

**Reprinted with Permission of the Canadian Bar Association**

**CANADIAN BAR ASSOCIATION  
NATIONAL CRIMINAL JUSTICE SECTION  
COMMITTEE ON CRIMINAL CODE REFORM**

**ACTUS REUS AND  
AUTOMATISM**

**Gerry Ferguson  
February, 1992**

## Table of Contents

I.	<u>Introduction</u> .....	1
II.	<u>Summary of Proposed Codification</u> .....	4
	Criminal Liability.....	4
	Prohibited Conduct.....	4
	Omission .....	4
	Causation .....	4
	Mental Elements.....	4
	Involuntary Conduct.....	6
	Automatism .....	6
III.	<u>Other Proposals for Codification</u> .....	10
	(a) <u>Canada</u>	
	1. Law Reform Commission of Canada, Working Paper 29 (1982).....	10
	2. Law Reform Commission of Canada, Report 31 (1987).....	10
	3. Final Report of the Federal/Provincial Working Group on Homicide (1991).....	12
	(b) <u>United States</u>	
	Model Penal Code (1962).....	12
	(c) <u>Australia</u>	
	Crimes (Amendment) Act 1990.....	14
	(d) <u>Israel</u>	
	Proposed Penal Law (1990).....	15
IV.	<u>Comments on Proposal</u>	
	1. Criminal Liability.....	16
	2. Prohibited Conduct.....	16
	3. Omission.....	17
	4. Causation.....	18
	5. Mental Elements.....	22
	6. Involuntary Conduct.....	23
	7. Automatism.....	26

## I. Introduction

1. As Eric Colvin notes in Principles of Criminal Law (2nd ed., 1991) at pp. 48-49, "it is common to use the Latin terms actus reus and mens rea to refer to different parts in the definition of an offence. These are terms of legal analysis, not legislative drafting. They are not found in the Criminal Code or other criminal legislation. They are used by judges, lawyers and commentators as analytical tools for handling problems of criminal culpability. Like all analytical tools, they create some difficulties while helping to overcome others. ... The terms have acquired technical meanings which are difficult to capture in straightforward translation. The Latin expressions have therefore continued to be standard usage."

2. Glanville Williams in Criminal Law: The General Part (2nd ed. 1961) at p. 16 defines actus reus as including all the elements in the definition of the crime except the mens rea. Smith and Hogan, Criminal Law (6th ed., 1988) at p. 33, n. 16 indicate that this is not the only possible definition of an actus reus, and although a more limited view is taken by some commentators, Smith and Hogan feel that it is the most useful definition of actus reus and therefore they adopt it in their text.

3. In regard to the question of whether actus reus includes the absence of lawful justifications or excuses, Smith and Hogan refer to two views (at p. 35):

In the terminology used by Glanville Williams:

"Actus reus includes ... the absence of any ground of justification or excuse, whether such justification or excuse be stated in any statute creating the crime or implied by the courts in accordance with general principle...."

An alternative view is that of D.J. Lanham:

"As a matter of analysis we can think of a crime as being made up of three ingredients, actus reus, mens rea and (a negative element) absence of a valid defence."

(Footnotes omitted)

Smith and Hogan note that there is something to be said for both approaches, but generally they favour Lanham's approach "for convenience of exposition" (p. 36).

4. In describing the nature of actus reus, Smith and Hogan, supra at pp. 33-34 note that the actus reus of an offence may include an act, an omission or a "state of affairs" and that some offences require a result (i.e. result crimes) while other

offences (i.e. conduct crimes) do not. Smith and Hogan suggest that it may not be necessary to make a distinction between result and conduct crimes since it is not clear that the distinction has, or should have, any practical consequences.

Smith and Hogan also note that in addition to acts, omissions, and sometimes consequences, actus reus also includes

...the circumstances in which the conduct takes place (or which constitute the state of affairs) in so far as they are relevant. Circumstances, like consequences, are relevant in so far as they are included in the definition of the crime. The definition of theft, for example, requires that it be proved that D dishonestly appropriated property *belonging to another*. If the property belonged to no-one (because it had been abandoned) D's appropriation could not constitute the actus reus of theft. However dishonest he might be, he could not be convicted of theft because an essential constituent of the crime is missing.

Sometimes a particular state of mind on the part of the victim is required by the definition of the crime. If so, that state of mind is part of the actus reus and, if the prosecution are unable to prove its existence, they must fail.

5. Colvin, supra, at pp. 49-50 describes the nature of actus reus as follows:

The actus reus of an offence can initially be conceived as the conduct which its definition requires to have occurred. Descriptions of conduct will ordinarily include reference to something which was done or not done and sometimes also to a consequence or a context. For example, the actus reus of the most common form of murder is simply causing the death of another human being, that of arson is setting fire to certain types of property, and that of dangerous driving is driving a motor vehicle in a public place in a manner that is dangerous to the public. It is sometimes said that the actus reus of an offence such as possession of a narcotic comprises a state of affairs rather than something which a person did or did not do. Such offences may, however, be regarded as disguised offences of omission. Their effect is to create liability for failure to withdraw from the state of affairs.

The contextual aspect of conduct may include the state of mind of someone else; for example, an assault ordinarily requires that force be applied to the person of another without the consent of that person. Hence, when the distinction between actus reus and mens rea is

expressed as a distinction between "material" and "mental" elements, the latter reference is to a person's own state of mind. The state of mind of someone else is part of the *actus reus*.

Unfortunately for conceptual clarity, some aspects of a person's own state of mind are also treated as part of the *actus reus*. They are often called "the mental element in the *actus reus*". For example, current orthodoxy insists that conduct must have been "voluntary" in order to constitute an *actus reus*. This means (i) in the case of an act, that there must have been a conscious choice directing the conduct, and (ii) in the case of an omission, that there must have been an immediate capacity to exercise powers of choice to act. When, therefore, *mens rea* is described as the "mental element" of an offence, the reference is to something more than mere voluntariness.

A more controversial view is that the characterization of some forms of conduct necessarily involves reference to mental states which are additional to mere voluntariness. Consider the offence of possession of a narcotic. Suppose that a narcotic is discovered in a residential property and that the inhabitant is charged with this offence. He may have (i) known of both its presence and its character, (ii) known of its presence but not its character (e.g., mistakenly believing it to be sugar), or (iii) not even have known of its presence. In the second situation, as well as in the first, it would ordinarily be said that he was "in possession" of the narcotic and therefore committed the *actus reus*, even though he did not realize what the substance was. In the third situation, however, this characterization is unsatisfactory. The verb "to possess" denotes not just a material state of affairs, but also a degree of control over that state of affairs which is dependent on some knowledge of it.

Similar problems arise with verbs such as "to use", "to conspire" and "to participate", which denote purposive activity. The difficulty is that in the distinction between conduct constituting an *actus reus* and an accompanying "mental element" constituting *mens rea* it is assumed that the conduct can be independently defined. This is not always possible. Where the characterization of conduct necessarily involves reference to a mental element, it would seem preferable to regard this as a matter of "the mental element in the *actus reus*" rather than as a matter of *mens rea*.

## **II. Summary of Proposed Codification**

- Criminal Liability** 1. Except where otherwise specified, no one is criminally liable for an offence unless that person engages in the prohibited conduct, with the required blameworthy state of mind, in the absence of a lawful justification, excuse or other defence.
- Prohibited Conduct** 2. Prohibited conduct consists of an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences.
- Omission** 3. No one is liable for an omission unless  
(a) that person fails to perform a duty imposed by this Act, or  
(b) the omission is itself defined as an offence by this Act.
- Causation** 4. (1) Everyone causes a result when that person's acts or omissions contribute to the result and are not just a minimal or insignificant cause.
- OR
- (1) Everyone causes a result when that person's acts or omissions substantially contribute to the result.
- (2) Everyone may (substantially) contribute to a result even though that person's acts or omissions are not the sole cause or the main cause of the result and may not alone have caused the result.
- Thin Skull** (3) For the purposes of causation, everyone must take the victim's physical or psychological condition as he/she finds it.
- Intervening Cause** (4) No one causes a result if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.
- Mental Elements** 5. [From Toronto Meeting with minor editing of subsection (1)]  
(1) For the purposes of criminal responsibility, the mental elements of an offence are:  
(i) intent,

- (ii) knowledge, or
  - (iii) recklessness.
- (2) **Intent.** A person acts intentionally with respect to prohibited conduct when the person wants it to exist or occur.
  - (3) **Knowledge.** A person acts knowingly with respect to prohibited conduct when the person is virtually certain that it exists or will occur.
  - (4) **Recklessness.** A person acts recklessly with respect to prohibited conduct when, in the circumstances actually known to the person:
    - (a) the person is aware of a risk that his or her act or omission will result in the prohibited conduct, and
    - (b) it is highly unreasonable to take the risk.
  - (5) **Prescribed state of mind applies to all aspects of prohibited conduct.** When the law defining an offence prescribes the state of mind required for the commission of an offence, without distinguishing among aspects of the prohibited conduct, that state of mind shall apply to all aspects of the prohibited conduct of the offence, unless a contrary intent plainly appears.
  - (6) **Residual rule.** Where the definition of a crime does not explicitly specify the requisite state of mind, it shall be interpreted as requiring proof of intent.
  - (7) **Greater culpability requirement satisfies lesser.** Where the definition of a crime requires recklessness, a person may be liable if the person acts, or omits to act, intentionally or knowingly as to one or more aspects of the prohibited conduct in that definition.
  - (8) **Mistaken belief in facts.** No person is liable for an offence committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as the person believed them he or she would have committed an included offence, the person shall be liable for committing that included offence.



- (9) **Caution respecting belief.** A Court or jury, in determining whether a person had a particular belief in a set of facts, shall have regard to all the evidence including where appropriate, the presence or absence of reasonable grounds for having that belief.
- (10) **Transferred intent.** In determining criminal liability a person's intention to cause, or recklessness whether the conduct causes, a consequence in relation to a person or thing capable of being the victim or subject matter of the offence shall be treated as an intention to cause, or, as the case may be, recklessness whether the conduct causes that consequence in relation to any other person or thing affected by such conduct.

**Involuntary 6. (1)  
Conduct**

- (1) No one is liable for an act, omission or state of affairs which is involuntary.
- (2) An act, omission or state of affairs is involuntary if it was not physically willed or was not within one's ability to physically control. For greater certainty, this includes
  - (a) a spasm, twitch or reflex action,
  - (b) an act or movement physically caused by an external force, and
  - (c) an omission or failure to act as legally required due to physical impossibility.
- (3) This section does not apply to involuntary conduct due to provocation, rage or loss of temper. Involuntary conduct due to mental disorder, voluntary intoxication and automatism are dealt with in other sections of this Act.
- (4) If the involuntary act, omission or state of affairs occurred because of a person's prior, voluntary blameworthy conduct, then that person may be held liable for that prior blameworthy conduct.

**Automatism 7. (1)  
General  
Rule**

- (1) No one shall be convicted of an offence in respect of an act or omission which occurred while that person was in a state of automatism.

**Definition  
of**

- (2) For the purposes of this section, automatism means unconscious, involuntary behaviour

- Automatism** whereby a person, though capable of action, is not conscious of what he/she is doing.
- Exceptions** (3) Subsection (1) does not apply to automatism which is caused by
- (a) mental disorder
  - (b) voluntary intoxication, or
  - (c) fault as defined in subsections (5) and (6).
- Definition of Mental Disorder** (4) For the purposes of this section, automatism is caused by mental disorder when the unconscious, involuntary behaviour arises primarily from an internal, subjective condition or weakness in the accused's own psychological, emotional or organic make-up, including dissociative states caused by the ordinary stresses and disappointments of life, but not unconscious, involuntary behaviour of a transient nature caused by external factors such as
- (a) a physical blow;
  - (b) a psychological blow from an extraordinary external event which might reasonably be expected to cause a dissociative state in an average, normal person;
  - (c) inhalation of toxic fumes, accidental poisoning, or involuntary intoxication;
  - (d) sleepwalking;
  - (e) a stroke;
  - (f) hypoglycaemia;
  - (g) a flu or virus; or
  - (h) other similar factors.
- Fault Exception** (5) Notwithstanding subsection (1), automatism is not a defence
- (a) to an intentional offence if a person voluntarily induces automatism with the intention of causing the prohibited conduct of that offence;

- (b) to a knowledge offence if a person voluntarily induces automatism knowing that it is virtually certain that he/she will commit the prohibited conduct of that offence while in that state of automatism;
- (c) to a reckless offence if a person voluntarily induces automatism notwithstanding the fact that the person is aware of a risk that he/she will commit the prohibited conduct of that offence while in that state of automatism, and it is highly unreasonable to take that risk.

**Included  
Offence of  
Reckless  
Automatism**

- (6) Where a person is found not guilty of an offence by reason of automatism and the state of automatism was caused by that person's own recklessness, that person shall be found guilty of the lesser included offence of reckless [or dangerous] automatism

- (a) causing death,
- (b) causing bodily harm, or
- (c) causing serious interference with, destruction of or serious damage to property.

shall be liable

- (d) upon indictment to a maximum penalty of
  - (i) 10 years imprisonment for paragraph (a),
  - (ii) 5 years imprisonment for paragraph (b), or
  - (iii) 2 years imprisonment for paragraph (c), or
- (e) upon summary conviction to a maximum penalty of 6 months.

[NOTE subsections (7) and (8) are included only as options to be considered]

**Special  
Verdict**

- (7) Where evidence of automatism is given at trial and the accused is acquitted, the judge or jury shall declare whether the accused was acquitted by reason of automatism.

**Special  
Disposition**

- (8) Where a person is
- (a) under subsection (7) found not responsible by reason of automatism, or
  - (b) under subsection (6) found guilty of the offence of dangerous automatism,

the court may, in lieu of any other disposition, dispose of that person in the same manner as if that person had been found not guilty by reason of mental disorder, provided that person's automatism is likely to occur again in a manner which poses a substantial danger to the lives or safety of others; and such persons shall be subject to the same safeguards, procedures and reviews as persons who are found not guilty due to mental disorder.

### III. Other Proposals for Codification

#### (a) Canada

#### 1. Law Reform Commission of Canada, Working Paper 29 (1982)

Principle of  
legality

1. No one is criminally liable except for an offence defined by law.

Criminal  
liability

2. (1) No one is criminally liable for an offence unless he commits it or is a party to it.

(2) No one commits an offence except by conduct coming within the definition of that offence.

(3) Notwithstanding that a person's conduct may come within the definition of an offence, he is not criminally liable for that offence if he has an exemption, excuse or justification allowed by law.

Automatism

7. (1) Every one is excused from criminal liability for unconscious conduct due to temporary and unforeseeable disturbance of the mind resulting from external factors sufficient to affect an ordinary person similarly.

(2) This section does not apply to conduct due to mental disorder, intoxication or provocation.

Physical  
compulsion  
and impossibility

8. Every one is excused from criminal liability for acts due to physical compulsion or omissions due to physical impossibility.

#### 2. Law Reform Commission of Canada, Report 31 (1987)

##### Chapter 2: Principles of Liability

2(1) **Principle of Legality.** No one is liable except for conduct defined at the time of its occurrence as a crime by this Code or by some other Act of the Parliament of Canada.

2(2) **Conduct and Culpability.** No one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition.

**2(3) Conduct.**

- (a) **General Rule.** Unless otherwise provided in the definition of a crime, a person is only liable for an act or omission performed by that person.
- (b) **Omissions.** No one is liable for an omission unless:
  - (i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or
  - (ii) it consists of a failure to perform a duty specified in this clause.
- (c) **Duties.** Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:
  - (i) provide necessities to
    - (A) his spouse,
    - (B) his children under eighteen years of age,
    - (C) other family members living in the same household, or
    - (D) anyone under his careif such person is unable to provide himself with necessities of life;
  - (ii) carry out an undertaking he has given or assumed;
  - (iii) assist those in a shared hazardous and lawful enterprise with him; and
  - (iv) rectify dangers of his own creation or within his control.
- (d) **Medical Treatment Exception.** No one has a duty to provide or continue medical treatment which is therapeutically useless or for which informed consent is expressly refused or withdrawn.

- 2(6) Causation.** Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it.

**Absence of Conduct or State of Mind Necessary for Culpability**

**3(1) Lack of Control.**

- (a) **Compulsion, Impossibility, Automatism.** No one is liable for conduct which is beyond his control by reason of:
  - (i) physical compulsion by another person;
  - (ii) in the case of an omission, physical impossibility to perform the act required; or
  - (iii) factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances.
- (b) **Exception: Negligence.** This clause shall not apply as a defence to a crime that can be committed by negligence where the lack of control is due to the defendant's negligence.

3. **Final Report of the Federal/Provincial Working Group on Homicide (1991)**

Recommendation 1: Rule of Causation

Everyone causes death, when their conduct significantly contributes to death, notwithstanding that there may be other significant contributory factors and that such conduct may not alone have caused death.

Recommendation 2: Definitions

For the purposes of this Part:

- (1) "conduct" includes any act of a person, and any omission to do anything that is a legal duty of the person;
- (2) "legal duty" means a duty imposed by an Act of Parliament or by an Act of a legislature of a province or territory;

(b) United States

Model Penal Code (1962)

**ARTICLE 2. GENERAL PRINCIPLES OF  
LIABILITY**

**Section 2.01. Requirement of Voluntary Act; Omission as  
Basis of Liability; Possession as an Act.**

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

- (a) the omission is expressly made sufficient by the law defining the offense; or

(b) a duty to perform the omitted act is otherwise imposed by law.

(4) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

**Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.**

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or



(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

(c) **Australia**

**Crimes (Amendment) Act 1990**

*"Division 1 - Preliminary*

**Interpretation**

"3C. (1) In this Part, unless the contrary intention appears: 'act' includes omission;

*"Division 3 - Involuntary Actions*

**Involuntary actions**

"3H. (1) Subject to subsection (4), a person is not guilty of an offence if the relevant act or omission was done involuntarily.

"(2) Without limiting the operation of subsection (1), an act done by a person is done involuntarily if:

(a) it was caused by the application of physical force by another person; or

(b) it was the result of a spasm or convulsion; or

(c) the act was done while the person was in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) that deprived the person of control of the act;

being an application of force, a spasm or convulsion or a condition that was not a result of an act done or omission made by the person with the fault required for the offence or a result of voluntary intoxication.

"(3) Without limiting the operation of subsection (1), an omission is made involuntarily if:

(a) the person was physically incapable of doing the required act; and

(b) the incapacity was not a result of an act done or omission made by the person with the fault required for the offence or a result of voluntary intoxication.

"(4) Where subsection (1) would, apart from this subsection, apply to a person only as a result of:

- (a) a mental disease or mental defect to which section 3Q applies; or
  - (b) a combination of such a mental disease or mental defect and the intoxication of the person;
- that subsection does not apply to the person.

"(5) In this section:  
'act' does not include omission.

(d) Israel

**Proposed Penal Law (1990)**

**Definitions** 18.(a) "Ingredient", in relation to an offence, means the act, in accordance with the definition of the offence, and a circumstance or consequence of the act which is part of the definition of the offence.

(b) "Act", unless otherwise provided, includes an omission.

(c) "Omission" means refraining from doing what is a duty under any law or contract.

Chapter Two

Defences as to Criminality of Act

**Absence of voluntariness** 42. A person shall bear no criminal liability for an act done by him while unable to choose between doing and not doing it, such as an act done in consequence of physical coercion which he cannot overcome or by way of reflectory or spasmodic reaction or while asleep or in a state of hypnosis or in any other state in which he has not control of his bodily movements.

#### **PART IV: Comments on Proposal**

##### **1. Criminal Liability**

Except where otherwise specified, no one is criminally liable for an offence unless that person engages in the prohibited conduct, with the required blameworthy state of mind, in the absence of a lawful justification, excuse or other defence.

##### **Comments**

1. Strictly speaking, section 1 may not be necessary since the three essential ingredients of criminal liability are each dealt with in other provisions of our proposed Code. However section 1 serves at least two useful functions:

- (i) it clearly informs persons of the three essential ingredients of criminal liability;

- (ii) it recognizes the requirement for the principle of concurrence of both actus reus and mens rea by stating that the prohibited conduct must be engaged in with the required mental state.

2. The phrase "except where otherwise specified" may be unnecessary, but it is included at this stage out of an abundance of caution.

##### **2. Prohibited Conduct**

Prohibited conduct consists of an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences.

##### **Comments**

1. The expression "prohibited conduct" is also used in our definition of mental elements. It is defined in section 2 to avoid frequent repetition of the longer expression "act, omission or state of affairs in specified circumstances or with specified consequences."
2. The expression "state of affairs" is included to avoid the difficult act/omission classification of some offences such as possession, being an inmate or a found-in of a gaming or bawdy house, care and control of a vehicle while impaired or over .08, vagrancy (s. 179) etc.

### 3. Omission

No one is liable for an omission unless

- (a) that person fails to perform a duty imposed by this Act, or
- (b) the omission is itself defined as an offence by this Act.

#### Comments

1. This section adheres to the common law position that there is no liability for omissions unless specifically imposed by law. Section 3(a) deals with liability for causing a criminal harm by omitting to perform a legal duty (e.g. to provide necessities of life to one's children). Section 3(b) covers a host of offences which define the prohibited conduct in terms of failing to do something (e.g. ss. 50(1)(b), 68(b) and (c), 69, 79-80, 126, 127, 129(b), 242, 252(1), 446(1)(a) and (c)).
2. Section 3(a) is narrower than the existing law. Section 3(a) requires that legal duties which can result in criminal liability must be specifically set out in the new Criminal Code. Current law appears to allow for criminal liability for breach of any legal duty whether specified at common law or in any federal or provincial statute: *R. v. Coyne* (1958), 124 C.C.C. 176 (N.B.C.A.) and *R. v. Popen* (1981), 60 C.C.C. (3d) 232 (Ont.C.A.).
3. The rationale for this change is the principle that the Code should be comprehensive; citizens should not only know what acts are criminal but also what omissions are criminal. Such information on omissions should be available by looking at the Code without reference to thousands of other statutory provisions or cases.
4. The articulation of legal duties is left to the specific part of the Criminal Code in the context of defining offences.

#### 4. Causation

- (1) Everyone causes a result when that person's acts or omissions contribute to the result and are not just a minimal or insignificant cause.

OR

- (1) Everyone causes a result when that person's acts or omissions substantially contribute to the result.
- (2) Everyone may (substantially) contribute to a result even though that person's acts or omissions are not the sole cause or the main cause of the result and may not alone have caused the result.

- (3) Thin Skull

For the purposes of causation, everyone must take the victim's physical or psychological condition as he/she finds it.

- (4) Intervening Cause

No one causes a result if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.

#### Comments

1. Alternative (1) codifies the existing causation rule as set out in Smithers, *infra*. The current causation rule sets a very low threshold for causation. The effect of this is to widen the net of those who can be held criminally responsible for causing a prohibited consequence. Alternative (2) sets a higher threshold for causation. Although the issue of what constitutes a "substantial" cause will be resolved on a case by case basis, I think it is fair to argue that a substantial cause is something greater than a contributory cause that is just one degree above being minimal or insignificant.

2. The Law Reform Commission of Canada (Working Paper 31 at 27) recommend the words "substantially contributes". The Federal/Provincial Working Group on Homicide (1991) recommend the words "significantly contributes". The Working Group were of the opinion that the expression "significantly contributes" best captures the meaning of the causation principle enunciated in Smithers. In my opinion, "significantly contributes" is a higher standard than a "contributing cause outside the de minimus range" as set out in Smithers: (1978), 34 C.C.C. (2d) 427, at 436 (S.C.C.).

3. The Smithers test was recently approved by the Supreme Court of Canada as the proper test on a charge of criminal negligence causing death arising out of the operation of a motor vehicle: R. v. Pinske, [1989] 2 S.C.R. 979, affirming the reasons given by the Court of Appeal on the issue of causation (1988), 30 B.C.L.R. (2d) 114, 6 M.V.R. (2d) 19 (C.A.). The Smithers test has also been applied by several appellate courts in regard to dangerous driving causing bodily harm/death and impaired driving causing bodily harm/death:

- (a) R. v. Larocque (1988), 5 M.V.R. (2d) 221 (Ont. C.A.) (s. 255(2));
  - (b) R. v. Singhal (1988), 5 M.V.R. (2d) 173 (B.C.C.A.) (s. 249(3));
  - (c) R. v. Halkett (1988), 11 M.V.R. (2d) 109 (Sask. C.A.) (s. 255(3));
  - (d) R. v. F. (D.L.) (1989), 52 C.C.C. (3d) 357 (Alta. C.A.) (s. 249(3));
  - (e) R. v. Ewart (1989), 53 C.C.C. (3d) 153 (Alta. C.A.), additional reasons at (1990), 53 C.C.C. (3d) 159 (Alta. C.A.) (ss. 255(2), 255(3), 249(4));
  - (f) R. v. Colby (1989), 52 C.C.C. (3d) 321, 18 M.V.R. (2d) 73 (Alta. C.A.) (ss. 255(3), 249(4)).
4. In Pinske, supra, Lambert J.A. (at B.C.L.R. 127, M.V.R. 36) replaced the phrase "outside the de minimis range", using the words "and not just a minimal or insignificant cause".
5. In Pinske, supra, the British Columbia Court of Appeal held that the trial Judge erred in instructing the jurors that they must find that the accused's driving was the "substantial cause of the accident and not just a minimal or insignificant cause". At B.C.L.R. 123, M.V.R. 32, Craig and Macfarlane J.J.A. agreed with the Crown's submission that the trial Judge should have applied Smithers and should therefore have instructed the jury that if the criminally negligent driving of the accused was "at least a contributing cause of death, outside the de minimis range" they could convict the accused of criminal negligence causing death. As noted above, Lambert J.A. avoided using the expression "outside the de minimis range" and stated that the correct direction is to tell the jury that in order to convict they must conclude that the accused's driving was "a contributing cause and not just a minimal or insignificant cause". Lambert J.A. also added (at B.C.L.R. 127, M.V.R. 36): "The difference between 'substantial' and 'contributing' is significant in fact and crucial in law." The Supreme Court of Canada dismissed the accused's appeal, stating (at S.C.R. 979, B.C.L.R. 152, N.R. 400): "We are all

of the view that, for the reasons given by the Court of Appeal as regards to the trial judge's instructions on causation, this appeal must fail and the order for a new trial must stand."

6. In Singhal, supra, at 177, the accused was driving at excessive speed, but the trial Judge found that, even if he had been driving within the speed limit, he could not have stopped in time to avoid the cyclist who, without warning, turned suddenly into his lane of travel, "thereby making the collision inevitable". Thus driving at excessive speed was not a contributing cause of the accident. The British Columbia Court of Appeal agreed.

7. There is still some uncertainty as to what it means to be "at least a contributing cause, outside the de minimis range". In Ewart, supra, McClung J.A. for the Alberta Court of Appeal said (at 61) that the Smithers test "requires that the underlying dangerous driving or impaired driving must be shown to have been a real factor in bringing about any bodily harm or death which follows". In F.(D.L.), supra at C.R. 398, M.V.R. 70, McClung J.A. stated:

In my view the words "thereby caused" must demand, at least, that the unlawful operation of the accused's vehicle be proven to be a real and truly contributing cause of any ensuing injury or death and the trial Court should be chary of allowing speculative inferences alone to stand as the causative link between the driving and the injury accident solely because of the target of the statute. The unlawful driving must still demonstrably influence the actual injury accident beyond serving as its backdrop.

8. Although McClung, J.A. acknowledges that the "outside de minimis" rule now governs, he suggests it is a test of sweeping accountability that may be in conflict with principles of fundamental justice under s. 7 of the Charter in its application to some aggravated driving prosecutions, although he states that this issue does not have to be resolved on the facts of this case.

In Colby, supra at C.C.C. 330, M.V.R. 82, while explaining the "outside the de minimis range" test, the Court cited with approval the words of McClung J.A. in Ewart that the accused's impairment must be a "real factor" in the chain of events leading to the death.

9. See R. Libman, "Case Comment: R. v. Ewart; R. v. F.(D.L.); R. v. Colby; R. v. Pinske" (1990), 18 M.V.R. (2d) 86 at 91:

Is the formulation of the causation test Ewart, F.(D.L.) and Colby in accordance with Pinske? With

respect, it is submitted that the interpretation of the causation requirement in these cases comes very close to the impugned direction at trial in Pinske. It is true, of course, that none of the three cases before the Alberta Court of Appeal involved jury trials and the Court was therefore not called upon to determine how a jury should be directed on the issue. However, the phrases used by the Court, viz., "a real factor", "real connection" [Ewart]; "a real and truly contributing cause" [F.(D.L.)]; "a real factor" [Colby] arguably impose too onerous a burden on the prosecution in proving the element of causation.

10. Subsection (2) reflects the current law as set out in Smithers that the accused's act need not be the sole cause nor even the main cause. In R. v. Kitching and Adams, [1976] 6 W.W.R. 697 (Man. C.A.), O'Sullivan J.A. stated: "I think the law is that the conduct of a defendant in a criminal trial need not be shown to be the sole or 'effective' cause of a crime..... [T]here may be two or more independent operative causes of death."
11. Subsection (2) also recognizes the notion of cumulative causation.
12. Subsection (3) codifies the thin-skull rule of causation. This rule was applied by the Supreme Court of Canada in Smithers, supra, at 437 when the Court stated: "It is a well-recognized principle that one who assaults another must take his victim as he finds him." This rule will be largely nullified by our mental element provisions which provide that an accused is only liable for what the accused was aware of or foresaw.
13. Subsection (4) recognizes that certain, intervening causes are so overwhelming that the original acts or omissions are no longer held in law to be causes. In other words, those acts or omissions are now deemed to be insignificant contributory factors. See R. v. Smith, [1959] 2 All E.R. 193 (Ct. Martial App. Ct.): "Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wounds merely part of the history can it be said that the death does not flow from that wound."
14. Although the law of causation can raise difficult problems, these issues are often avoided by deciding cases on the basis of no mens rea. Concerns about remoteness are dealt with by our mental element requirements that an accused is only liable for consequences which he or she was aware of or foresaw. However if the Criminal Code continues to have



some offences where it is unnecessary for the accused (or even a reasonable person) to have foreseen the consequences, then causation problems will continue. For example, it is not necessary under current law to prove that the result or consequence was foreseeable by either the accused or a reasonable person in the following offences:

- (i) manslaughter - unlawful act causing death;
- (ii) impaired or dangerous driving causing bodily harm or death;
- (iii) assault causing bodily harm.

## 5. Mental Elements.

1. For the purposes of criminal responsibility, the mental elements of an offence are:

- (i) intent,
- (ii) knowledge, or
- (iii) recklessness,

Subsection (1) of the Mental Element Proposals as agreed upon at the Toronto Meeting (see Summary of Proceedings, January 4-5, 1992) is amended in form but not in substance to be consistent with sections 1 and 2 of this Working Paper. The other mental element provisions (subsections (2) to (10)) remain unchanged. Subsection (1) from the Toronto Meeting read as follows:

- (1) For the purposes of criminal responsibility, the material elements of an offence are:

(a) a state of mind with which a person acts or omits to act, consisting of:

- (i) intent,
- (ii) knowledge, or
- (iii) recklessness, and

- (b) prohibited conduct, consisting of:

- (i) an act or omission in a specified circumstance, or
- (ii) an act or omission with a specified consequence.

6. Involuntary Conduct

- (1) No one is liable for an act, omission or state of affairs which is involuntary.
- (2) An act, omission or state of affairs is involuntary if it was not physically willed or was not within one's ability to physically control. For greater certainty, this includes
  - (a) a spasm, twitch or reflex action,
  - (b) an act or movement physically caused by an external force, and
  - (c) an omission or failure to act as legally required due to physical impossibility.
- (3) This section does not apply to involuntary conduct due to provocation, rage or loss of temper. Involuntary conduct due to mental disorder, voluntary intoxication and automatism are dealt with in other sections of this Act.
- (4) If the involuntary act, omission or state of affairs occurred because of a person's prior, voluntary blameworthy conduct, then that person may be held liable for that prior blameworthy conduct.

Comments

1. Sections 6 and 7 reflect the view that involuntary conduct which does not involve unconsciousness should be dealt with in a separate provision and should not be referred to as automatism. In this proposal (s. 7), automatism refers to unconscious (and therefore involuntary) conduct. This decision to separate involuntary conduct into two distinct sections is purely pragmatic in the sense that including all forms of involuntary conduct under one provision would make the provision unduly complex and therefore harder to draft and harder for the reader to comprehend. LRCC Report 31, section 3(1) only uses one section but in my opinion it is seriously inadequate, especially in regard to automatism. Section 3(H) of the proposed Australian Crimes (Amendment) Act, 1990 is a more complete effort, but still wanting in some respects.
2. Section 6(1) incorporates a fundamental principle of criminal liability. The requirement that conduct be voluntary is at the very root of our notions of criminal justice. Correctly or incorrectly, our principles of criminal responsibility are based upon the assumption that human beings are rational and autonomous. In other words, human beings are generally assumed to have the capacity to

reason between right and wrong and the capacity to choose between right and wrong. If a person knows right from wrong, yet chooses to do wrong, then society is morally justified in holding that person responsible for that wrong. Conversely, it is immoral to hold a person responsible for conduct if that person does not have the capacity to reason or choose right from wrong.

3. The requirement that conduct be voluntary is reflected in the following Supreme Court of Canada case law:

: In R. v. King, [1962] S.C.R. 746, at 749, Taschereau J. stated:

"[T]here can be no actus reus unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a willpower to do an act whether the accused knew or not that it was prohibited by law."

: In R. v. Leary (1978), 33 C.C.C. (2d) 473 (S.C.C.) Dickson, J., dissenting on another point, stated:

"A person is accountable for what he wills. When, in the exercise of the power of free choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less. But, to be criminal, the wrongdoing must have been consciously committed."

: In Rabey v. The Queen (1980), 54 C.C.C. (2d) 1, at 9-10, Dickson, J. dissenting on another point, stated:

"The fundamental precept of our criminal law is that a man is responsible only for his conscious, intentional acts."

...

"Although the word "automatism" made its way but lately to the legal state, it is basic principle that absence of volition in respect of the act involved is always a defence to a crime."

4. Subsection (2) is limited to physical involuntariness. It is not intended to cover moral involuntariness (which is dealt with by necessity, duress, etc.).

5. In regard to subsection (2)(a), spasms and twitches in Hill v. Baxter, [1958] 1 Q.B. 277 (Div.Ct.) and reflex actions in R. v. Wolfe (1975), 20 C.C.C. (2d) 382 (Ont.C.A.) are recognized as involuntary conduct.
6. Subsection 2(b) is broad enough to cover various forms of involuntary conduct:
  - (i) accidental movement: trip, fall, and hit someone or accidentally discharge a gun: R. v. Kolbe, [1974] 4 W.W.R. 579, at 606 (Alta. C.A.); R. v. Tennant and Naccarato (1975) 23 C.C.C. (2d) 80, at 96 (Ont.C.A.);
  - (ii) unexpected mechanical failure of car: R. v. Spurge [1961] 2 All E.R. 688, at 691 (C.A.);
  - (iii) physical compulsion (A takes B's hand in which there is a knife and physically compels it into c): 1 Hale Pleas of the Crown 434; O'Sullivan v. Fisher [1954] S. Australia State Reports 33 (S.C.);
  - (iv) a gust of wind (or another person) hurls A into B.
7. Section (2)(c) recognizes the defence of physical impossibility to perform a legal duty. See Stuart, supra, at 441-42 and Colvin, supra, at 249-50.
8. Subsection (3) excludes involuntary conduct due to provocation, rage or loss of temper on the basis that the law expects us to control our behaviour notwithstanding provocation, rage or loss of temper. Whether this is proper or not is debatable. Its relationship to reflex actions (Wolfe, supra) is also unclear.
9. Subsection (4) confirms that a person can be held responsible for prior, voluntary, blameworthy conduct which results in subsequent involuntary prohibited conduct. This can be done by arguing that the voluntary conduct caused the involuntary conduct and that the person knew that (or was reckless in regard to whether) the voluntary conduct would cause the involuntary but prohibited conduct. This issue is also dealt with in section 7 on automatism. This provision is also somewhat analogous to our proposed provision on compulsion which states that the defence of compulsion does not apply to a person who has knowingly and without reasonable excuse exposed himself or herself to the harm.

## 7. Automatism

- |                                              |        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|----------------------------------------------|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Automatism<br/>General<br/>Rule</b>       | 7. (1) | No one shall be convicted of an offence in respect of an act or omission which occurred while that person was in a state of automatism.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>Definition<br/>of<br/>Automatism</b>      | (2)    | For the purposes of this section, automatism means unconscious, involuntary behaviour whereby a person, though capable of action, is not conscious of what he/she is doing.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>Exceptions</b>                            | (3)    | Subsection (1) does not apply to automatism which is caused by <ul style="list-style-type: none"><li>(a) mental disorder</li><li>(b) voluntary intoxication, or</li><li>(c) fault as defined in subsections (5) and (6).</li></ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Definition<br/>of Mental<br/>Disorder</b> | (4)    | For the purposes of this section, automatism is caused by mental disorder when the unconscious, involuntary behaviour arises primarily from an internal, subjective condition or weakness in the accused's own psychological, emotional or organic make-up, including dissociative states caused by the ordinary stresses and disappointments of life, but not unconscious, involuntary behaviour of a transient nature caused by external factors such as <ul style="list-style-type: none"><li>(a) a physical blow;</li><li>(b) a psychological blow from an extraordinary external event which might reasonably be expected to cause a dissociative state in an average, normal person;</li><li>(c) inhalation of toxic fumes, accidental poisoning, or involuntary intoxication;</li><li>(d) sleepwalking;</li><li>(e) a stroke;</li><li>(f) hypoglycaemia;</li><li>(g) a flu or virus; or</li><li>(h) other similar factors.</li></ul> |

**Fault  
Exception**

(5) Notwithstanding subsection (1), automatism is not a defence

- (a) to an intentional offence if a person voluntarily induces automatism with the intention of causing the prohibited conduct of that offence;
- (b) to a knowledge offence if a person voluntarily induces automatism knowing that it is virtually certain that he/she will commit the prohibited conduct of that offence while in that state of automatism;
- (c) to a reckless offence if a person voluntarily induces automatism notwithstanding the fact that the person is aware of a risk that he/she will commit the prohibited conduct of that offence while in that state of automatism, and it is highly unreasonable to take that risk.

**Included  
Offence of  
Reckless  
Automatism**

(6) Where a person is found not guilty of an offence by reason of automatism and the state of automatism was caused by that person's own recklessness, that person shall be found guilty of the lesser included offence of reckless [or dangerous] automatism

- (a) causing death,
- (b) causing bodily harm, or
- (c) causing serious interference with, destruction of or serious damage to property, and

shall be liable

- (d) upon indictment to a maximum penalty of
  - (i) 10 years imprisonment for paragraph (a),
  - (ii) 5 years imprisonment for paragraph (b), or
  - (iii) 2 years imprisonment for paragraph (c), or
- (e) upon summary conviction to a maximum penalty of 6 months.

- Special Verdict** (7) Where evidence of automatism is given at trial and the accused is acquitted, the judge or jury shall declare whether the accused was acquitted by reason of automatism.
- Special Disposition** (8) Where a person is
- (a) under subsection (7) found not responsible by reason of automatism, or
  - (b) under subsection (6) found guilty of the offence of dangerous automatism, the court may, in lieu of any other disposition, dispose of that person in the same manner as if that person had been found not guilty by reason of mental disorder, provided that person's automatism is likely to occur again in a manner which poses a substantial danger to the lives or safety of others; and such persons shall be subject to the same safeguards, procedures and reviews as persons who are found not guilty due to mental disorder.

#### Comments

##### a) Summary

1. The discussion proposal attempts to codify the existing law in regard to automatism. In this regard, the proposal follows the majority decision of the Supreme Court of Canada in Rabey
  - (a) in its definition of automatism,
  - (b) in its distinction between insanity and automatism, and
  - (c) in its exclusion from the defence of automatism of unconscious behaviour which is induced by insanity or voluntary intoxication.
2. The discussion proposal is new to the extent that
  - (a) it clarifies the situations in which automatism induced by the accused's own fault is a bar to its use as a defence,
  - (b) it creates a new offence of reckless automatism (similar to the new offence of dangerous intoxication), and
  - (c) it provides for special disposition orders (similar to provisions for the mentally disordered) when necessary for public safety.

b) A Separate Defence of Automatism

3. The discussion proposal limits the automatism defence to unconscious, involuntary behaviour. The automatism proposal does not include other forms of involuntary behaviour where the accused is not unconscious. These other forms of involuntary behaviour are dealt with in section 6 of this proposed codification. To attempt to unite these various forms of conscious but involuntary behaviour into one proposal on automatism, which also has as its major concern incidents of unconscious, involuntary behaviour, would tend to make the defence of automatism complex, difficult to draft, and less certain. In addition, the word "automatism" is normally used in medicine and law to refer to unconscious behaviour (see Rabey definition), although it has been used on occasion to include all forms of involuntary behaviour (see Bratty v. A.G. Northern Ireland, [1963] A.C. 386, at 409-410).

c) Definition of Automatism

4. Automatism has been defined in Rabey v. The Queen (1980), 54 C.C.C. (2d) 1, at 6, by Mr. Justice Ritchie, for a majority of the Supreme Court of Canada, as follows:

Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done.

5. It should be noted that the discussion proposal (s. 7(2)) defines automatism as both unconscious and involuntary behaviour. Requiring that the behaviour be both unconscious and involuntary
- i) serves to emphasize the rationale for the automatism defence (i.e. lack of volition), and
  - ii) eliminates the possibility of relying on the defence of automatism in cases where consciousness was impaired but the conduct was not involuntary.
6. Subsection (3)(a) and (b) codify existing law:
- (a) When unconscious, involuntary behaviour is caused by insanity, the defence of insanity applies and the defence of automatism is not open to the accused: Rabey, supra; Revelle v. The Queen (1981), 21 C.R. (3d) 161, at 166 (S.C.C.).
  - (b) When unconscious, involuntary behaviour is caused by voluntary intoxication, the defence of intoxication



applies and the defence of automatism is not open to the accused: R. v. Hartridge (1966), 48 C.R. 389 (Sask. C.A.); R. v. MacRae (1986), 76 N.S.R. (2d) 30 (C.A.); Revelle, supra; R. v. King (1982), 67 C.C.C. (2d) 549 (Ont. C.A.); R. v. McDowell (1980), 52 C.C.C. (2) 298 (Ont. C.A.).

The distinction in paragraph (b) is of little practical importance since the majority in Bernard v. The Queen (1988), 45 C.C.C. (3d) 1 (S.C.C.) held that evidence of intoxication akin to a state of automatism is admissible to negate the minimal intent required for offences of general intent.

d) Uncodified Rules

7. Do you agree that it is unnecessary to codify the following procedural and evidentiary rules:

- (a) When unconscious, involuntary behaviour may have been caused by a combination of factors (e.g. brain-damage, voluntary consumption of alcohol, blow to the head), the defence of insanity should be considered first, followed by the defence of intoxication: Revelle (1980), 48 C.C.C. (2d) 267 (Ont. C.A.), aff'd (1981) 21 C.R. (3d) 161. The defence of automatism should be considered where there is evidence of an external factor, independent of the mental disorder or voluntary intoxication, which may have been sufficient to give rise to the unconscious behaviour: Revelle, supra; McDowell, supra; R. v. Oakley (1986), 24 C.C.C. (3d) 351 at 360-361 (Ont. C.A.)
- (b) The defence of automatism should be put to the jury where it is supported by a sufficient evidential foundation. Normally this should involve something more than the testimony of the accused alone: R. v. Bartlett (1983), 5 C.C.C. (3d) 321 (Ont. H.C.); R. v. MacRae (1986), 76 N.S.R. (2d) 30 (C.A.). In Rabey, supra, Dickson J., dissenting on another point, stated (at p.31) that the evidence of unconscious behaviour "should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition. ..." The question of whether there is sufficient evidence to put the defence of automatism to the jury is a question of law: R. v. Sproule (1975), 26 C.C.C. (2d) 92, at 99 (Ont. C.A.); R. v. Oakley (1986), 24 C.C.C. (3d) 351, at 362 (Ont. C.A.).
- (c) Once the issue of automatism is properly before the trier of fact, the Crown bears the burden of proving beyond a reasonable doubt that the accused's conduct was conscious and voluntary: Rabey, supra, at p.9.

e) Non-insane Automatism

8. In regard to section 7(4) the test for distinguishing between automatism caused by insanity and automatism caused otherwise is the test laid down by Martin, J.A. and adopted by a majority of the Supreme Court of Canada in Rabey, supra, at 477-78 and 482-483:

In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a "disease of the mind" if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind. (For an interesting and helpful discussion see "The Concept of Mental Disease in Criminal Law Insanity Tests" by Herbert Fingarette in 33 University of Chicago Law Review 229). Particular transient mental disturbances may not, however, be capable of being properly categorized in relation to whether they constitute "disease of the mind", on the basis of a generalized statement, and must be decided on a case by case basis.

...

In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind". To hold otherwise would deprive the concept of an external factor of any real meaning. In my view, the emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be an external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up. I conclude, therefore, that, in the circumstances of this case, the dissociative state in which the

respondent was said to be, constituted a "disease of the mind". I leave aside until it becomes necessary to decide them, cases where a dissociative state has resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and the like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience.

9. The proposal adopts the distinction between insanity and automatism which was set out by Martin, J.A. in Rabey and subsequently approved by the majority of the Supreme Court of Canada in that same case. According to that distinction, if unconscious, involuntary behaviour is caused by a disease of the mind, then insanity, not automatism is the proper defence. The discussion proposal relies on the Rabey definition of "disease of the mind" which draws a distinction between internal and external causes. However, to be consistent with the mental disorder provisions, this discussion proposal uses the term "mental disorder" in place of "disease of the mind" and "insanity".
10. The Supreme Court in Rabey acknowledged that its general statement of the distinction between internal and external causes may not be appropriate for classifying all cases and that it may be necessary to classify some causes on a case by case basis. Thus the discussion proposal in subsection (4) sets out the general distinction and then, for greater certainty, lists certain causes which have already been classified as external by the courts. Subsection (4)(h) -- "or other similar factors" -- leaves room for the courts to add to this list on a case by case basis (e.g., certain forms of epilepsy if considered appropriate).
11. The "external cause" test has been criticized by D. Stuart, Canadian Criminal Law (2nd ed., 1987, pp. 94-95) because it is set up as "an exclusive criterion of sane automatism" without justifying why an external cause must be pointed to in all cases. Stuart also argues that the "external cause" criteria is inadequate for classifying conditions such as somnambulism or physical ailments. He suggests that these conditions are not "external causes", yet they are classified as such in regard to automatism. Stuart's criticisms, though legitimate, do not constitute an overwhelming or compelling case against the "external cause" test. If it is acknowledged that insanity and automatism

must be distinguished, that the distinction is a matter of common sense after taking into account medical opinion, public acceptability, and other pragmatic considerations, and that exceptions are made where the "external cause" approach does not result in a common sense classification, then the imperfect labelling of conditions as either external or primarily internal does little harm.

12. The discussion proposal in subsection (4)(b) follows Rabey in its adoption of an objective standard in regard to psychological blow automatism. In his dissenting judgment in Rabey, Dickson, J. criticizes the adoption of that objective test. Stuart has also criticized the adoption of an objective test. However, the objective approach is supported by other commentators: see W. Holland, "Automatism and Criminal Responsibility" (1982), 24 Crim.L.Q. 95; K. Campbell, "Psychological Blow Automatism: A Narrow Defence" (1982), 23 Crim.L.Q. 342.
13. The objective test seems appropriate in regard to psychological blow automatism. The very focus of the inquiry is to identify persons with a mental weakness. If a psychological blow would not cause an ordinary, average person in circumstances similar to the accused to go into a state of dissociation, then that fact suggests that there is some internal, subjective weakness in this particular accused's mental make-up. It is also worth noting that an objective test is also used in regard to several other defences: e.g., provocation, self-defence, etc. In my opinion, however, the LRCC proposal goes too far in making all factors -- both physical and psychological -- subject to an objective test. Their proposal (perhaps unintentionally) would rule out automatism for a thin-skulled accused, a diabetic accused, or an accused with an unexpected metabolic reaction.

f) Fault Requirement

14. There have been statements in several cases which indicate that automatism is only a defence when the state of automatism has not arisen through the accused's own fault or, in other words, where the accused is not to blame for the automatism: Hill v. Baxter; R. v. King, [1962] S.C.R. 746; R. v. Lucki (1955), 17 W.W.R. 446; R. v. Spurge, supra; R. v. Rabey, supra. These general statements on the effect of fault on the defence of automatism were made in cases where fault was not in issue. In that respect they are too general and require greater refinement. Mr. Justice Martin came closer to the mark on the issue of fault when he stated in Rabey (1977), 37 C.C.C. (2d) at 472:

[A]utomatism not resulting from disease of the mind leads to an absolute acquittal, unless induced by voluntary intoxication due to the consumption of

alcohol or drugs or unless foreseeability or foresight with respect to its occurrence supplies the necessary element of fault, or mens rea, where negligence or recklessness constitutes a basis of liability.

15. The discussion proposal (subsection (5)) adopts the approach of Martin, J.A. to the issue of automatism and fault, although the discussion proposal is a little more detailed than Martin, J.A.'s statement. In short, the discussion proposal deals with automatism induced by fault on the basis of the general principles governing mens rea or fault. An accused who is in a state of automatism is not liable for a particular crime unless the requisite fault requirement for that crime exists; conversely, an accused is liable for a crime if, just prior to inducing the state of automatism, the accused had the requisite fault required for that crime.
16. By way of illustration, the discussion proposal would work as follows in regard to a charge of assault. Assault is an offence requiring an intentional application of force (Crim. Code, s. 265(1)(a)). If A hits B while A is in a state of automatism,
  - i) A is guilty of assault if A induced a state of automatism with the intention of assaulting B while in that state. In these circumstances, A has done an act (inducing automatism) with the intention of applying force to B. The fault requirement of intention to apply force exists and thus liability is justified. The fact that the actual blow occurred while A was in an altered state of consciousness should not relieve A from liability for intentionally setting this chain of action in course. A's automatism is simply the instrument by which A intentionally committed the assault.
  - ii) If A was reckless or negligent in respect to becoming automatic and committing an assault while in that state, that would not be a sufficient mens rea to convict A of the intentional offence of assault. The accused would be entitled to an acquittal on the charge of assault by reason of automatism. However, under subsection (6), the accused would be guilty of the new offence of reckless automatism if A caused bodily harm to B since the automatism was caused by A's own fault (i.e. recklessness). Alternatively, A could be charged with an offence which only requires recklessness or negligence as a fault element (e.g. criminal negligence causing bodily harm).
  - iii) If A's state of automatism did not arise from insanity, voluntary intoxication, or fault (intention or recklessness), then A will be acquitted of both the

offence of assault and the offence of dangerous automatism.

17. Subsection (5) of the discussion proposal is currently drafted on the assumption that the fault requirements under the proposed Code will be intention, knowledge and recklessness. If the fault elements are redefined in some different way, subsection (5) can be redrafted to conform with the new definitions of fault.
18. Before an accused can be convicted of an offence committed while in a state of automatism, subsection (5) of this discussion proposal requires that there be proof of the specific fault element normally required for that offence. Thus, there is no question of substituting self-induced automatism (or self-induced intoxication) as the mens rea for the offence and therefore the constitutional concerns, under s. 11(d) of the Charter, which arose in regard to substituted mens rea in Vaillancourt, [1987] 2 S.C.R. 636, Whyte, [1988] 2 S.C.R. 3, and Bernard supra, are not at issue in the scheme proposed in subsection (5) of this discussion proposal.

g) Offence of Reckless Automatism

19. The creation of a new offence of reckless automatism is modelled on the creation of a similar offence of dangerous intoxication. The similarities between voluntary intoxication and voluntarily inducing a state of automatism are sufficiently striking to warrant parallel treatment. The arguments for the creation of a new offence of dangerous intoxication are set out in the Intoxication Working Paper. For the most part, those arguments are equally applicable to the creation of an offence in situations where the accused, voluntarily and through his/her own fault, has become automatic and caused bodily harm, death, or property damage in that automatic state.
20. If the proposal for the creation of a new offence of dangerous intoxication is not accepted by Parliament, then obviously the proposal in subsection (6) for an offence of reckless automatism must be reconsidered.

h) Special Verdict and Dispositions

21. The creation of a special verdict in subsection (7) of not responsible due to automatism and mental disorder dispositions in subsection (8) where the automatism is likely to occur again and the person poses a substantial danger to the lives or safety of others are both modelled on the mental disorder defence.
22. The requirement in subsection (7) that the judge or jury shall declare whether the accused is acquitted by reason of

automatism has the effect of creating a special verdict of not responsible due to automatism. In this respect it is similar to the special verdict for the mental disorder defence and is justified for the same reasons that the special mental disorder verdict exists.

23. To the extent that special detention provisions are warranted in the case of persons acquitted by reason of mental disorder, similar provisions for detention of persons acquitted by reason of automatism are warranted where those persons continue to represent a danger to the public.
24. Subsection (8) may need more detail. At the moment, subsection (8) simply suggests that those very few persons who are acquitted by reason of automatism and continue to be a danger to society, should be treated in a similar fashion to persons who are acquitted by reason of mental disorder and continue to be a danger to society.