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## Criminal Law and Procedure—The Automaton Court: North Carolina Places Burden on Defendant to Prove Unconsciousness

The criminal defense of unconsciousness has been recognized in many states<sup>1</sup> and in England<sup>2</sup> as a means by which a defendant, although he has committed the act with which he is charged, can escape criminal responsibility. Unconsciousness, often referred to as automatism, occurs when one who engages in what would otherwise be criminal conduct is at that time in a state of unconsciousness or semi-consciousness.<sup>3</sup> This defense, however, is not a simple one, and its use presents several difficulties. The principal problems center on whether the defense is in actuality only an offshoot of an insanity defense and therefore should require no separate treatment with respect to the applicable criminal law and procedure and whether, assuming that unconsciousness is a separate and distinct defense, the burden of persuading the trier of fact that the defendant did the act while in a state of unconsciousness should be on the defendant.

In *State v. Caddell*<sup>4</sup> the North Carolina Supreme Court was presented both problems and in a nearly unanimous decision<sup>5</sup> held that the defenses of insanity and unconsciousness are not the same in nature and that the burden rests on the defendant to establish his defense of unconsciousness to the satisfaction of the jury. The court's decision is unusual in that it not only refuses to follow its own precedent, as well as strong California precedent and some English case law to the contrary, but also bases its decision on the rationale that unconsciousness, al-

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1. Initially Kentucky, California and Wisconsin recognized the defense in the late 1800's and early 1900's in court decisions. See *People v. Methever*, 132 Cal. 326, 64 P. 481 (1901); *Fain v. Commonwealth*, 78 Ky. 183 (1879); *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910). Other states soon followed with court decisions that approved the unconsciousness defense and often the defense was incorporated into the state statutory framework. See note 14 *infra* and accompanying text.

2. The English acceptance of the defense received full court support in *Rex v. Harrison-Owen*, [1951] 2 All E.R. 726 (Crim. App.) and numerous cases thereafter. See text accompanying notes 38-49 *infra*.

3. For further definition and discussion of the defense see 1 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 388, 395 (9th ed. 1923); 1 H. BRILL, CYCLOPEDIA OF CRIMINAL LAW §§ 124, 128 (1922); 1 W. BURDICK, THE LAW OF CRIME §§ 216, 217 (1946); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 44 (1972) [hereinafter cited as LAFAVE]; J. MILLER, MILLER ON CRIMINAL LAW § 39 (1934); H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954); 1 F. WHARTON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 50 (R. Anderson ed. 1957). See also 21 AM. JUR. 2d *Criminal Law* § 55 (1965); 22 C.J.S. *Criminal Law* § 55 (1961).

4. 287 N.C. 266, 215 S.E.2d 348 (1975).

though "distinct" from insanity, is "akin" to it and hence the burden of proof placed on the defendant with respect to insanity should likewise be applicable to unconsciousness.<sup>6</sup> This result is a confusing mixture of the true policy grounds and case law that properly justify the court's conclusion.

Willis Tony Caddell was charged with kidnapping and was tried before a jury in Guilford County. He entered pleas of not guilty and not guilty by reason of insanity. At trial the State's evidence tended to show that defendant kidnapped a fourteen-year-old girl, that he attempted intercourse with her, and that he choked and beat the victim over a period of thirty minutes. Defendant testified in his own behalf and stated that he "remembered nothing"<sup>7</sup> of the events of that day. He also introduced medical testimony, contrary to the advice of his counsel, that tended to show that defendant was *not* insane. Upon this evidence, the superior court judge charged the jury with respect to the issue of unconsciousness<sup>8</sup> and insanity, and the jury convicted defendant.

On appeal to the North Carolina Supreme Court, defendant asserted that the jury instruction that the defendant does not have the burden of proving unconsciousness and the instruction that the jury should find him not guilty if they found he was "completely unconscious" were inconsistent.<sup>9</sup> Although acknowledging the truth of this contention, the majority concluded that defendant *did* have the burden and that therefore the alleged error was harmless and in favor of defendant.<sup>10</sup> Relying upon an analogy to the insanity defense and quoting some of the

5. Chief Justice Sharp and Justice Copeland dissented. See text accompanying notes 57-60 *infra*.

6. 287 N.C. at 281-90, 215 S.E.2d at 358-63.

7. *Id.* at 272, 215 S.E.2d at 352.

8. The instruction read:

Now, members of the jury, a person cannot be held criminally responsible for acts committed while he is unconscious. Unconsciousness is *never* an affirmative defense. Where a person commits an act without being conscious thereof, such act is not criminal even though if committed by a person who was conscious it would be a crime. The defendant has *no burden* to prove that he was unconscious. If you find that the defendant was completely unconscious of what transpired . . . then he would not be guilty . . . .

*Id.* at 283-84, 215 S.E.2d at 359 (emphasis added).

9. The proper instruction when a defendant does not have the burden of proving unconsciousness is that the jury should find the defendant not guilty unless they find beyond a reasonable doubt that he was conscious of what transpired. In other words, when the defendant does not have the burden, he only has to show "reasonable doubt" and the state has the ultimate burden of persuading the jury that the defendant was conscious of his acts. See generally *State v. Mercer*, 275 N.C. 108, 116, 165 S.E.2d 328, 336 (1969); *LAFAVE*, *supra* note 3, at § 44.

10. 287 N.C. at 284, 290, 215 S.E.2d at 359-60, 363.

rationale in *Bratty v. Attorney General for Northern Ireland*,<sup>11</sup> the court concluded:

"The necessity of laying [the] proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury." . . .

. . . .

. . . We are unable to perceive a reasonable basis for distinction . . . between insanity . . . and unconsciousness. . . . In [both] defenses the contention is the same—the defendant did the act, but should not be convicted because the requisite *mental element* was not present. The same presumption, which casts upon the defendant, claiming insanity, the burden of proving it to the satisfaction of the jury, and thus to negative the presence of *mens rea*, applies also to the defendant who asserts a temporary mental lapse due to [unconsciousness].<sup>12</sup>

The supreme court, therefore, placed the burden of proving unconsciousness, to the satisfaction of the jury, on the defendant.

Unlike the situation in North Carolina, where contacts with the automatism defense have been few, other American courts have dealt extensively with the situation.<sup>13</sup> In fact, in some states the defense of unconsciousness has been codified into state law.<sup>14</sup> Where the defense is recognized, various sources of automatism have been accepted by court decision. These sources include somnambulism and somnolenture,<sup>15</sup> hypnotism,<sup>16</sup> diabetic shock,<sup>17</sup> epileptic black-outs,<sup>18</sup> kleptoman-

11. [1961] 3 All E.R. 523.

12. 287 N.C. at 288-89, 215 S.E.2d at 362-63 (emphasis added and deleted). Note the court's reference to *mens rea*. See text accompanying notes 25, 50-55 *infra*.

13. For a broad treatment of the defense see Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963). See also Edwards, *Automatism and Criminal Responsibility*, 21 MODERN L. REV. 375 (1958).

14. ARIZ. REV. STAT. ANN. § 13-134(2) (1973 Supp.); CAL. PENAL CODE § 26(5) (1970); IDAHO CODE ANN. § 18-201(2) (1975 Cum. Supp.); MONT. REV. CODES ANN. § 94-201(5) (1969); NEV. REV. STAT. § 194.010(6) (1967); OKLA. STAT. ANN. tit. 21, § 152(6) (1958). The typical statute reads: "All persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act charged without being conscious thereof. . . ." CAL. PENAL CODE § 26(5) (1970).

15. Somnambulism is commonly referred to as "sleep-walking," while somnolenture has been defined as "the lapping over of a profound sleep into the domain of apparent wakefulness." *Fain v. Commonwealth*, 78 Ky. 183, 187 (1879), quoting F. WHARTON & M. STILLE, A TREATISE ON MEDICAL JURISPRUDENCE § 151 (1855). See also H. BRILL, *supra* note 3, at § 127.

16. *People v. Worthington*, 105 Cal. 166, 38 P. 689 (1894).

17. *Corder v. Commonwealth*, 278 S.W.2d 77 (Ky. 1955).

18. *Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960); *Smith v. Commonwealth*, 268 S.W.2d 937 (Ky. 1954); *People v. Magnus*, 155 N.Y.S. 1013 (Ct. Gen. Sess. 1915).

ia,<sup>19</sup> delirium from fever or drugs,<sup>20</sup> drunkenness,<sup>21</sup> and cerebral concussion.<sup>22</sup> However, the decisions with respect to these sources have not been uniform<sup>23</sup> and, compounded by the variance among the states concerning where the burden of the defense lies, the result has been inconsistent case law that provides ample support even within a single jurisdiction for different findings.<sup>24</sup>

The primary reason for this variance is the confusion over the constituent element of crime—actus reus or mens rea<sup>25</sup>—to which the automatism defense relates. If the unconsciousness defense is categorized as precluding “voluntariness,” then the defense relates to the lack of an actus reus. Such is the view in California.<sup>26</sup> However, some statutes and courts characterize the defense as relating to the presence or absence of mens rea.<sup>27</sup> This divergence over whether the defense is connected with the “voluntary act” or the “guilty mind” produces two

19. H. BRILL, *supra* note 3, at § 126.

20. *See* People v. Kelly, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (Sup. Ct. 1973); Note, *Drug Induced Insanity and Unconsciousness—A Clarification of California Law*, 1 PEPPERDINE L. REV. 442 (1974).

21. *See* Lewis v. State, 196 Ga. 755, 27 S.E.2d 659 (1943). Although drunkenness that results in a “black-out” condition may sometimes be considered a source of unconsciousness or an affirmative defense in and of itself, it has been held that “voluntary” drunkenness is an exception and provides no defense (for instance, when the defendant has formed an intent to commit a crime and drinks to give himself courage to commit it). State v. Arnold, 264 N.C. 348, 141 S.E.2d 473 (1965).

22. Carter v. State, 376 P.2d 351 (Okl. Crim. App. 1962).

23. Compare People v. Higgins, 5 N.Y.2d 607, 159 N.E.2d 179, 186 N.Y.S.2d 623 (Ct. App. 1959) (where the court did not differentiate between epilepsy and insanity) with People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (Dist. Ct. App. 1943) (where the court held that insanity is not the same as epilepsy).

24. Compare Fain v. Commonwealth, 78 Ky. 183 (1879) with Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910) for an example of this variance within Kentucky.

25. *See, e.g.*, 1 W. BURDICK, *supra* note 3, at § 96 where the elements of crime are defined:

Every crime necessarily requires two elements . . . one being physical the other mental. The physical element is the prohibited thing done or the commanded thing left undone, or what is called “the act” [or the actus reus or the voluntary act]. The mental element is the state or condition of the doer’s mind which accompanies the act, the human will, otherwise known as “the intent” [or the mens rea or the guilty mind].

26. *See* CAL. PENAL CODE § 26(5) (1970), *quoted supra* note 14. The actus reus category is also the one chosen by the Model Penal Code:

(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; . . . .

MODEL PENAL CODE § 2.01 (Prop. Official Draft, 1962) (emphasis added).

27. *See, e.g.*, ARK. STAT. ANN. § 41-116 (1964).

important consequences: the categorization of unconsciousness as dependent upon mens rea instead of actus reus can result in (1) a confusion with the insanity defense,<sup>28</sup> and (2) a different burden of proof upon the defendant (*i.e.*, if the focus is on actus reus, the burden is on the State; if on mens rea, the burden will fall on the defendant).<sup>29</sup>

With respect to the first consequence, the equating of automatism with insanity may in some instances seem somewhat purposeful due to the results occasioned by pleading one defense as opposed to the other. While, for example, a plea of "not guilty by reason of insanity" carries with it in most jurisdictions a commitment for some definite term to a mental hospital or institution for the criminally insane, the plea of "not guilty by reason of unconsciousness" typically results in outright acquittal of the defendant.<sup>30</sup> Therefore, some courts utilize the association of insanity with unconsciousness<sup>31</sup> to preclude use of automatism as a separate defense, instead recognizing the unconsciousness defense "as a species of insanity."<sup>32</sup> In this way, a focus on automatism as relating to mens rea enables the court to confuse automatism with insanity and serves as a device whereby the courts can dictate the result of pleas (and strike a plea of automatism by the defendant) due to the courts' dislike for the outright release afforded by the assertion of the unconsciousness defense.

Concerning the burden-of-proof<sup>33</sup> consequence in jurisdictions that

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28. See text accompanying notes 31-33 *infra*. In fact, several authors list the sources of unconsciousness under the general heading of "insanity" without a separate discussion of automatism. See, e.g., 1 J. BISHOP, *supra* note 3, at § 388.

29. See text accompanying notes 34-49 *infra*.

30. LAFAYE, *supra* note 3, § 44, at 338.

31. Of course, the insanity defense always relates to the mens rea element of a crime. The general test for insanity is "that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from *disease of the mind*, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) (emphasis added). It is the meaning of "disease of the mind" that frequently creates problems with respect to unconsciousness sources. Although, technically, unconscious acts caused by epilepsy, somnambulism, etc. are "diseases," most courts that recognize automatism consider that such sources are not the "diseases" of insanity. See, e.g., *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969).

32. *Tibbs v. Commonwealth*, 138 Ky. 558, 567, 128 S.W. 871, 874 (1910). The court says in its opinion that it fails to see how evidence of somnambulism "would constitute any defense other than that embraced in a plea of insanity." *Id.*

33. It is interesting to note that the United States Supreme Court has also wrestled with the problem of the burden of proof when a mens rea type defense is asserted. See *Davis v. United States*, 160 U.S. 469 (1895). In that case the Court was torn between placing a burden of proof to the satisfaction of the jury on the defendant or maintaining the reasonable doubt burden on the prosecution. Justice Harlan decided that the prosecution should have the burden because, otherwise, a burden on the defendant "is in

recognize the distinction between insanity and unconsciousness, the cases in two such jurisdictions provide an interesting comparison. In California, where courts focus upon the actus reus, the burden of proof is on the defendant merely to go forward with the evidence to raise a reasonable doubt as to his consciousness,<sup>34</sup> and the ultimate burden of persuasion remains on the prosecution. Although the California courts recognize that the law creates a presumption that when a person commits an act, he is presumed conscious, it emphasizes that the "cardinal rule in criminal cases [is] that the burden rests on the prosecution to prove the offense beyond a reasonable doubt."<sup>35</sup> Thus, one California court has stated that "[m]en are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem, they must impart that knowledge by affirmative proof [,] . . . [which] is merely another way of saying that defendant has the burden of going forward."<sup>36</sup> Thus, under this analysis, any evidence produced by the defendant would be sufficient to raise such a defense and to require the trial judge to instruct upon unconsciousness—even if the evidence is merely the defendant's statement that he "remembers nothing" or that "it was hazy."<sup>37</sup>

In contrast to California, the English courts have not been unified in their allocation of the burden of proving consciousness and of persuading the jury. In *Rex v. Harrison-Owen*<sup>38</sup> the defendant, who was arrested in a home that was obviously being burglarized, testified that he had "no recollection" of entering the house and that he must have done so in a state of automatism. Lord Goddard stated that the defendant was entitled to an automatism instruction because "[w]hen a prisoner sets up such defences it is as well to leave the matter to the jury."<sup>39</sup>

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effect to require him to establish his innocence, by proving that he is not guilty of the crime charged." *Id.* at 487. The issue of unconsciousness itself has not been specifically dealt with by the Court. The tendency of the Court, however, has been to leave the burden of proof on the prosecution and the Court may eventually extend this analysis to the unconsciousness defense. See *Mullaney v. Wilbur*, 421 U.S. 684, 701-03 (1975).

34. See *People v. Hardy*, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948).

35. *Id.* at 63-64, 198 P.2d at 871.

36. *Id.* at 64-65, 198 P.2d at 872, quoting in part *People v. Nihell*, 144 Cal. 200, 202, 77 P. 916, 917 (1904).

37. See, e.g., *People v. Wilson*, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (Sup. Ct. 1967) (where the court stated that the fact that evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon). *But cf.* *Thomas v. State*, 201 Tenn. 645, 301 S.W.2d 358 (1957) (where the court held that a failure to remember what happened is alone not sufficient to present such an issue to the jury).

38. [1951] 2 All E.R. 726 (Crim. App.).

39. *Id.* at 727.

Accordingly, this analysis was similar to that of the California courts and focused upon the actus reus element of the crime.<sup>40</sup> In a later case, *Regina v. Charlson*,<sup>41</sup> the defendant produced medical evidence of a cerebral tumor and a history of ill health in the family; the court instructed the jury as to unconsciousness, and the jury acquitted the defendant despite the brutal nature of the crime.<sup>42</sup> In response to this "defect of the law" (*i.e.* the outright release for dangerous defendants),<sup>43</sup> the court the following year in *Regina v. Kemp*<sup>44</sup> muddled the distinction between the insanity and unconsciousness defenses and accordingly refused to instruct the jury on unconsciousness.

After *Kemp, Hill v. Baxter*<sup>45</sup> marked the initial policy change of the English courts toward a shifting of the burden of proving automatism to the defendant. In *Hill* no evidence of the defendant's automatic action other than his own testimony of "remembering nothing" was presented. The same Lord Goddard of *Harrison-Owen* responded to these facts: "[T]he onus of proving that [the defendant] was in a state of automation must be on him. [Automatism] is not only akin to a defence of insanity but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it."<sup>46</sup> Thus, the British court had clearly shifted to a mens rea analysis of the defense and had imposed some sort of burden on the defendant.

The court in *Bratty v. Attorney General for Northern Ireland*<sup>47</sup> attempted to answer the question whether the burden was that of going

40. *Id.* at 728 (where the court held that "[w]hether [it is] a *voluntary act* or not was a question for the jury") (emphasis added).

41. [1955] 1 All E.R. 859 (Chester Ass.).

42. The facts of the case show that the defendant-father called his ten-year-old son to a window and then brutally assaulted him with a mallet. *Id.*

43. See Edwards, *Automatism and Criminal Responsibility*, 21 MODERN L. REV. 375 (1958) for a discussion of the dissatisfaction of the courts with automatism and outright release afforded by the unconsciousness defense.

44. [1956] 3 All E.R. 249 (Bristol Ass.). In this case evidence of arteriosclerosis was introduced as a cause of defendant's unconsciousness. The trial judge broadened the "disease of the mind" focus of insanity to include these facts and thus preclude use of automatism. The court was obviously focusing on the mens rea element of the crime.

45. [1958] 1 Q.B. 277.

46. *Id.* at 282. Lord Devlin in the same case also related that a defendant cannot rely on the automatism defense without providing some evidence of it. Other language in the opinion is that the nature of the burden is one of "going forward" but that there must at least be some "prima facie" evidence before the defense can be relied on. He hedged, however, by stating that he reserved "for future consideration . . . the question of where the burden ultimately lies." *Id.* at 285.

47. [1961] 3 All E.R. 523. The facts of the case involved a murder of a young girl and the defendant stated that he had a "feeling of blackness." Medical evidence indicating a disease of the mind was also introduced.



forward or whether the burden was one of at least a degree of persuasion on the defendant. The court concluded that a "proper foundation" must be laid by the defendant before the evidence and charge of unconsciousness will be submitted to the jury. Lord Kilmuir suggested that the defense was similar to insanity and, concentrating on the mens rea element, concluded that some sort of persuasion burden should be on the defendant. However, Lords Denning and Morris spoke of the necessity of a "voluntary act" and categorized the burden as merely one of going forward; nevertheless, both still recognized the need of first laying a proper foundation.<sup>48</sup> Therefore, the court split in its analysis and left authority for at least two divergent viewpoints with respect to defendant's burden of proof.<sup>49</sup>

Although the North Carolina experience with automatism has been limited to two cases, the conclusions of the state's supreme court have been just as varied as those of the English courts. In *State v. Mercer*<sup>50</sup> the trial judge limited the evidence of defendant's "black-out" to the issue of intent. A unanimous supreme court, however, held that this ruling was erroneous and cited California law as authority for the proposition that "[u]nconsciousness is never an affirmative defense. . . ."<sup>51</sup> and that even though the only evidence of automatism was the defendant's own testimony, he was entitled to an instruction to the jury that he could be found not guilty because of his unconscious-

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48. Therefore, the burden advocated by Denning and Morris is not that of going forward which typically requires that the defendant merely come forward and present any evidence but is a slightly stricter burden requiring at least a proper foundation more than the mere statements by the accused (*i.e.*, some medical testimony is needed). *Id.* at 535-36. In this light, the Denning and Kilmuir proposals are not far apart, although Denning would still leave the ultimate burden of persuasion on the state. *Id.* at 536.

49. As an example of the complications that resulted from this divergence, see *Regina v. Quick*, [1973] 3 All E.R. 347 (where defendant assaulted the victim while in diabetic shock and the court confessed confusion not only as to where the burden of the defense lay but also as to whether such shock was the result of an internal disorder and thus a "disease of the mind" precluding assertion of the unconsciousness defense); Beck, *Voluntary Conduct: Automatism, Insanity and Drunkenness*, 9 CRIM. L.Q. 315 (1967) (in which the author relates that three types of automatism have developed since *Bratty*: (1) Sane automatism (involving a blow to the head and the actus reus element; the burden is always on the Crown), (2) Insane automatism (resulting from internal malfunction; the defendant has the burden of persuasion on the balance of probabilities), and (3) Alcoholic automatism (raising the question of lack of intent to a specific intent crime; the burden is on the Crown)). See also Sullivan, *Self induced and Recurring Automatism*, 123 NEW L.J. 1093 (1973) (in which the author discusses the turmoil created by the unconsciousness defense).

50. 275 N.C. 108, 165 S.E.2d 328 (1969). The case involved a murder by the defendant who testified that he was "blank in mind." No medical evidence concerning the cause of the black-out or symptoms of somnambulism or epilepsy was introduced.

51. *Id.* at 117, 165 S.E.2d at 335.

ness. No mention was made of English precedent or the likeness of the defense to insanity. Automatism, then, in accord with California law, was held to be a defense of "no voluntary act," as to which the state and not the defendant had the ultimate burden of proof.<sup>52</sup>

*Caddell*, six years later, not only marks an overruling of *Mercer* and a refusal to follow California precedents, but also is indicative of the recognition of British law precedents on the issue and the dissatisfaction of courts in general with the automatism defense. The majority recognized that there is variance with respect to the burden of proof<sup>53</sup> but decided that the rationale underlying the *Hill* decision and underlying the "proper foundation" analysis of Lord Kilmuir in *Bratty* was controlling. The court deemed this rationale to be that the defense of unconsciousness is "like unto insanity" and "it does not necessarily follow that the two defenses are different in law with respect to the burden of proof"<sup>54</sup>—both relate to the mens rea element, both involve facts that are within the realm of knowledge of the defendant alone, and both involve conclusive presumptions (in the case of insanity, the doing of the act presumes conscious volition).<sup>55</sup> Although the court incorrectly stated that *Mercer* was the *only* decision in which a court had allowed a defendant's uncorroborated testimony of a "black-out" to be sufficient to present the jury with the question of unconsciousness,<sup>56</sup> it was correct in its interpretation of English precedent as authority for placing an affirmative burden of proof on the defendant not only to produce evidence constituting a "proper foundation" but also to persuade the jury to their satisfaction that he was unconscious at the time of the crime.

Chief Justice Sharp, joined by Justice Copeland, dissented from the majority's conclusion that automatism is an affirmative defense and that the burden of proving it is on the defendant. Her focus, in contrast to

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52. *Id.* at 115, 165 S.E.2d at 334.

53. 287 N.C. at 286, 215 S.E.2d at 361.

54. *Id.* at 288, 215 S.E.2d at 362. The burden of proving insanity to the satisfaction of the jury rests on the defendant. See *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975); *State v. Creech*, 229 N.C. 662, 51 S.E.2d 348 (1949); *State v. Swink*, 229 N.C. 123, 47 S.E.2d 852 (1948); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232 (1943).

55. See Annot., 8 A.L.R.3d 1246 (1966) ("... the general criminal intent necessary to conviction is *deduced from the doing of the criminal act.*") (emphasis added).

56. 287 N.C. at 290, 215 S.E.2d at 363. Several California cases and at least one early English case permitted automatism to be raised when the only evidence of it was defendant's own testimony. See *People v. Wilson*, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (Sup. Ct. 1967) (cited *supra* note 37); *Regina v. Harrison-Owen*, [1951] 2 All E.R. 726 (Crim. App.) (cited *supra* note 38).

that of the majority, was on the actus reus,<sup>57</sup> and, instead of analogizing to the defense of insanity, she stated that “[t]he plea of unconsciousness is analogous to a plea of accident or of alibi, neither of which is an affirmative defense. Each plea merely negates an essential element of the crime charged.”<sup>58</sup> She concluded that if defendant has a burden, it is only that of going forward.<sup>59</sup> The Chief Justice’s analysis then depended upon the actus reus and upon one of the “long-established principles of our criminal jurisprudence—that the defendant has no burden to prove his innocence.”<sup>60</sup>

Although the majority was at odds with the Chief Justice and ostensibly violated “long-established” criminal jurisprudence with its holding in *Caddell*, the decision appears to be a wise one and compatible with current policy formulations. First, the decision comes on the wings of the law-and-order movement of the seventies that advocates a toughened judicial stance against crime. Such a position then is consistent with the deterrence of criminal conduct, not by depriving the innocent of his rights, but by simply forcing the defendant, when the unusual automatism circumstances are involved, to provide a proper foundation for the jury to believe that such circumstances were actually present. The fear that the defendant will be deprived of an unconsciousness plea because of lack of corroboration of his testimony is in any event no different from the fear that an insanity plea will be denied because not supported by medical evidence. Secondly, the focus on mens rea seems justified because of the nature of the defense and its close relationship with the mental element. Also, since evidence of black-out or causes thereof lies entirely within the knowledge of the

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57. 287 N.C. at 291, 215 S.E.2d at 364 (defendant “voluntarily committed the . . . act charged”). *Id.* at 293, 215 S.E.2d at 366 (“possibility of a voluntary act”; “voluntary act is an absolute requirement for criminal liability”), quoting *LAFAVE*, *supra* note 3, at 181.

58. *Id.* at 296, 215 S.E.2d at 367.

59. For support of her position, see *Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960); *People v. Hardy*, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948); Lord Morris’s opinion in *Bratty v. Attorney Gen. for N. Ireland*, [1961] 3 All E.R. 523, 535-36. Justice Sharp has also espoused the same opinion concerning the burden of proof with respect to the insanity defense. See *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975) (where she argued that the evidence introduced by defendant short of the foundation necessary to take the issue of insanity to the jury should still be considered in determining whether the accused formed the necessary intent; therefore, she argued that the ultimate burden should always remain on the state).

60. 287 N.C. at 301, 215 S.E.2d at 370. See also N.C. CONST. art. I, § 23; N.C. GEN. STAT. § 8-54 (1970). This long-established principle is the “cardinal rule” in *People v. Hardy*, 33 Cal. 2d 52, 64, 198 P.2d 865, 872 (1948) (see note 34 *supra*) and the “golden rule” of Lord Morris in *Bratty v. Attorney Gen. for N. Ireland*, [1961] 3 All E.R. 523, 535-36 (see note 48 *supra*).

defendant, the burden should be on him to bring out those facts that tend to negate the presence of the guilty mind which is necessary to convict. The presumption of consciousness deduced from the doing of the proscribed act is controlling, and the *defendant* should show and prove that at the time the act was committed, he was not conscious and thus did not possess the intent requisite to the crime. Finally, in view of the consequences of a plea of unconsciousness—acquittal and outright release—the decision rightly embodies the judicial dislike for the defense that has been categorized as “the refuge of guilty minds.” Thus, by making automatism an affirmative defense with burden of satisfaction on the defendant, the court is simply hoping to close off an avenue of outright release for the guilty defendant. In the long run, however, the problems raised by this defense cannot be solved in one case; therefore it remains the job of the General Assembly to awaken from its own automatous state and to clear the confusion surrounding the defense of unconsciousness.<sup>61</sup>

JAMES M. ISEMAN, JR.

### Criminal Procedure—North Carolina Rejects a Retroactive Application of Mullaney

Homicide defendants in North Carolina who asserted that they had acted in self-defense or in the heat of passion upon sudden provocation were long required to “satisfy the jury” of the truth of their assertions.<sup>1</sup>

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61. Several variances on the theme and solutions to the problems have been proposed. See *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965) (in which an expert witness psychiatrist proposed that the mens rea element be abolished because, in his opinion, the “conscious is always the unwitting and unsuspecting puppet of the unconscious.” *Id.* at 458, 210 A.2d at 198); Beck, *supra* note 49 (in which Beck proposes that the fault lies in a criminal code giving outright acquittal and that the legislature should require some sort of compulsory treatment after the trial if an automatism defense is asserted); Fingarette, *Diminished Mental Capacity as a Criminal Law Defense*, 37 MODERN L. REV. 264 (1974) (in which the author says that the defense of automatism is not unconsciousness but is an “altered state” of conscious action where defendant has lost “rational control of his conduct” and that the confusion can be alleviated by treating the defense as such.); and Sullivan, *supra* note 49 (in which he suggests that a solution lies in making the unconscious defendant criminally negligent if he had a previous history of black-outs and the jury found that a reasonable man would have anticipated the unconscious state which occurred).

1. *State v. Barnett*, 132 N.C. 1005, 43 S.E. 832 (1903). See also *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969); *State v. Miller*, 112 N.C. 878, 17 S.E. 167 (1893); *State v. Ellick*, 60 N.C. 450 (1864).