

# A Comparison of *R. v. Stone* with *R. v. Parks*: Two Cases of Automatism

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Both the medical and legal professions recognize that some criminal actions take place in the absence of consciousness and intent, thereby inferring that these actions are less culpable. However, experts enter a legal quagmire when medical expert evidence attempts to find some common meaning for the terms “automatism” and “unconsciousness.”

The Concise Oxford Dictionary<sup>1</sup> defines automatism as “Involuntary action. (Psych) action performed unconsciously or subconsciously.” This seems precise and simple until we attempt to define unconscious or subconscious. Fenwick<sup>2</sup> notes that consciousness is layered and that these layers largely depend on subjective behavior that is ill defined. The definition becomes more relevant to the law by using the term involuntary, but this, too, is difficult to define. Fenwick suggests the following definition of automatism:

An automatism is an involuntary piece of behavior over which an individual has no control. The behavior itself is usually inappropriate to the circumstances and may be out of character for the individual. It can be complex, coordinated, and apparently purposeful and directive. They were lacking in judgment. Afterward, the individual may have no recollection, or only particular and confused memory of these actions. In organic automatisms, there must be some disturbance of brain function, sufficient to give rise to the above features. In psychogenic automatisms, the behavior is complex, coordinated, and appropriate to some aspects of the patient’s psychopathology. The sensorium is usually clear but there will be a severe or complete amnesia for the episode [Ref. 2, p 272].

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The *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (DMS-IV),<sup>3</sup> does not define automatism, although it does include several diagnoses, such as delirium or parasomnias, that could be the basis for automatism.

The seminal legal definition is that of Lord Denning in *Bratty v. A-G for Northern Ireland*:

...an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action, or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done while suffering from concussion or while sleepwalking.<sup>4</sup>

This was developed by Canadian courts in *R. v. Rabey*:

Automatism is a term used to describe unconscious, involuntary behavior, 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 [adopted by *R. v. Rabey* (Ref. 5, p 18) from an earlier case, *R. v. K* (Ref. 15)].

The law in England and those jurisdictions whose law is derived from English law<sup>6</sup> has a fundamental basis in the dictum “*actus non facit reum nisi mens sit rea*.” This means that the act does not make a person guilty unless his or her mind is guilty. However, it has been argued that the *actus reus* has its own mental element and, therefore, the act must be voluntary for the *actus reus* to exist. This is distinguished from the *mens rea*, referring to the wrongful intention of the accused. It is this concept of voluntariness that has become the crux of the criminal liability component when applied to the concept of automatism. There are certain acts that the public and the medical and legal professions agree do not appear to qualify as an act for which an individual should be held responsible. To put this at its least contentious, if a person,

while asleep, rolls over and crushes his wife's spectacles that she left on the bed, there would be a general consensus that this was done in an automatic state and that he should not be held responsible. The psycholegal cases before the courts are rarely so simple or so innocuous. However, as Judge Schroeder observed, "Automatism (is) a defense 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" (Ref. 7, p 608).

The waters become even muddier when voluntary intoxication is involved, which, it could be argued, could give rise to a defense of automatism.<sup>8</sup> It is the position of the Canadian Psychiatric Association (CPA) that voluntary intoxication should not be used as a defense except when issues of specific intent are raised or when the intoxication causes a distinct mental disorder—for example, in a case of delirium tremens or the rare pathological intoxication.

Amnesia, whether partial or complete, is usually at issue in cases of automatism.<sup>9</sup> A conclusion of amnesia, unfortunately, relies to a significant degree on subjective data, which poses significant problems, especially in the psycholegal area. It is the present state of the art that the optimal opinion that psychiatrists can offer is to place a period of amnesia in the context of the patient's history, the history of previous periods of amnesia, witness statements, and any other descriptions of the behavior resulting in the offense.

Automatism has come to be used as a defense in court based on the fundamental principles of criminal law that only voluntary actions attract findings of guilt. It is assumed that a sane and conscious person acts under voluntary control and is therefore responsible for any act or omission. This is generally easy to prove in the ordinary course of a trial. As we will see later in the article, a distinction is made between the related but not synonymous concepts of "unconscious" and "involuntary." The Supreme Court of Canada in *R. v. Rabey*<sup>5</sup> held that automatism that cannot be attributed to any external cause such as a blow on the head, should be characterized as a "disease of mind" based on *R. v. Quick*.<sup>10</sup> This has come to be dichotomized into "insane" and "noninsane" automatism. Since amendments to the Criminal Code made in 1991,<sup>11</sup> this should more properly be referred to as "mental disorder" automatism and "non-mental disorder" automatism.<sup>12</sup> Further analysis of these concepts then suggests that mental disorder automatism includes any automatic states pro-

duced by a disease of mind. A disease of mind is assumed to be a state caused by the internal or psychological makeup of the accused and, therefore, includes a mental disorder and, perhaps most pertinently when addressing automatism, an organic mental disorder such as delirium. Non-mental disorder automatism includes an automatic state resulting from external causes such as administration of insulin,<sup>10</sup> drugs (not self-induced), or concussion.<sup>13,14</sup> It also includes a psychological blow<sup>5,15-17</sup> and possibly posthypnotic suggestion or hypnosis, although the latter has not been tested by the courts as far as we know. Mental disorder automatism is presumed to be automatism produced by a disease of mind. We are clearly told in *Rabey* that the definition of disease of mind is a question of law for the judge to determine. In practice, judges solicit psychiatric input to help make this determination. However, psychiatry has difficulty defining the terms mental disorder or mental illness, especially when it comes to transient behavioral states produced by such entities as somnambulism or dissociative states. Thus, it is no wonder that the courts have preserved the right to make this distinction themselves, based on the input given to them. Lord Denning is often quoted as defining disease of mind as "any disorder that manifests itself in violence and is prone to recur."<sup>18</sup> This is interpreted in *Rabey* as meaning a state that manifests itself in violence but leaves a residual mental illness that requires treatment to ensure the protection of the public.

The foregoing analysis is used by the judge as an analytic tool, but a holistic, or case-by-case, approach should be taken.

## R. v. Parks

### The Facts

In the late evening of May 23, 1987, Kenneth James Parks<sup>19</sup> fell asleep on the living room couch. Sometime after falling asleep, he put on shoes and jacket, but no socks and underwear, and left his house, leaving the front door open. He then drove to the townhouse of his parents-in-law, which was 23 kilometers away, mostly by highway. He entered the townhouse using his key, taking a tire iron that was in his car trunk with several tools that included a hatchet and two knives. He then apparently killed his mother-in-law and seriously injured his father-in-law.

His first recollection was seeing his mother-in-law's face. He then recalls hearing the family's children yelling from upstairs, and he recalls running up the stairs calling out to them. The children, who were upstairs, did not hear any words articulated but merely heard animal grunting noises from him. Without entering the children's bedroom he then exited the house, and went to his car. He drove to the local police station, which was very close. He entered the police station and stated "I just killed someone with my bare hands. I just killed two people." Evidence revealed that Mr. Parks was very close to his wife's parents. He was particularly close to his mother-in-law who referred to him as "the gentle giant." There was no animosity between him and his in-laws.

Mr. Parks had no history of mental illness, and there was no evidence of a neurological illness. Five doctors gave evidence at his trial, including a neurophysiologist and arguably Canada's leading sleep expert; a neurologist; a general psychiatrist; a forensic psychiatrist; and an internationally renowned neuropsychiatrist. Their evidence revealed, based on clinical interviews, the witnesses' evidence at trial, and sleep laboratory studies, that the accused had been sleepwalking. It was noted that Mr. Parks had always slept very deeply and had a history of having trouble waking up, often being groggy for some time after awakening. There was a strong family history of parasomnia. He had a history of nocturnal enuresis until his early teens, and collateral history confirmed that he had a history of sleepwalking. There had been one prior episode of sleepwalking. For months before the episode, he had been under considerable stress and had experienced serious initial insomnia, reportedly getting as little as two to four hours of sleep at night and no sleep at all the two nights immediately preceding the incident. It was the unanimous opinion of the five doctors that the incident had occurred while the respondent was sleepwalking. They gave evidence that sleepwalking is not considered a neurological, psychiatric, or other illness, but is a disorder of sleep. The evidence was not in any way contradicted by the prosecution who had a sleep expert and an eminent forensic psychiatrist sitting at the Crown's table throughout the expert testimony. The Crown Attorney chose not to call the psychiatrist or sleep expert in rebuttal.

The trial judge directed that if the jury found that Mr. Parks was in an episode of sleepwalking when the

incident occurred, then this would lead to a finding of noninsane automatism (more properly referred to as non-not criminally responsible due to mental disorder [non-NCR-MD] automatism). Therefore, the accused should be acquitted. This was subsequently the jury finding, and he was acquitted. There are few jurisdictions in which the Crown can appeal an acquittal, and Canada is one of them. In this case the Crown appealed, adopting the position that if the accused was sleepwalking at the time of the incident, his disorder should have been held to be a disease of mind and, therefore, the judge should have instructed the jury on "insane automatism" or "insanity" (NCR-MD). The main issue, therefore, boiled down to whether sleepwalking is a disease of mind.

The court of appeal<sup>20</sup> for Ontario ruled that insane automatism was properly withheld from the jury. The court held that, on the facts before the learned trial judge, somnambulism was rightly not classified as a disease of mind. This case went to the Supreme Court of Canada which handed down a decision in 1992 that clarified some of the issues.<sup>21</sup> The Court concluded that it was clear in this case that the defense had laid a proper foundation for a defense of automatism. The only real question is whether sleepwalking or somnambulism is a disease of mind. The Court noted that disease of mind is a legal concept that has a policy component. It quoted from Judge Arthur Martin in *Rabey* who noted that there is a substantial medical component in defining the terms. The Court agreed that medical evidence has an impact on the policy inquiry. It noted that there are two approaches to deciding whether a disorder should be considered disease of mind. These include the "continuing-danger" approach and the "internal-cause" approach, but somnambulism is not well suited to this analysis. The Court also added two policy considerations: whether the disorder can be easily feigned and whether it would open the floodgates to the use of automatism as a defense.

The Supreme Court also listed several decisions in Britain and Canada that seem to recognize the same principle. However, two British decisions, *R. v. Sullivan*<sup>21</sup> and *R. v. Burgess*<sup>22</sup> seem to contradict this opinion and suggest that some diseases, including sleepwalking, are likely to lead to an insanity verdict.

The Court noted, in the instant case, that the medical testimony unanimously demonstrated that Mr. Parks was sleepwalking at the time of the incident and that sleepwalking is not a neurological, psy-

chiatric, or other illness but is a sleep disorder. It noted that the Crown experts who were present during the testimony were not called and did not give contradictory evidence. The Court found that the English case of *R. v. Burgess*, which defined sleepwalking as a mental illness, relied on completely different evidence than did *Parks*. The medical evidence in *Burgess* suggested sleepwalking was a hysterical phenomenon. In *Parks*, therefore, the appeal was accordingly dismissed and the acquittal was upheld. This was supported by unanimous and uncontradicted evidence that Mr. Parks was sleepwalking and that sleepwalking was not considered a mental disorder, coupled with evidence that the chances of a recurrence were infinitesimal.

The issue of the burden of proof was not subject to significant analysis. The respondent's *factum* stated that because the criminal code includes a presumption of sanity, it casts on the accused the persuasive burden to prove insanity. However, the court of appeal went on to state that the presumption of sanity does not relieve the Crown of its obligation to prove voluntariness beyond a reasonable doubt where insanity is not the issue, as in the case of non-mental disorder automatism. The Supreme Court appeared to concur with this brief conclusion on the burden of proof.

Mr. Justice LaForest noted that an evidentiary burden rests with the accused to provide a claim of automatism that goes beyond a mere assertion. He quoted from Mr. Justice Dixon in the case of *R. v. Rabey*:

[T]he prosecution must prove every element of the crime charge. One such element is the state of mind of the accused, in the sense that the act was voluntary. The circumstances are normally such as to permit a presumption of volition and mental capacity. That is not so when the accused. . .has placed before the court. . .evidence sufficient to raise an issue that he was unconscious of his actions at the time of the alleged offense. No burden of proof is imposed on the accused raising such a defense beyond pointing to the facts which indicate the existence of such a condition. . . [Ref. 23, p 26].

The defense has only to lay the proper foundation for the defense of automatism and support this with expert testimony.

In dealing with the question of whether, in the second stage of deliberation, automatism should be considered a disease of mind, the Court raised the analysis involving the internal-cause theory and the continuing-danger theory. It was pointed out that the two theories share a common concern for the

protection of the public. The Court noted that both in Canada and Britain the internal-cause theory has achieved recognition, suggesting that if the behavior is caused by something in the subject's mind or brain, and if it is left untreated, it is likely to recur, presumably causing further dangerousness.

### **Binding Over to Keep the Peace**

*R. v. Parks* also addressed whether, after an acquittal for automatism, the case should be referred back to the trial judge for a decision on an order to keep the peace, pursuant to the judge's preventive justice power. The majority pointed to the difficulty in making an order restricting the liberty of the accused for an act for which he has been acquitted. The Court also noted that in the instant case the accused was charged more than five years ago and he had already made considerable effort to reestablish his life. It would therefore be unfair for him to be involved in legal proceedings to maintain his liberty at this time. The chief justice dissented on this issue, saying that there is still a concern that the accused has been simply set free without any consideration of measures to protect the public. The chief justice held that such control could be exercised under the common law. He thought that this remedy could be justified under preventive-justice power.

In summary, the Supreme Court agreed that the expert medical evidence established that the accused was sleepwalking at the time of the incident. Sleepwalking, according to the evidence, is not a neurological, psychiatric, or other illness, but is a sleep disorder. The evidence established that the chances of a recurrence were minimal. The prosecution did not present any evidence to contradict this. Therefore, the Supreme Court held that the trial judge did not err in instructing the jury on the defense of automatism instead of insanity.

### **Bert Thomas Stone v. R.**

Bert Stone<sup>12</sup> admitted stabbing his wife 47 times but claimed to have done it while in a state of automatism brought on by his wife's insulting words to him. He testified that he felt a "whooshing" sensation washing over him. When his eyes focused again, he was staring straight ahead and felt a six-inch hunting knife in his hand. He looked over and saw his wife slumped over on the seat. He then disposed of her body in his truck tool box, cleaned up, drove home, and prepared a note for his stepdaughter. He

then checked into a hotel. He subsequently collected a debt, sold his car, and flew to Mexico. Sometime later in Mexico, he awoke one morning and had the sensation of having his throat cut. At this stage he remembered stabbing his wife twice in the chest before experiencing a whooshing sensation. About six weeks later he returned to Canada, spoke to a lawyer, and surrendered himself to the police. He was charged with murder. In his defense he claimed that he was in a state of automatism either insane or non-insane, or that he lacked the specific intent to murder, or alternatively, that he was provoked. The trial judge found that the defense had laid a proper evidentiary foundation for insane automatism but not for noninsane automatism. He therefore instructed the jury on insane automatism, specific intent, second-degree murder, and provocation. Mr. Stone was found guilty of the lesser charge of manslaughter and sentenced to seven years in prison.

The Crown appealed the conviction and the sentence. The British Columbia Court of Appeal<sup>24</sup> upheld the conviction but dismissed the appeal of sentence. Both the accused and the Crown appealed to the Supreme Court of Canada.

At the outset, the Court stated that the law presumes that people act voluntarily.<sup>25</sup> Following this reasoning, it argued that the defense of automatism involves a claim that the actions in question were not voluntary, and therefore the evidentiary burden rests with the accused to establish a proper foundation for this defense. Once this evidentiary foundation has been established and the judge concludes that a properly instructed jury could find on the balance of probabilities that the accused acted involuntarily, the trial judge must determine whether the case satisfies the criteria for mental disorder automatism or non-mental disorder automatism. The Court pointed out that voluntariness rather than unconsciousness is the key legal element in automatistic behavior. It argued that the defense of automatism amounts to a denial of the voluntariness component of the *actus reus*. It noted that in previous criminal cases, such as *Rabey*, the accused needed only raise sufficient evidence to permit a properly instructed jury to find a reasonable doubt as to voluntariness to rebut the presumption of voluntariness. Mr. Justice Binnie, in his dissenting opinion, relied heavily on this approach to the burden of proof. The majority held that the appropriate legal burden analysis must reflect policy concerns about claims of automatism. They noted that in

Great Britain and some U.S. jurisdictions, the legal burden is on the defense to prove involuntariness on the balance of probabilities. In 1993, the Canadian Department of Justice prepared a document<sup>26</sup> recommending that the legal burden should be on the party that raises the issue. An analogy is made to the burden the court puts on the accused on raising the defense of extreme intoxication akin to automatism.<sup>27</sup>

These proposals, which we will discuss later, outline a legislative scheme that would be analogous to the NCR system in the current legislation<sup>11</sup> and therefore, would use the same burden-of-proof standard. The Court went on to note that the appropriate legal burden must reflect policy considerations. It noted that policy considerations are already inherent in the reasoning in automatism cases because the definition of disease of mind depends on a consideration of policy matters. The Court therefore concluded that the legal burden in cases of automatism must be on the defense to prove involuntariness on a balance of probabilities. It believes that this conclusion would be justified under Section I of the Charter of Rights and Freedoms.

Therefore, the burden is on the defense to satisfy the trial judge that there is evidence on which a properly instructed jury could find on the balance of probabilities that the accused acted involuntarily. This must be more than a mere assertion and must be a claim. Most important, the Court then stated that, in addition, the defense must present expert psychiatric evidence confirming its claim. This goes beyond the brief analysis in *Parks* that the defense has only to lay the proper foundation for the defense of automatism, leaving the Crown to prove voluntariness beyond a reasonable doubt.

The concept of voluntariness is more fully analyzed in a recent case, *R. v. Ruzic*.<sup>28</sup> In this case, the principles of voluntariness were extended to the "moral involuntariness" inherent in a person acting under duress. The Supreme Court, in a thorough analysis of voluntariness, emphasized the concepts of rationality and ability to make a choice as an organizing principle of our criminal law. They traced this principle through the history of our law ending pertinently with *Parks* and *Stone*. The Court declared in *R. v. Ruzic* that the onus was on the Crown to prove voluntariness, even though the elements of this proof (i.e., duress) were in Yugoslavia, a distant and inaccessible country. In a surprising aspect of the deci-

sion, although the Court placed *Stone* in a succession of cases upholding the importance of voluntariness, it did not acknowledge the important deviation in burden of proof that it had introduced in *Stone*. Our theory is that the Court was concerned that, as a matter of public policy, the situation in *Stone* could open the floodgates. In fact, Mr. Justice Bastarache in *Stone* mentioned this possibility occurring *in terrorem*. However, since *Rabey*, the case that arguably opened up the defense, there have only been 13 recorded cases, resulting in one acquittal and three not guilty by reason of insanity (NGRI)/NCR decisions.<sup>29</sup> There is no evidence to support the floodgate argument. Nevertheless, the Court saw fit to raise the bar by shifting the burden, thereby making it a more difficult defense. However, the Court has set a standard that may cause great difficulties in future cases.

The Court noted that the judiciary must be aware and make determinations about the scientific methodology of expert evidence and referred to the U.S. case of *General Electric Co. v. Joiner*.<sup>30</sup> It noted that it is not unusual in cases involving expert evidence that jurists are required to assess confusing and other contradictory psychiatric evidence. It noted that some factors may go to the weight of the psychiatric evidence in automatism; these include:

1. Documented history of automatism.
2. Existence of corroborative evidence, of a bystander, for example. The Court noted that a description of the person as being uncharacteristically glassy-eyed, unresponsive, and/or distant before, during, or after the incident would be supportive. It cautioned that the evidence of bystanders must be approached carefully because automatism may be indistinguishable by untrained bystanders. However, we add, as an editorial comment, that if a history of previous automatic states were present, this could well nudge the judicial decision over to a disease of mind and therefore NCR automatism.
3. Motive. A motiveless act lends plausibility to involuntariness. The Court also noted that if a single person is both the "trigger and victim" the claim should be considered suspect, because it suggests an understandable motive. If, on the other hand, the act is random and lacks motive, it lends credence to the story.

Under Canadian law as it stands, mental disorder automatism qualifies as NCR-MD, and the accused qualifies for the legislative scheme outlined in our previous article,<sup>11</sup> but a finding of non-mental disorder

automatism results in an absolute acquittal. The Court re-emphasized that disease of mind is a legal term with a definition that raises policy considerations. It noted that medical evidence is highly relevant to the judicial determination. The Court noted that the CPA suggests that all automatisms, in a reductionist sense, are abnormalities of the brain.<sup>31</sup> They all, therefore, may be mental disorders, and any distinction made between mental disorder and non-mental disorder is an artificial one.

## Conclusions

In certain circumstances, persons can act in a manner such that the conduct apparently occurs without will, purpose, or reasoned intention in a state of apparent unconsciousness or lack of awareness. There is general agreement that the term automatism can be used to describe this state. Criminal acts committed in this state are apparently rare. It is generally logical to conclude that if there is unconsciousness, the voluntariness of the act is affected.

The Supreme Court in *Parks* did not address the burden to prove involuntariness in a detailed manner. In *Parks* the Court adopted *Rabey* in saying that the prosecution must prove every element of the crime charged including whether the act was voluntary. It stated that the evidentiary burden rests with the accused to lay the proper foundation for the defense. The Court in *Stone*, however, clearly stated that the burden to prove involuntariness is on the defense. In *Stone*, the psychiatric evidence, although thorough, had to rely mostly on the credibility of the accused because there was no corroborating psychiatric history, medical history, or corroborating witness statements. In the case of *Parks*, there was uncontradicted medical evidence by five experts.

We have some difficulty with the traditional manner in which courts have dichotomized automatism into states caused by disease and mind and states not caused by disease and mind. We agree with the CPA's position that reducing behavior to brain mechanisms results in use of a single brain disturbance to explain automatism, whether it is a transient state or part of a stable or recurring preexisting mental disorder.

We have referred in this article to some proposals to amend the criminal code and, in fact, representatives of the CPA and Canadian Academy of Psychiatry and the Law have had extensive discussions with representatives of the Ministry of Justice regarding

these proposals. To summarize the proposals, if the court makes a verdict of automatism, the accused then goes into a Section 16-type<sup>32</sup> analysis. The court then asks whether the accused represents a significant threat to the community. If this threshold is not reached, an absolute acquittal is the outcome. If, however, it is found, based on psychiatric and other evidence, that the accused represents a significant threat to the community, the court has the option of a conditional discharge or an order detaining the accused in a hospital. A conditional discharge could require the accused to attend treatment sessions with a psychiatrist or neurologist, to abstain from alcohol and drugs, and not to possess firearms or explosives or drive a motor vehicle. The proposal suggests that a forum be available to which submissions could be made by the parties regarding the suitability of these and other conditions that might be raised.

Although it may seem paradoxical that an order of detention in a hospital is an option, automatisms caused by ongoing mental disorders could be treated in hospitals. We submit that detention would be a rare event, because, if this were the case, a finding of NCR-MD would more likely have been made. It then becomes difficult to imagine a situation in which detention would be ordered.

Another problem could arise if a person who has antisocial personality disorder feigns automatism as a defense but is still found to be dangerous based on the established factors for predicting dangerousness. A hospital detention order would therefore be inappropriate but may be the only course of action open to the court for preventative detention. We contend, however, that although hospital detention is a possibility, it is unlikely because, by definition, a person who has antisocial personality disorder would have a documented pattern of violence, which would suggest that the offense itself would not be “out of character” or that the violence would be clearly instrumental and motivated. Also, the credibility of the accused would be called into doubt in the initial stages of the trial. It would, therefore, be unlikely that a finding of automatism would be made.

The fundamental difference between *Stone* and *Parks* is the shift in the burden of proof. *Stone* puts an affirmative onus on the defense to prove voluntariness, whereas *Parks* appears to endorse placing the onus on the Crown to prove all aspects of the act. This flows from a fundamental axiom governing the principle, historically reflected in English and Cana-

dian law, clearly and explicitly relied on in *Parks* but insidiously deviated from in *Stone*.

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