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SLEEP SEX - WAKING UP TO A NEW DAWN IN THE CRIMINAL COURTS

With fewer than 100 cases identified in the world, Colin Buckle considers the rare condition of Sexsomnia and its application in the criminal courts.

The criminal culpability of the sleep walker who commits an offence is not a new phenomenon in the Crown Court. The condition of the sleepwalker falls under the banner of 'parasomnia' and is joined under that banner by the sleep talker, sleep eater and sleep driver.

A relatively new area of 'sleep' activity is arising where the sleeper is not walking, talking or driving but is in fact engaged in full sexual intercourse. The condition known as 'sexsomnia' is with increasing frequency finding its way into defence statements in answer to allegations of rape and other sexual assaults. Sexsomnia, like sleep walking and talking, also falls under the banner of parasomnia.

The *International Statistical Classification of Diseases and Related Health Problems (ICD-10)* provides that a 'parasomnia' is an '*abnormal episodic event occurring during sleep*'. Sexsomnia is considered to be a condition akin to somnambulism (sleepwalking) and for that reason 'sexsomnia' is now recognised and accepted as a genuine medical condition.

My recent experience of this new medico-legal area came in the form of a three week trial of a defendant (M) in his late 20's alleged to have sexually assaulted and then on a separate occasion raped his female partner. It was said by the first complainant that the act took place in their bed whilst the complainant was awake and on a second occasion when she was asleep but then awoke to find that the defendant was penetrating her. The allegation against the defendant by the complainant was that at the time of the sexual act, the defendant was very much awake and that the complainant was not consenting.

The relationship between the first complainant and the defendant ended and sometime later in the following months, the defendant formed a new relationship which developed into an engagement. This new relationship ended 8 months later when the second complainant alleged that on one occasion the defendant sexually assaulted her whilst she was in bed but awake. Shortly after this first event it was alleged that he then raped her, again in bed, whilst she was initially asleep but awoken by the act of penetration.

Both complainants reported that following these very similar offences the defendant had absolutely no memory whatsoever of his actions whilst in bed, or so he claimed.

The defendant in interview with the police could offer no recollection of the acts being alleged by either complainant. He could neither admit nor deny the allegations but claimed that if the sexual acts had in fact taken place then he was asleep when they had occurred.

A defendant's claim that his physical act was at the time disassociated from his conscious mind allows the defence of automatism to be raised. Such a defence inevitably requires the assistance of experts in the field. Notwithstanding the fact that sexsomnia as an area of expertise which is still developing there are both medical doctors and academics prepared to take an oath and tell the jury that they can offer expert opinion on the subject of 'sleep sex'.

Having had the opportunity to both call one such expert in chief and cross-examine another I conclude that one thing is certain……currently there is no certainty in respect of expert evidence and the condition of sleep sex.

The lack of genuine and well-established expertise in these cases no doubt has caused and will cause jury's some disquiet. In the trial of M, the verdicts that were returned caused all those involved to draw an inevitable conclusion that the jury had rejected the evidence of at least one if not both experts. The direction from the trial Judge to a jury that they are free to disregard expert evidence if it seems right to do so is a direction which might find favour whilst the subject of sexsomnia develops.

On behalf of the defendant M a point was made of laying challenge to the prosecution expert in respect of his qualifications to give such evidence. The prosecution expert, a qualified psychologist, was trained in research methodology but did not train as a medical doctor and had no formal medical training. The expert had no recognised regulatory body, was not subject to CPD requirements and was not formally peer reviewed.

The defence expert had trained as a medical doctor and his major field of practice was in psychology. The expert was regulated by the GMC, was required to complete formal CPD and was regularly peer reviewed.

Whilst the legal and medical professions

develop a greater understanding of parasomnia and particularly sexsomnia we can expect experts of differing abilities and levels of experience as commentators and witnesses. We have seen the same situation in the fields of facial mapping, DNA 17 and in evidence obtained from social media. These developing areas often allow for wider interpretations of facts, differing approaches to the collection of material and ultimately opposing conclusions.

A defendant who pursues a defence of automatism by way of sexsomnia is required to at very least raise the issue and lay a proper foundation to allow the defence to be left with a jury. Expert evidence is a must to ensure that this hurdle is overcome. The prosecution will be required to respond to the expert evidence called by the defence and it is incumbent upon defence solicitors and advocates to look very carefully at the prosecution expert's qualifications, experience and general suitability when preparing for trial.

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The way in which the defendant raises the defence of sexsomnia is not simply a case of calling an expert to confirm that sexsomnia in the defendant is a possibility and then saying to the Crown 'over to you'. There is a very important consideration in the way that the defence is raised, to what standard and what then might be waiting for a defendant at the end of the trial..... even for a successful defendant!

Where the issue of automatism is raised by the defence and the trial Judge is satisfied that there is a proper evidential foundation for the defence to go to the jury, the judge must then embark on his own careful consideration of the evidence. It falls to the Judge to decide whether the evidence of automatism in the trial is a form of non-insane automatism or whether it is insane automatism and therefore within the *M'Naughten Rules* (see R v Burgess 93 Cr.App.R 41 CA).

In the case of a sexsomnia defence and in other cases of automatism it is vital that the advocate is aware, from the very outset of the trial, that at the end of the trial this very important decision will have to be taken by the trial Judge. It is also imperative that the advocate is aware of how the Judge will go about addressing that question and how the decision taken by the Judge can have significant implications for the defendant.

We are all familiar with the concept of the driver of a vehicle who knocks down and injures a pedestrian whilst the driver is being attacked by a swarm of bees. The criminal act and the mind are separated to the point that the defendant could not consciously take control of the act.

In such cases the driver acts as an automaton at the point of the offence being committed, his mind does not control the act and his defence of *non-insane* automatism should be accepted. The presence of the bees in the car is an 'external factor' and the likelihood of reoccurrence is almost nil.

An assault committed at the time that a sufferer of epilepsy is having a seizure has an internal cause and the risk of reoccurrence of at least the seizure is likely and in some cases certain. The condition of epilepsy is an 'internal factor' and is properly classified as *insane* automatism and subject to the *M'Naughten Rules.*

In trials concerning sexsomnia the awareness of the internal / external causes is a crucial consideration for the trial Judge at the end of the trial but is just as important for the advocate during the trial process. The advocate must identify the factual areas of the trial which lend themselves to settling the internal / external conflict. These areas must be introduced in chief or cross-examined as the case may be particularly when the jury are hearing expert evidence.

The identification and subsequent examination of the internal / external features will assist the advocate in making final submissions to the trial Judge as to which, if any defences should be left to the jury. The final decision as to what is left to the jury could, as stated, have substantial repercussions for the defendant.

If the trial Judge leaves the defence of non-insane automatism to the jury and they acquit on that basis then the defendant is a free man. If the Judge leaves insane automatism to the jury and they find the defendant 'insane' and return the 'special verdict' the defendant then faces the potential of a hospital order with or without restrictions as appropriate.

A hospital order made to treat a defendant with a standard illness or personality disorder is one that is familiar to Judges and lawyers alike and is also familiar to those treating such patients. The potential trouble for the sexsomniac who receives a restricted hospital order, whose characteristics and antecedents requires such an order to be made, is that the condition is only just being recognised and so successful or meaningful treatment could be a very long way in the future. What is to become of such a defendant?

Many years ago I attended a lecture that was an introduction to the rigours of the original 'dangerousness provisions.'

The lecture was inventively entitled *When Will I See You Again*? The same title might be given to the lecture concerning the sexsomniac and the imposition of a hospital order.

The question of which strain of automatism is left to the jury has a further significance for the defendant. Non-insane automatism, like self-defence requires the defence to suitably raise an evidential footing for the defence and it is then for the prosecution to negate the defence. In these circumstances the prosecution bears the burden by the criminal standard to prove that the defendant was *not* acting as an automaton.

It is highly likely in such a case that the judicial 'route to verdict' will have been placed in the hands of the jury at summing up. The question for the jury where non-insane automatism is left for them to consider is 'are you sure that the defendant was not asleep when he committed the act.'

If the defence to be left with the jury is one of insane automatism then the burden shifts. The defence bears the burden of proof on the balance of probabilities. The question then posed to the jury must reflect not only the switch in the burden but also the standard of proof. The question then posed to the jury will be 'is it more likely than not that at the time that the defendant committed the act he was asleep?'

In the trial of M we grappled with a 6 count indictment in which *both* internal features and external features were present, *both* insane and non-insane automatism were in play and the jury had to consider *both* defences and *both* burdens in more than one count on the indictment.

In M's trial, in 3 counts on the indictment, the jury was required to consider whether the defendant's defence of non-insane automatism on the criminal standard applied and if not, then had to consider whether the defence of insane automatism applied on the balance of probabilities. If the jury had rejected the non-insane defence and moved on to the insanity defence, they had the small task of applying the *M'Naughten rules*.

For good measure, the sexsomniac can neither admit nor deny the physical act because they claim they were asleep at the time and so the prosecution are automatically put to proof on each and every constituent part of the offences on the indictment.

In 3 counts on the indictment in M's trial, the jury were asked to consider all of the normal ingredients of rape that a jury would usually consider and which the Crown must prove and then go on to consider the two automatism defences with the shifting burdens.

These complications for both Judge and advocate arise out of the conflict between the all important external and internal factors. If the suggested cause of the parasomnia is internal only – the jury will consider insanity only. If the cause is external only – the jury will consider non-insane automatism only.

For the advocate to be in a position to identify the various external and internal features of the sexsomniac, the advocate needs to know what to look for.

The issue of intoxication being a trigger for sexsomnia is one which is controversial. Opinions differ and in fact, in the trial of M, one expert was shown to have been quite inconsistent as to whether or not alcohol can trigger sexsomnia.

The medical / scientific exploration of the link between alcohol and parasomnia is underway but no firm conclusions have been drawn. If an advocate was to complete a small amount of internet research he or she would quite easily and quickly reveal commentary and competing ideas on this issue.

One thing that is clear however is that if alcohol is indeed a trigger to sexsomnia then that trigger is an *external* feature and in the absence of other potentially internal triggers or causes, the jury should be left with non-insane automatism.

As a side note, the advocate must be aware that if a defendant knows that he suffers from a parasomnia that can be triggered by alcohol and notwithstanding that knowledge the defendant then takes drink knowing the potential harmful effects, his claim to automatism might be restricted.

Other features known to be potential triggers to a parasomnia include stress, sleep deprivation, broken or restless sleep and even the touch of a partner whilst in bed. It would be for an advocate to argue whether these features are internal, external or possibly both.

Where one or more triggers are present the advocate should then look toward potential characteristics of sexsomnia. Where a defendant commits a physical act, such as penetration and he claims he was acting in his sleep *and* where there are accepted characteristics of sexsomnia present at the time *and* where there is an identifiable trigger, the foundation of sexsomnia is clearly laid.

One potential characteristic of sexsomnia and indeed other parasomnia is what might be called 'an unusual act'. The definition of automatism in its simplest form is that the mind and body are separate from each other at the time of the act. Where this separation is in

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operation it is not unknown for the act to be of a very differing nature and character than might be performed by the person when they are awake.

In the trial of M, the jury heard about both a specific type of sexual act committed and specific sexual language. It was agreed by the complainants that this behaviour and language was completely out of character for the defendant and was not something that he had ever been known to do when awake.

Sleepwalkers whilst asleep are known to act in ways that would be completely foreign to them whilst awake. It is therefore an accepted characteristic of sexsomnia that whist in sleep, the sexsomniac might act in a very unusual and unpredictable way.

Another feature that might be present in the behaviour of the sexsomniac is how they react to being disturbed whilst asleep. Both complainants' in M's trial reported how, when challenged about his behaviour, he simply moved away and went to sleep. This might be considered to be an unexpected and unusual reaction to being shouted at by a shocked and furious partner in bed.

It was agreed by one of the experts in the trial that simply ending the intercourse and rolling away might be a feature that points to sexsomnia. It might not have been the case that the defendant simply rolled away and went to sleep, it might have been the case that he rolled away and continued to sleep.

One of the key features of sexsomnia, agreed by both experts in the trial of M, is the complete and total amnesia of the sexsomniac. A person who suffers from any type of parasomnia will have no recall of the events whilst they were in that state.

The sexsomnia defence is a relatively new phenomenon. Some commentators, both academic and clinical suggest that the steady rise in the defence might simply be due to the media reporting these cases nationally and thereby informing defendants of this defence. The cynical view is that the media is allowing defendants who have no such condition to make false claims of being a sexsomniac. The lack of precise science and understanding of the condition makes the flushing out of the fraudulent claim very difficult.

The contrary argument is that this condition is often not reported to doctors and further the sexsomniac does not often find themselves facing a jury. It seems likely that there exists many genuine sufferers of the condition and that these sufferers have sensitive and understanding partners. Where couples accept that one of them has issues with sleep walking, sleep talking and sleep sex, a report to the doctor might be unlikely if they as a couple can live with the condition.

Like the medical profession and academics, lawyers must also develop their understanding of the topic and the way it should be approached. If the cynics are correct and the reporting of the condition provokes false claims to the condition, the Courts will become more familiar with the condition as time passes.

At this time being a relatively uncertain time there are many questions yet to be answered in respect of sexsomnia and ultimately how the Courts assist juries to make informed decisions. Guidance for the judiciary and for advocates on this specific topic is limited although general guidance on the subject of automatism is plentiful.

The Court of Appeal is yet to be seized with the topic of internal and external causes of parasomnia. The internal and external causes of the condition must be carefully considered and addressed in both examination of witnesses and ultimately in submissions to the trial Judge.

The potential roads down which a jury can proceed when considering verdicts in cases of sexsomnia and the way in which the Judge sets out that map for the jury will be influenced by the evidence given by witnesses and ultimately submissions from advocates. A failure by defence advocates to properly identify the key issues can cause the jury to be left with an inaccurate map detrimental to the defendant's cause.

It seems likely that a new dawn has arrived. Whether the proliferation of these cases is as a result of false claims to the condition or whether a greater awareness of the condition results in genuine cases of sexsomnia being recognised, only time will tell.

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