR 290 at 294.

[147] *R v Stone* [1999] 2 SCR 290 at 311 (Bastarache J).

[148] *R v Stone* [1999] 2 SCR 290 at 398.

[149] *R v Swain* [1991] 1 SCR 933.

[150] Section 672.34 of the *Criminal Code*.

[151] Section 672.54 of the *Criminal Code*.

The Court of Appeal decision in *R v Luedecke* reflects these changes in the law, but also clarifies other uncertainties, not the least of which is whether sleepwalking is a disease of the mind. Doherty JA, with whom Borins and Lang JJA agreed, stated definitively that sleepwalking is a disease of the mind. It has a "genetic predisposition" which is "the epitome of an internal cause".[152] The trial judge, Otter J, was criticised for placing "considerable emphasis" on evidence from a doctor that parasomnias are not a disease of the mind.[153] Doherty JA makes it clear that trial judges should not be influenced by medical opinion when deciding, as a matter of law and for policy reasons, whether a particular condition is a disease of the mind.[154]

Doherty JA indicates that offences committed by sleepwalkers pose "one of the most difficult problems encountered in the criminal law".[155] On the one hand, automatism renders Luedecke's actions non-culpable in the eyes of the criminal law because people who act involuntarily are innocent of any criminal wrongdoing. On the other hand, the fact that the accused's conduct was involuntary does not lessen the trauma to the victim,[156] and it does not "lessen the interest of the community because automatism makes his conduct potentially dangerous and raises legitimate public safety concerns".[157] An outright acquittal reflects the lack of culpability, but it does not address the potential danger to the public. According to Doherty JA, Canadian criminal law responded to this by regarding almost all automatisms as the product of a mental disorder, leading not to an outright acquittal but instead to an NCR-MD verdict. However, his Honour made the point that such a verdict does not suggest that an accused is mentally ill but rather the concept of mental disorder in criminal law describes criminal acts committed because of some abnormal mental state.[158] This in turn requires an inquiry into the dangerousness of the accused.

His Honour found two errors in Otter J's application of the continuing danger test. The first was Otter J's finding that prior incidents of sexsomnia did not help in assessing danger to the public because they did not involve criminal conduct. Doherty JA said these incidents were important in assessing future risk.[159] The second criticism was the trial judge's failure to consider the "likelihood of the recurrence of triggering events and not just the likelihood of the recurrence of acts of violence while in an automatistic state".[160] The triggers in Luedecke's case included fatigue and stress, which are common in most people's lives, and Doherty JA said it was "virtually inevitable" that these would recur with some frequency in Luedecke's life.

The Ontario Court of Appeal set the verdict aside and ordered a new trial, limited to a determination of whether his automatism should result in an acquittal or a verdict of not criminal responsible because of mental disorder. At the new trial, before Nakatsuru J of the Ontario Court of Justice, Luedecke consented to an NCR-MD finding. He was later granted an absolute discharge by the Ontario Review Board, after the Board concluded that the evidence it had heard did not prove Luedecke remained a significant threat to public safety.[161]

It could be argued that the Court of Appeal decision in *R v Luedecke*, and particularly the clear finding that almost all automatisms are a disease of the mind, renders any future application of either the internal/external or continuing danger tests unnecessary in the pre-verdict stage of a sexsomnia trial. The arguments in *R v Luedecke* that pointed to sexsomnia being a disease of the mind – prior sexsomnic episode, and the external triggers readily found in everyday life – and indeed the other

[152] *R v Luedecke* 2008 ONCA 716 at [106].

[153] *R v Luedecke* 2008 ONCA 716 at [113].

[154] *R v Luedecke* 2008 ONCA 716 at [114].

[155] *R v Luedecke* 2008 ONCA 716 at [6].

[156] *R v Luedecke* 2008 ONCA 716 at [13]-[14].

[157] *R v Luedecke* 2008 ONCA 716 at [6].

[158] *R v Luedecke* 2008 ONCA 716 at [6]-[7].

[159] *R v Luedecke* 2008 ONCA 716 at [108].

[160] *R v Luedecke* 2008 ONCA 716 at [111].

[161] *Re Luedecke* 2009 ORB File no 5364 (6 October) at 10.

factors relied on by the medical profession to distinguish genuine from feigned sleepwalking, make it very difficult to prove that sexsomnia is not a disease of the mind.

Therefore, in future sexsomnia cases, the key issue at trial will be whether or not the sexsomnic episode was genuine: questions about whether it was caused by an internal or external factor, and about whether it is likely to recur, will be irrelevant because it is now accepted that sleepwalking is a disease of the mind. Consideration of these factors will still be relevant in the "very rare one-off cases" of non-mental disorder automatism where an accused suffers from a single automatistic incident, and can point to an external trigger, show the event is unlikely to recur and that the event could have produced a dissociative state in an otherwise normal person.[162] This formulation of the test for sane automatism is identical to that set out in Australia in *R v Falconer*: that "when an accused raises automatism and assigns some malfunction of the mind as its cause, he raises a defence of unsoundness of mind or insanity" unless the malfunction was transient, caused by external factors and not likely to recur.[163] An application of this test leads inevitably to a conclusion that sexsomnia is a disease of the mind. The acquittals in recent Australian sexsomnia cases are therefore difficult to explain.

In Canada, a verdict of not criminally responsible because of mental disorder is now the standard approach in cases where sexsomnia is proven. It was the outcome of a 2011 Calgary case in which a man pleaded automatism in response to charges arising out of a violent sexual assault of a prostitute,[164] and in a 2013 Winnipeg case, in which a man raped his wife repeatedly over several years.[165] The Court of Appeal ordered a retrial on the same basis after a man was acquitted in 2013 of violently attacking and sexually assaulting his two widowed neighbours, aged 60 and 82.[166]

Proposed reform in England

In July 2013, the Law Commission of England and Wales released a Discussion Paper entitled *Criminal Liability: Insanity and Automatism*, which sets out proposals for reforming the defences of insanity and automatism, including abolishing the existing common law defence of insanity and replacing it with a new defence of "not criminally responsible by reason of recognised medical condition".[167] This is essentially the same as the Canadian approach, except that the defence applies to all medical conditions and not just mental conditions. The Law Commission also proposes abolishing the existing common law rules on insane and sane automatism, and this would mean that tests like internal/external or recurrence would become obsolete.[168] Instead, the Commission proposes that automatism defence would be available only where a defence is not based on a recognised medical condition.[169] Giving that is now widely accepted that sleepwalking is a recognised medical condition, an acquittal based on a plea of sane automatism in sexsomnia cases would no longer be possible if the Commission's recommendations are adopted. The Commission clearly envisages this: the new defence of automatism would not be available to people with sleep disorders.[170] Instead sexsomnia defendants would recourse only to the new defence and its verdict of NCR-MC.

The proposed English reforms would have the same effect as *R v Luedecke* in Canada: defendants would no longer be able to plead sane automatism or secure a complete acquittal.

[162] *R v Luedecke* 2008 ONCA 716 at [63].

[163] *R v Falconer* (1990) 171 CLR 30 at 56 (Mason CJ, Brennan and McHugh JJ).

[164] Martin K, "Sleep Disorder Triggered Assault on Hooker, Judge Rules", *Toronto Sun* (20 June 2011).

[165] McIntyre, n 72.

[166] Mandel M, "Ontario Court Quashes Acquittals in 'Sleepwalker' Sex Attacks", *Toronto Sun* (23 April 2014).

[167] Law Commission, n 50, p 19.

[168] Law Commission, n 50, p 40.

[169] Law Commission, n 50, p 23.

[170] Law Commission, n 50, p 49.

Australia

The Queensland and Tasmanian Criminal Codes still use the traditional verdict of not guilty on the grounds of insanity.[171] Other Australian jurisdictions have changed the wording of the defence to not guilty because of mental illness,[172] mental impairment,[173] mental incompetence[174] or unsoundness of mind.[175] No Australian jurisdiction has a "not criminally responsible" verdict like Canada. In recent years, some law reform bodies have considered whether changes to the defence of automatism, in the context of homicide, are warranted, but have decided to leave the law of automatism unchanged.[176]

Conclusion

There have been several cases in recent years in which defendants charged with sexual offences have pleaded sexsomnia as a defence. This automatistic conduct has presented judges with difficult challenges in reconciling the non-culpability of a defendant for involuntary acts with the need to protect the public and to recognise the harm to the victim. Traditionally, judges in Canada, Australia and England have relied on two tests to distinguish between sane and insane automatism, but these tests have not been helpful, partly because of the complexity of sleep disorders, and in particular the fact that a combination of internal and external factors is involved. Another difficulty has been the tendency of some courts to accept as definitive medical opinion about the status of sleep disorders as a mental disease, despite the lack of medical consensus, and the fact "disease of the mind" is a legal rather than a medical concept.

The current Canadian approach to sexsomnia, set out in the recent Ontario Court of Appeal decision in *R v Luedecke*, provides a more coherent legal approach to sexsomnia cases. Acceptance that sexsomnia and sleepwalking are diseases of the mind in law overcomes problems in earlier cases about conflicting medical opinion and judicial deference to this opinion. If the cause of automatism is a mental disorder, the accused will be found NCR-MD – there can be no acquittal.[177] The NCR-MD verdict means that judges no longer have to contend with the stigma associated labelling sleepwalking offenders as insane. It also allows judges to address the lack of culpability of sleepwalking offenders as well as consider the public policy need to protect the public from further offending. The range of disposition options following an NCR-MC addresses concerns about mandatory detention in a psychiatric facility. The proposed reforms to the defences of insanity and automatism, set out by the Law Commission of England and Wales in its 2013 Discussion Paper, would have the same effect, and the approach to sexsomnia in these two cases would essentially be the same. This is so even though the focus of the Discussion Paper is individual criminal responsibility, and not public protection,[178] whereas in Canada public policy issues take precedence.

Although *R v Luedecke* confirms the shift in focus from the internal/external test to the continuing danger test, and clarification that it is not the recurrence of the offending conduct that is at issue but rather the recurrence of the factors or events that triggered the accused's automatistic state, the effect of the decision is to render both tests obsolete in sexsomnia cases. The tests are relevant in assessing

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[171] Section 647 of the *Criminal Code 1989* (Qld); s 381 of the *Criminal Code 1924* (Tas).

[172] Section 19BJ of the *Crimes Act 1914* (Cth); s 38 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

[173] Section 28(7) *Crimes Act 1900* (ACT); s 27(7) of the *Criminal Code 1983* (NT); s 20(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

[174] Sections 269F-269G of the *Criminal Law Consolidation Act 1935* (SA).

[175] Section 19 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

[176] VRLC, n 78, p 248; Law Reform Commission of Western Australia, n 104, p 151.

[177] *R v Luedecke* 2008 ONCA 716 at [59].

[178] Law Commission, n 50, p 4: "The question at the heart of this paper is whether the law has the right test to distinguish between those who should be held criminally responsible for what they have done, and those who should not because of their condition … We take the view that it is unjust to hold people criminally responsible when they could not have avoided committing the alleged crime, through no fault of their own."

whether the condition at hand is a disease of the mind, and it now appears to be accepted, in medical and legal circles, that sleep disorders fall into this legal concept. The proposed English reforms would have the same effect.

The law in Australia, however, remains a mess. Cases like *R v Falconer* suggest that judges should continue to apply the internal/external and recurrence tests, despite judicial dissatisfaction with both approaches. However, the complete acquittals in Australian cases where sexsomnia was pleaded successfully suggest that the distinction between sane and insane automatism, and the tests for evaluating this, have been overlooked. *R v Luedecke* provides a useful model that Australian courts could follow in future sexsomnia cases.