

LEGAL }{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

MANNY CONDITSIS
SENIOR TRIAL ADVOCATE AND ACCREDITED SPECIALIST
CRIMINAL LAW

PRESENTED AT LEGAL EAGLES CLE CONFERENCE
LAKE COMO ITALY 11/8/2017 – 15/8/2017

INVOLUNTARINESS- A CASE STUDY- DEAN WATERS

Index

	<u>Page No.</u>
1. Involuntariness.....	2
2. Brief background.....	2 - 5
3. Dean’s confession.....	5
4. Outcome of co-accused trial.....	6
5. Lead up to Dean’s trial.....	6 - 8
6. The Law.....	8
7. Falconer and other Authorities.....	9 - 13
8. Approach and Principles from authorities.....	13 - 14
9. The Trial of Dean Waters.....	14
10. Conclusion.....	15

INVOLUNTARINESS

R v Dean Waters – a Case Study

Notation: I appeared for Dean Waters as trial advocate, in my first murder trial [at Newcastle Supreme Court] in 1997 before his Honour RS Hulme J (as he then was), when after a 9 day trial, the jury took about 30 minutes to find the accused not guilty of the murder of Allen Hall; notwithstanding the accused's admission to firing the shotgun that killed the deceased. All the subjective background of the accused, including his very substantial abuse at the hands of his father, Cec Waters, was in evidence at the trial and was never disputed by the Crown.

Brief Background

1. Allen Henry Hall ("Hall") was shot dead on 29 June 1988. Hall was the defacto spouse of the stepmother of Dean Waters ("Dean") to whom I will refer by the pseudonym of "Helen".
2. In 1988, Dean and Cecil Waters ("Cec"), Dean's father, were charged with murder and conspiracy to murder Hall respectively and subsequently jointly faced a committal hearing. Both were discharged as there was insufficient evidence to be committed for trial under the then provisions of the Justices Act.
3. At the committal hearing in 1988, the prosecution alleged that Hall had been killed by shotgun pellets fired by Dean at the behest of his evil father Cec. Police found 22 calibre bullets in a fence paling and believed there was another shooter who was at that time unknown to police.
4. There is no doubt that police bungled the 1988 investigation but the purpose of this paper does not enable me to go into detail about that, except to say an example is that when police attended Dean's home in the early hours of the morning following the shooting of Hall, he was asked to produce what clothes he had been wearing [as if any person with a consciousness of guilt would diligently comply?]. Dean went into the bathroom and pulled out clothes from the laundry basket and handed them to police. In fact these were not the clothes he had been wearing at the time of the shooting. As police had followed Dean into the bathroom he recalled seeing the clothes he had in fact been wearing, on the floor alongside still muddy sneakers – police stepped over the clothes and sneakers and did not ask any questions about them, let alone seize them.
5. In the 80's the Waters family was commonly referred to as a "boxing family dynasty" and each of the brothers, Dean, Guy Waters and Troy Waters held various National and Oceania pacific boxing titles. Troy had 3 tilts at the WBC Crown, with his last being against Felix Trinidad in 1994 for the WBC

mandatory position, losing in a knockout at Madison Square Garden, New York.

6. Cec was an evil and violent man. He served many years in prison in London for manslaughter. He migrated to Australia with his then partner Helen who was about 16 years his junior, the three (3) boys and his eldest child, a daughter.
7. Cec ruled his family with an iron fist and the upbringing of the children and the treatment of Helen was horrific. Dean's earliest memory of his step mother, was as a 3 year old, in the UK, when Cec smashed a milk bottle over her head with blood profusely pouring out of a gaping head wound. Not only were there regular physical beatings with hoses, pipes and other objects but Cec also fired a rifle at Dean and his siblings on an occasion when they were running away from him in fear. Cec was the master of manipulation and mind games and almost everything he did relating to his children was aimed at having complete dominion and control over them, as boxing prodigy's, even as adults.
8. Dean's relationship with his father was very much one of contradiction. Although Dean loved his father very much, at the same time he was in constant and extreme fear of him. Dean never knew when the "punishment" was going to come and one of Cec's tools of manipulation, intimidation and fear was that he would allow his children to believe that all was well and then some hours or days later, in the middle of the night they would wake to being physically beaten for their prior [forgotten about] misdemeanour.
9. Cec also employed psycho/sexual tactics to manipulate and control his children, particularly Dean, but the purpose of this paper does not allow me to go into the detail. Suffice to cite one example; when the family was living in rented accommodation at Terry Hills, Sydney, Dean was a young teenager and all the children [including the eldest child, a girl] slept on the floor in the lounge room. Cec placed a bucket on the lounge room floor and everyone, including the boys, Helen and the eldest sister were required to urinate in the bucket in the middle of the lounge room floor. The boys described how their step mother, Helen would have to squat over the bucket [as they turned away] and would have to endure hearing the sound of Helen peeing in the bucket, only 1-2 metres away. Only Cec could use the toilet.

Whenever Dean wanted to urinate, Cec would hold his penis, which made Dean feel extremely uncomfortable.

10. Not until after Hall's shooting did Dean and his other siblings learn that for about 16 years, Cec had forced Helen to prostitute herself at Kings Cross so he could financially benefit from her earnings. Helen, like the children, lived in fear of Cec and did not dare not to follow his instruction.
11. The start of Cec's plotting to have Hall killed (as well as Helen) was when he introduced Helen to Hall and over time persuaded and manipulated her to have sex with Hall so that Cec could watch; and he would do so, through

peep holes in walls. Cec had not planned for Helen and Hall falling in love with one another. After many months and threats and under enormous intimidation and duress, Helen and Hall found the courage for Helen to leave Cec and she went to live with Hall.

12. Cec commanded Helen to return home, enlisting Dean as the go between to try to persuade her to do so. This was a daily constant and went on for over 12 months, with Dean communicating Cec's demands to Helen. It failed.
13. The Crown's position at Dean's 1988-89 committal and at his 1997 murder trial was that Cec was enraged at Helen having eventually left him for Hall and that he pounded his sons with the "disgrace" and "shame" she had brought on "the Waters name" and that "something had to be done".
14. Dean was the son most exposed to Cec's tactics since a baby and the most vulnerable to Cec's manipulation. It was always the Crown position that Dean was put up to the shooting of Hall by Cec. For the sake of brevity, Dean was pursued by Cec over this 12 months, on an almost daily basis, being told that he was gutless and a coward to allow Hall to "take" his step mother and to bring disgrace to the family name.
15. By this time Dean was in his early 20's and a tower of a man, who in a physical sense could have pummelled Cec if he had had the mental capacity and will to have done so.
16. At 1997 trial the defence played part of a 60 Minute interview with Dean when the boxing brothers were at their respective peaks. The interview was telling as it was filmed during the 12 month period when Cec was bombarding Dean with his deadly commands to shoot and kill Hall. It showed then 60 Minute journo, Jennifer Byrne, questioning Dean about his dependency on his father, Cec and how Dean would feel if "something" happened to his father. Dean began to cry [on camera] and Ms Byrne placed a comforting hand on his shoulder as he was clearly distraught at the thought.
17. After all attempts of intimidation of Hall and Helen had failed, Cec became increasingly incensed and his command to Dean was not only to shoot Hall but also his step mother, Helen, whom Dean deeply loved and cared about. The additional command added to Dean's deep conflict and thinking about it caused him nausea and he would sweat profusely.
18. Cec made Dean dig a grave for Hall and his step mother, swearing and cursing him the whole time with his mantra, that if he didn't do as Cec commanded that he would be "no good" and a "coward" and so on. Whilst digging the graves, Dean was distraught and kept suggesting to his father "that there must be some other way", to which Cec would respond, screaming his mantra with spittle coming out of his mouth and widened eyes and the look of an enraged madman; Dean described it as the look Cec would get "just before another beating".

19. It was not disputed by the Crown that at the time of the shooting of Hall, Dean lived in fear of Cec and that Cec controlled his children, but of course whether that control entitled Dean to a defence in respect of the charge of murder of Hall was unsurprisingly, in contention.
20. Being discharged at committal in 1988-89, Dean was a “free man”, however, the guilt of his actions in shooting Hall never left him and after leaving his father, his demons pursued him and he led a life of petty crime, drug abuse and violence. He contemplated suicide on many occasions and just prior to coming forward to confess to the shooting of Hall in 1996, he sat at the end of his bed with a loaded pistol, barrel in his mouth intent on pulling the trigger.

Dean’s confession

21. After years of drugs and petty crime he found Christianity. Even though he was in a sense “free”, in another sense, he felt as though he was imprisoned, held captive to the demons that would visit him daily and remind him of his shooting of Hall. He believed that he would either, have to kill himself or come forward, confess to his actions and be dealt with according to law, fully expecting to serve significant time in prison.
22. In January 1995 Dean saw me and confessed to the shooting of Hall and we prepared for him to come forward and to confess to police. After many hours of conferencing, just before doing so, Dean reasoned that he was not now the person he was in 1988 and that he had found God and that he had a responsibility to look after his children (who were by now living with him) and had God wanted him to go to gaol, that would have already happened. He decided against coming forward.
23. Almost to the day one year later, Dean again came and saw me and said he was now ready, that he couldn’t live with the guilt any more. If, by coming forward he would have to go to gaol for many years, then at least he would be facing up to what he had done. He was completely ignorant of any potential defence of involuntariness.
24. Arrangements were made for Dean to meet with police when he participated in an E.R.I.S.P. confessing to the shooting of Hall and he confirmed that there was indeed an “accomplice”. In February 1996 Dean and the accomplice were jointly charged with the murder of Hall.
25. It was the Crown case that Dean and the accomplice were acting in concert and in a joint criminal enterprise.
26. In his E.R.I.S.P. Dean told police about *some* of the unspeakable events he and to a lesser extent, his siblings experienced growing up in the Cec Waters household.

Outcome of co-accused trial

27. Through a twist of fate the trials of Dean and the co-accused were separated, not due to any application, but rather, administrative court convenience. Both trials had been listed for the May sittings at Newcastle Supreme Court, however, Dean was awaiting the outcome of plea Representations made by the defence and the co-accused's trial was [more or less] ready to proceed. The co-accused's lawyers opposed the matter being set down separately to Dean but as the May sitting was crashing, Newman J (as he then was) refused to delay the co-accused's trial any longer and set it down for trial and Dean's trial was stood over.
28. In May 1997, the co-accused was acquitted of the murder of Hall but found guilty of his manslaughter on the grounds of "Diminished Responsibility" that was then available: s23A of the Crimes Act 1900 (since repealed). Although there was evidence in the co-accused's trial about Cec's manipulative and persuasive "powers", the co-accused did not have the history endured by Dean, namely, having grown up under Cec's evilness. The co-accused did not make any application during his trial for any lack of will/involuntariness being left to the jury and on the evidence it was not reasonably raised. That the co-accused was acquitted of the murder of Hall on the grounds of Diminished Responsibility, due to Cec's domination of him, spoke volumes of the evil manipulative ability of Cec.
29. There was some debate in the co-accused's trial and in Dean's trial as to whether the bullets fired by the co-accused hit the deceased at all, however, the evidence clearly suggested it was the shotgun pellets fired by Dean that killed Hall.
30. The co-accused was sentenced to a maximum term of imprisonment of eighteen (18) years with a non-parole period of twelve (12) years for the manslaughter of Hall.

Lead up to Dean's trial

31. Dean was assessed by two (2) psychiatrists briefed by the defence, Dr McMurdo and Dr Strum.

Doctors Strum and McMurdo opined and gave evidence to the effect that Dean was in a "dissociative state" at the time of the shooting, similar to those persons in cults who are brainwashed.

Dr Strum referred to Cec in this way, "*He may well have been one of the most evil people that I have ever had the misfortune to write about*".

Both psychiatrists spoke of the violent, psycho/sexual and manipulative upbringing of Dean (and to a lesser extent his male siblings) at the hands of Cec and opined that he had an *abnormality of the mind* at the time of the shooting; opening up the partial defence of Diminished Responsibility, which

would have led to a manslaughter verdict, not an acquittal [as with the co-accused].

32. Although the defence psychiatrists opined as to Dean being in a dissociative state, neither opined as to whether Dean was an *automaton* at the time of the shooting. At that time, my understanding from the authorities was that unless Dean was an automaton at the time of the shooting that we could not point to *reasonable evidence* raising the issue of involuntariness and the best we could do would be "*abnormality of the mind*" and manslaughter.
33. I explored this issue with the defence psychiatrists and I understood that whilst they were comfortable in expressing the view that Dean had been brainwashed by Cec and that it was not Dean's *will*, but Cec's *will* for Hall to be killed, they did not believe that Dean was an automaton.
34. Dr Westmore, psychiatrist, was briefed for the Crown and arguably, his opinion was stronger than the defence psychiatrists, opining that Dean had an abnormality of the mind at the time of the shooting (former s23A of the Crimes Act 1900).

Dr Westmore diagnosed Dean Waters at the relevant time, as being in a "reactive depression". Dr Westmore also, expressed the view, orally, that he did not think that Dean was an automaton, but agreed that he had been brainwashed and that it was not his will for Hall to be killed.

35. Accordingly, all three (3) psychiatrists agreed that Dean had an abnormality of the mind at the time of the shooting and if that evidence was accepted by the jury Dean would have been entitled to be acquitted of the murder charge, but as I say, without other evidence, convicted of manslaughter.
36. Consequently, I offered in writing, on no less than five (5) occasions to the ODPP, for Dean to plead guilty to manslaughter on the grounds of diminished responsibility. On each of those occasions, the ODPP rejected the "offer" and insisted on proceeding to trial on the murder charge. One may question the reasoning behind that decision, given the outcome in the co-accused's trial, who did not have the subjective history of Dean in relation to Cec and the more or less unanimous opinions of all psychiatrists, justifying a finding that at the time of the shooting, at the least, Dean had an abnormality of the mind.

In any event, the decision was made and the battle lines were drawn. It would be fair to assume that the ODPP position was that the worst it could do at trial was for Dean to be convicted of manslaughter but it would pursue a murder conviction.

As it turned out, Dean Waters was *acquitted* of the murder and manslaughter of Hall because the jury accepted that his actions in shooting Hall were not his *will*.

37. What I was not sufficiently aware of at the time of making the plea offer of manslaughter, was the very important distinction between a doctor's meaning

and/or use of the term “automatism” as opposed to the meaning and/or use of that term by lawyers: as warned by Toohey J (as he then was) in *Q v Falconer* [1990] 171 CLR30 at [pp68.10-69.4]. Their Honours Dawson, Dean and Galudron JJ were of the same view.

38. Further, I learned that advocates should not get caught up in the use of the term “automatism” or “dissociated states” but rather, consider and apply the simple wording referred to in the authorities in relation to the actus reus of any crime, having to be “willed” or “voluntary”, before an accused can be guilty as a matter of law.
39. It is trite that it is necessary in cases such as these to distinguish between the essential mental and physical elements which must be present for the commission of any crime. In Dean’s case, we are not here talking about his [mental] intention having been impacted upon. He intended to kill Hall and he did so. What we are talking about is whether his actions in carrying out the killing were his willed actions, without which, he would be and was entitled to his acquittal.

The Law

40. Dean was charged with the murder of Hall: s18 of the Crimes Act 1900 (NSW).
41. The *mens rea* [relevantly] is that the accused had the intent to kill or inflict grievous bodily harm. Clearly enough, the *actus reus* is that [relevantly] the shooting of the deceased was willed/voluntary on the part of Dean and the ultimate onus is on the Crown to negate involuntariness, beyond reasonable doubt where there is evidence that reasonably raises the issue: *Woolmington v Director of Public Prosecutions* [1935] A.C. 462; *Bratty v Attorney-General Or Northern Island* [1963] A.C. 386 (approved by the High Court in *Ryan v the Queen* 121 C.L.R. 205 [at pp214 and 215] and *Falconer* [*Ibid*]).
42. In *Ryan* at 121[at p213.4] Barwick CJ held:

“... it is basic, in my opinion, that the “act” of the accused, of which one or more of the various elements of the crime of murder as defined must be predicted must be a “willed”, a voluntary act which has caused the death charged. It is the act which must be willed, though its consequences may not be intended”

Ryan has been approved and applied by many subsequent authorities including the High Court, in *Falconer*.
43. At p216.9 in *Ryan*, Barwick CJ confirmed that an accused is not guilty if the act was not done “in exercise of his will”.

***Falconer* [*Ibid*] and other Authorities**

44. *Falconer* is a very important authority on dissociated states where the defence is seeking to argue that the actions of the accused were involuntary and/or not his/her will.
45. A woman was convicted of the murder of her husband. There was evidence of violence he inflicted on her and that she found out he had been sexually interfering with their daughters a couple of months prior to killing him. On the day of the killing, the woman learned/believed that he had also sexually assaulted their 9 year old niece. Further, he had sexually assaulted the woman (the accused). The woman was charged with murder under the W.A. Criminal Code which reflected the common law on issues such as involuntariness and sane and insane automatism (see for example judgement of Toohey J).
46. One psychiatrist, Dr Schioldan-Nielsen called by the defence opined that the accused was in a dissociative state as a result of panic and another, Dr Finlay-Jones opined that at the time of the killing, the accused was in “psychological conflict” and that she acted in an “automatic way”. The trial judge rejected the evidence of the psychiatrists and refused to leave involuntariness to the jury. The WACCA upheld an appeal that the trial judge erred in rejecting the medical evidence. On appeal to the high court by the Crown, the court confirmed that evidence of dissociation was relevant to the independent exercise of will and should not have been rejected.
47. It is instructive that the evidence of Dr Schioldan-Nielsen was to the effect that, notwithstanding the dissociative state, witnesses who saw the accused whilst she was in that state would not likely have noticed anything unusual about her at [p36]. Dr Finaly-Jones also opined and it appeared that the court accepted that, psychological stress may lead to dissociation at [p36]. In involuntary cases, it will rarely be sufficient for there to just be evidence from an accused alone, and medical evidence will usually be required: at [pp40.9-41.8] and [see] Ryan.
48. All seven justices held that the trial judge had erred and that he should not have rejected the psychiatric evidence. Mason CJ and Brennan and McHugh JJ held that the matter should be referred back to the trial judge to reconsider the issue of voluntariness in light of the psychiatric evidence, whereas, Deane and Dawson JJ (in a joint judgement) and Toohey and Gaudron JJ all held that the psychiatric evidence should have been left to the jury for its assessment.
49. It should be noted that Deane and Dawson JJ agreed with the *reasoning* of Toohey and Gaudron JJ (separate judgements) and so, in essence, those four judges formed the majority to the extent that there is any conflict between the judgements of Toohey and Gaudron JJ and the joint judgement of Mason CJ and Brennan and McHugh JJ.

Deane and Dawson JJ recognised dissociative states as one of the confined examples of sane automatism at [p61.9].

Caution should be exercised in getting caught up in the use of technical and/or medical terms such as “automatism” which may have different meanings “on the lips” of lawyers as distinct from on the lips of psychiatrists: Toohey J in *Falconer* [at pp68.10-69.4], with whom Deane and Dawson JJ and Guadron J agreed.

And Barwick CJ in *Ryan* at [pp214.8 - 215) held:

“It is important.....not to regard this description as of the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack which is the relevant determinant.....It is of course the absence of the will to act or, perhaps, more precisely of its exercise rather than lack of knowledge or consciousness which, in my respectful opinion, decides criminal responsibility”.

50. In *Ryan* [at p213.9], the then Chief Justice, referred to Woolmington (supra) and said: “In that case the description “unintentional” appears to be used to cover an act which was involuntary or unwilled, descriptions of it which for my part I would prefer. However, by whatever adjective or adjectival phrase it is described, the deed which was not the result of the accused’s will to act cannot, in my opinion, be made the source of criminal responsibility in him”.

Notwithstanding that “a claim of involuntariness is no doubt easily raised, and may involve nice distinctions, the accused, if the material adduced warrants that course, is entitled to have the issue properly put to the jury”: *Ryan* at [p217.6].

51. In *Falconer*, Toohey J acknowledged instinctive scepticism with dissociation type cases but inter alia, reasoned that it is a matter for the jury to assess the credit of the accused’s evidence and the psychiatric evidence at [p73.6].

Whilst considering whether there must be some sort of shock precipitating the dissociation, Toohey J (in *Falconer*) held that there was no reason why the shock cannot be the product of an emotional blow as much as the result of some external physical force at [p73.10] and his Honour approved of *Radford* 20 A Crim R 389 (1985) (see below) and *R v Joyce* [1970] S.A.S.R. 184 where it was considered that the accused had worked himself up into an *emotional frenzy*.

In *Falconer* Toohey J went on:

“The question for the jury is whether the accused’s conduct was involuntary.....” at [p74.1]. Toohey J again referred to and approved of *Radford* when he confirmed “an unwilled act may be “the reaction of a sound mind to external stimuli, including stress producing factors” at [p78.7].

Further, Toohey J, reasoned that “there are real difficulties with the ‘external factor’ test” at [p75.5]; and “The application of the ‘external factor’ test is artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease. As well, there is confusion in the idea of an external factor” at [p76.1] and is “apt to mislead” at [p78.7]. “Dissociation may warrant a conclusion that the act or omissionoccurred independently of his or her will” per Toohey J at [p76.9].

At [pp214 – 216.4] in *Ryan* the court approved of *Woolmington* and *Bratty* that, the ultimate onus remains with the prosecution to prove guilt; whilst there is a presumption of mental capacity at law, the accused is entitled to point to evidence that suggests that his act(s) were involuntary; when there is such evidence and the jury is satisfied with the accused’s explanation or are left in reasonable doubt about it, the accused is entitled to be acquitted; the overriding principle is that the prosecution must prove every element of the offence including the accused’s state of mind at [p215.5].

52. As to the rebuttal of the presumption (of mental capacity), Deane and Dawson JJ (in *Falconer*), held at [p61.7] that this is “merely a requirement that there be evidence to displace ordinary human experience”; that medical evidence is required before sane automatism can realistically be said to be raised: at [p61.8]; “dissociative states” are but one of the confined examples of sane automatism: at [p61.9]; the accused is not required to prove “his condition” on balance of probabilities, he merely has to raise a reasonable possibility that his actions were involuntary at [p62.1].

Psychological trauma may produce transient non-recurrent malfunction (of the mind) on an otherwise sound mind and there is no reason why such trauma should be distinguished from a physical trauma which produces a like effect: *Falconer*, per Mason CJ and Brennan and McHugh JJ at [p54.9].

Yousseff [Volume 50 A Crim R at 1] involved an appeal to the NSWCCA following his conviction of manslaughter after the car he was driving struck and killed a pedestrian. There was medical and other evidence that the accused may have had an epileptic seizure at the relevant time of driving. The trial judge ruled that the medical evidence raised the issue of insane, not sane, automatism and refused to leave involuntariness to the jury. The principal ground of appeal was that the judge was wrong to exclude sane automatism as being available to the accused. The appeal was upheld. Importantly, Hunt J held that even if the evidence established that an accused “could have” been in state of automatism, then involuntariness “must go to the jury” at [p4.6]. If the accused is able to point to evidence from which it “could” be inferred that there is at least a reasonable possibility that his act was involuntary as a result of a state of automatism, then it is a matter for the jury to determine at [p4.8].

Hunt J in *Yousseff* confirmed the common law, namely, that automatism may also be relevant to the defence of mental illness, *if* there is a defect of reason proceeding from a disease of the mind, where the accused did not appreciate the nature and quality of his physical act.

In *Ugle v The Queen* ([2002] 211 CLR 171), where there was a knife fight and the victim was killed, the accused argued that the deceased walked into the knife and claimed self defence; whilst self defence was left to the jury, the trial judge declined to leave involuntariness and an appeal to the WACCA was dismissed. On appeal to the High Court, it unanimously held that the issue of involuntariness ought to have been left to the jury as it was open to the jury to find that the act of the accused in the stabbing of the deceased was an *unwilled act*: per Gaudron J at paragraph [5].

Where there is evidence of involuntariness, the issue should be left to the jury and it is for the jury to evaluate the evidence: *Ugle*, per Gummow and Hayne JJ at paragraphs [30] and [31] respectively. Also in *Ugle*, it was held that notwithstanding that the accused had problems with his self defence argument (because he deliberately intruded in the altercation), the issues of self defence and unwilled acts require separate consideration and “unwilled act directions” ought to have been left to the jury: per Kirby J at paragraphs [47] and [48].

In *Ugle*, Callinan J held that the trial judge ought to have told the jury that the prosecution must negate the possibility of an unwilled and that it is a matter for the jury to assess all the evidence and any conflicting versions.

In *R v Williamson* 67 SASR 428 the accused was charged with having stabbed to death the deceased. The accused argued that he did not know that he was holding a knife at the time of the stabbing. Instructively, notwithstanding that the accused’s trial counsel conceded manslaughter (at trial) the SACCA held on appeal that, the trial judge ought to have left involuntariness to the jury. *Pemble v The Queen* (1971) 124 CLR 107 was referred to and the CCA restated that a jury cannot be told that it cannot acquit at [430]; and that it is for the prosecution to prove that the accused voluntarily struck the deceased *knowing* that he had the knife in his hand at [pp. 436.4 and 447.6].

In *Williamson*, the court discussed the wider and narrow view(s) in determining what constitutes the act that must be done voluntarily, and which, if not done voluntarily, cannot support a conviction at [pp433-434]. Unsurprisingly, it held that each case turns on its own facts. The court followed the view expressed by Mason CJ, Brennan and McHugh JJ in *Falconer*: “.....the prosecution had to prove that the accused made a *conscious choice* to do an act of the kind done” at [p434.4] (italic emphasis added) and held that the prosecution had to prove that the accused knew he had the knife in his hand and intended to and did deliberately strike the deceased. The court further held that the common law in effect, mirrored s 23 of the SA Criminal Code in relation to murder at [p445.2 and p447.6].

In *Radford*, a man was convicted of murdering a woman who was friendly with his wife. The accused believed that his wife and the woman were in a lesbian relationship. There was psychiatric evidence that the accused had dissociated due to acute stress, not due to a disease of the mind. The trial

judge refused to leave automatism to the jury. On appeal the CCASA held that (relevantly) automatism should have been left to the jury at [p392 and p398.9]. King CJ distinguished between disease of the mind and “involuntary or automatic behaviour” and confirmed the common law that, these terms arise from the reaction of a healthy mind of extraordinary external stimuli and “the point of automatism is that the conduct was not subject to the control and direction of the will....” at [p397].

Importantly in *Radford* (approved by the high court in *Falconer* and other appellate authorities on many occasions), the chief justice held that there is no reason to distinguish between disturbance of mental faculties by reason of stress caused by external factors and disturbance caused by effects of physical trauma or sleep walking at [p397.9]; and notwithstanding that sane automatism cases may result in outright acquittals the chief justice held: “I do not see any reason to shrink from that consequence” and “If a person was not morally responsiblebecause that action was an unwilled act, he should not suffer conviction or punishment” at [p398.3].

The court (in *Radford*) acknowledged the psychiatric evidence to the effect that the accused killed the deceased in a state of depersonalisation or dissociation brought about by severe stress at [p398.5]; and although King CJ expressed a degree of scepticism as to how the accused could have fired 7 bullets into the deceased without it being his will, he and Johnson J held that that, given the evidence of the psychiatrist, that evidence had to be assessed by the jury at [p398.8].

King CJ in *Radford* at [p397.4) referred to *Ryan* (supra) and observed that “the critical point, is that the conduct was not subject to the control and direction of the will, *not the accused’s consciousness or awareness of his conduct*” (emphasis added).

As a matter of logic and subject to psychiatric evidence, an accused may be conscious or aware of his conduct and his actions may still be involuntary. The chief justice referred to a number of authorities where automatism resulting from psychological or emotional stress was left for the consideration of the jury at [p397.9].

Approach and Principles from authorities

Assuming there is evidence that at the relevant time the accused was in a dissociated or some other state, what then?

You will need to point to evidence that raises the reasonable possibility that the accused’s actions were not willed/voluntary; almost always, psychiatric/psychological evidence in combination with other evidence.

You will then need to consider whether the lack of will/voluntariness was a result of sane or insane automatism; the former leading to an outright acquittal and the latter, to a qualified acquittal, with the accused being detained “at the Governor’s pleasure”

pending the Mental Health Tribunal determining that he/she is not a danger to himself/herself or anyone else in the community.

For the sake of brevity, if the cause of the dissociative state is transient then sane automatism may well be open, however, if the cause is non-transient and prone to recur then there may be argument about whether sane or insane automatism (or both) should be left to the jury.

In appropriate cases, both sane and insane automatism may be left for the consideration of the jury.

The Trial of Dean Waters

My view was that Dean had a good case to be acquitted of murder, but due to the oral opinions expressed by all psychiatrists, that Dean was not an automaton at the time of the shooting, that there was a strong likelihood that he would be convicted of the lesser charge of manslaughter.

Accordingly, when Dean was arraigned [at trial], he offered to plead guilty to the alternate charge of manslaughter, however, the plea was rejected by the Crown; the battlelines were drawn and the charge of murder was pursued by the Crown, likely feeling comfortable in the view, if they didn't get murder, then the worst they could do would be manslaughter.

During the trial, each of the psychiatrists gave evidence consistent with their respective reports. Being aware of the likely evidence from the psychiatrists, that Dean was not an automaton at the time of the shooting, I did not ask them that question. Nor did the Crown.

Each of the psychiatrists, in giving their evidence, confirmed their opinions that it was not the *will* of Dean Waters to shoot Hall but rather, the will of Cec.

Powerful and emotive evidence was given by Dean and each of his siblings, including his eldest sister who told the jury she did not know that tampons or an iron existed until she left the home of Cec, in her 20's. They each gave detailed account after detailed account of the abuse each of them (and particularly, Dean) suffered at the hands of their father Cec.

As the siblings and Dean recounted their abuse at the hands of Cec, many of the jurors were either crying or had tears in their eyes and some gasped, which disposes of the myth, in my view, that juries follow directions of the trial judge [relevantly, to consider the evidence dispassionately and without emotion].

The evidence from Dean and the siblings was so powerful and emotive that even seasoned court journalists appeared to be deeply affected by their testimony.

After the closing of the defence case, Hume J asked the Crown why the issue of lack of will/voluntariness should not be left to the jury and after argument his Honour did

leave it to the jury. After jury deliberation of about 30 minutes the Sheriff's Officer was notified that a unanimous verdict had been reached, that being, the *acquittal* of Dean in respect of both charges of murder and manslaughter (and arson – setting fire to the home of Hall and Helen, some months prior to the shooting).

Conclusion

After Dean's acquittal, Dean's co-accused appealed his conviction in the NSWCCA and the appeal was rejected.

Subsequently, the co-accused retained me and I appeared for him in a special leave application in the High Court which was also rejected. In the High Court special leave application Kirby J acknowledged that the law on involuntariness/lack of will may have been ripe to be looked at but that the co-accused's case was not the vehicle by which to do so.

The High Court referred to the decision of the NSWCCA in the co-accused's case when the CCA referred specifically to the Dean Waters trial, and after observing that it was not for that court (the NSWCCA) to comment on the outcome of the Dean Waters trial, it noted the life-long abuse of Dean at the hands of his father and said "Dean Waters is entitled to the full benefit of his acquittal".

Presented at Lake Como
August 2017 by

Manny Conditis
Senior Trial Advocate and
Accredited Specialist Criminal Law