

Sexsomnia and Criminal Responsibility

Ian Freckelton AO KC

- Barrister, Castan Chambers, Melbourne;
- Judge, Supreme Court, Republic of Nauru;
- Member, Administrative Review Tribunal;
- Professor of Law & Professorial Fellow in Psychiatry, University of Melbourne;
- Honorary Professor of Forensic Medicine, Monash University

<https://ianfreckelton.com.au>

I.Freckelton@vicbar.com.au



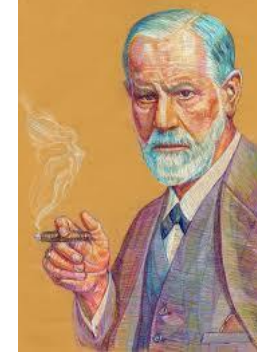


Acknowledgment of Country

- From Olinda in Victoria, Australia, I acknowledge the traditional custodians of the unceded Lutruwita land, in particular Nipaluna country of the Muwinina people, on which this talk is being delivered, past, present and emerging, and on which all participants in this conference are residing or visiting.



Automatism Art



- In art, automatism refers to creating **art without conscious thought, accessing material from the unconscious mind** as part of the creative process
- **Sigmund Freud** used free association and automatic drawing or writing to explore the unconscious mind of his patients.
- Freud's ideas strongly influenced French poet Andre Breton who launched the surrealist movement in 1924 with the publication of the *Manifesto of Surrealism*, where he defined surrealism as:
'Pure psychic automatism ... the dictation of thought in the absence of all control exercised by reason and outside all moral or aesthetic concerns'.
- Later automatism played a role in the abstract impressionism of Jackson Pollock and others and was an important element in the European movements of **art informel** and **arte nucleare**

What is Sexsomnia?

- Sexsomnia: a type of non-rapid eye movement (NREM) parasomnia involving abnormal behaviour occurring while a person is asleep
- Often regarded as a clinical subtype of “confusional arousal”
- Characterised by sexual behaviour during early phases of deep sleep with no memory remaining of what the person did
- Typically presents as “disorder of arousal” arising from partial or incomplete arousal from slow-wave sleep when dreaming absent

DSM V for NREM Parasomnia Including Sexsomnia



- Criterion A. Recurrent episodes of incomplete awakening from sleep, usually occurring during the first third of the major sleep episode, accompanied by sleepwalking
- Criterion B. No or little dream imagery is recalled
- Criterion C. **Amnesia for the episodes is present**
- Criterion D. Clinically significant distress or impairment
- Criterion E. **Disturbance is not attributable to the effects of a substance**
- Criterion F. **Coexisting mental or medical conditions do not explain the episodes of sleepwalking or sleep terrors**
- Diagnosed as “NREM sleep arousal disorders, sleepwalking type, with sleep-related sexual behavior (sexsomnia) “

Table 2

Prevalence of different parasomnias.

	Lifetime prevalence in percent (95%CI)	Current prevalence (at least once during the last 3 months)(%)
Sleep walking	22.4 (19.8–25.0)	1.7 (0.9–2.6)
Sleep talking	66.8 (63.9–69.7)	17.7 (15.3–20.0)
Confusional arousal	18.5 (16.1–20.9)	6.9 (5.3–8.5)
Sleep terror	10.4 (8.5–12.3)	2.7 (1.7–3.8)
Injured yourself during sleep	4.3 (3.1–5.6)	0.9 (0.3–1.5)
Injured somebody else during sleep	3.8 (2.6–5.0)	0.4 (0.0–0.8)
Sexual acts during sleep	7.1 (5.5–8.7)	2.7 (1.7–3.7)
Nightmare	66.2 (63.3–69.2)	19.4 (17.0–21.9)
Dream enactment	15.0 (12.8–17.2)	5.0 (3.6–6.3)
Sleep related groaning	31.3 (28.4–34.2)	13.5 (11.3–15.6)
Sleep related eating	4.5 (3.2–5.8)	2.2 (1.3–3.1)

Triggers for Sexsomnia

Typical triggers include:

- obstructive sleep apnoea (OSA)
- sleep deprivation
- physical contact and proximity
- some medications
- drugs and alcohol



Sexsomnia Prevalence: Pallesen, 2025

- 10.5% and 6.1% reported lifetime and current sexsomnia, respectively.
- In the adjusted analysis, male sex, sleep terrors, and dream enactment were significant predictors for lifetime sexsomnia, whereas sleep terrors, and dream enactment were significant predictors for current sexsomnia.
- Among those who reported lifetime sexsomnia, 6.5% had current sexsomnia episodes with at least a weekly frequency. Masturbation (5.4%), and fondling (4.0%) were the two most common behaviours, whereas consummated intercourse (1.8%) was the least common sexsomnia behaviour.

The Fundamental Issue: Ryan v The Queen (1967) 121 CLR 205 at 213

"It is basic ... that the 'act' of the accused, of which one or more of the various elements of the crime of murder as defined must be predicated **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."



Automatism



- Fundamentally, imposition of criminal responsibility on persons acting without free will or voluntariness is unfair:
 - *“It is not open to doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted. And why is this? Simply because he would not know what he was doing.”*
 - *R v Tobin* (1882) 23 QBD 168, 187, Stephen J

R v Cameron [2021] NZCA 80 at [45]

- Strictly speaking, automatism is not a defence as its effect is to negate an element of the offence that must be proved by the prosecution beyond reasonable doubt





Bratty v A-G for Northern Ireland [1963] AC 386

“No act is punishable if it is done involuntarily: and an involuntary act in this context – some people nowadays prefer to speak of it as ‘automatism’ - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.”

The Onus of Establishing (Sane) Automatism: *R v Carter* [1959] VR 105 at 111 per Sholl J

“Where automatism is raised, the position is the same as in drunkenness, provocation, and other such matters. The Crown is not bound in the first instance to negative such possibilities. .. It must be for the defence in the first instance *genuinely to raise the issue* ... then the Crown is bound in the long run to carry the ultimate onus of proving all the elements of the crime including the conscious perpetration thereof.”



The Evidential Onus: *R v Falconer* (1990) 171 CLR 30 at [13]

When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn - not as a matter of law but as a matter of fact - unless it be shown that the actor, being of sound mind, has been deprived of the capacity to control his actions by some extraordinary event or unless the actor, being of unsound mind, has thereby lost the capacity to control his actions. The accused bears no ultimate onus of proving that his act was not willed, but **he bears the evidential onus of rebutting the inference that his act was willed, and there is no occasion for the jury to consider the possibility of an unwilled act unless that evidential onus is discharged.**





Sane v Insane Automatism: The Incoherent Distinction

- **Insane Automatism** – A mental illness or ‘disease of the mind’ (prone to recur) is responsible for the involuntary action, eg schizophrenia, brain injury, tumour: it results in a finding of NGRI/NGRMI
- **Sane Automatism** – Something other than a ‘disease of the mind’ is responsible for the action, eg concussion or hypoglycaemia, resulting in a full acquittal.

The Policy:

Hill v Baxter [1958] 1 QB 277 at 285-286

- “If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free.”



R v Radford (1985) 42 SASR 266 at 273 per King CJ

If the conduct which would otherwise be criminal is involuntary, the accused is entitled to acquittal unless the involuntariness results from disease of the mind. If it results from disease of the mind, the accused is guilty unless the evidence proves on the balance of probabilities that the conduct resulted from a defect of reason caused by the disease of the mind in consequence of which the accused did not understand the nature and quality of his actions or did not know that they were wrong.

R v Falconer (1990) 171 CLR 30

- Toohey J: The jury should first consider whether the Crown has disproved, beyond reasonable doubt, non-insane automatism, and if the Crown has failed to do so, then the accused is entitled to an unqualified acquittal.
- Gaudron J: The jury should have been directed to consider whether the prosecution had proved beyond reasonable doubt that the accused's will accompanied the act; and that it should have been explained to the jury that the prosecution would not have proved the issue beyond reasonable doubt if it was a reasonable hypothesis that she acted while experiencing a particular mental state described in the evidence as one that may be experienced by a normal and healthy mind and in which the personality is segmented so that acts are performed independently of the will.
- Deane and Dawson JJ agreed generally with the reasoning of Toohey J and Gaudron J: In a case where an issue of sane automatism was raised, an accused would be entitled to an acquittal if the prosecution failed to disprove sane automatism beyond reasonable doubt.

R v Falconer (1990) 171 CLR 30

- Mason CJ, Brennan and McHugh JJ in (dissent): The accused bore **an onus to prove** that any claimed malfunction of the mind was transient, caused by physical or psychological trauma which the mind of an ordinary person would be likely not to have withstood and was **not prone to recur** (that is, sane automatism), whereas the majority required the prosecution to disprove sane automatism beyond reasonable doubt.

R v Falconer (1990) 171 CLR 30 at [13]

The inference that an act is willed is thus supported by the presumption that all persons have the capacity to control their actions unless they be of unsound mind, and an accused bears an ultimate onus of proving that he was of unsound mind if he chooses to raise that issue. The cause of any alleged loss of capacity is important, for the verdict of acquittal must be qualified if it is reached "on account of" the accused's unsoundness of mind at the time.



CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 1997 (VIC)- s20

(1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that—

(a) he or she did not know the nature and quality of the conduct; or

(b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

(2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

MENTAL HEALTH AND COGNITIVE IMPAIRMENT FORENSIC PROVISIONS ACT 2020 (NSW)- s28

(1) A person is not criminally responsible for an offence if, at the time of carrying out the [act](#) constituting the offence, the person had a [mental health impairment](#) or a [cognitive impairment](#), or both, that had the effect that the person--

(a) did not know the nature and quality of the [act](#), or (b) did not know that the [act](#) was wrong (that is, the person (b) of sense and composure about whether the [act](#), as perceived by reasonable people, was wrong).

(2) The question of whether a [defendant](#) had a [mental health impairment](#) or a [cognitive impairment](#), or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.

(3) Until the contrary is proved, it is presumed that a [defendant](#) did not have a [mental health impairment](#) or [cognitive impairment](#), or both, that had that effect.

Crimes Act 1961 (NZ), s23

(1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.

(2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—

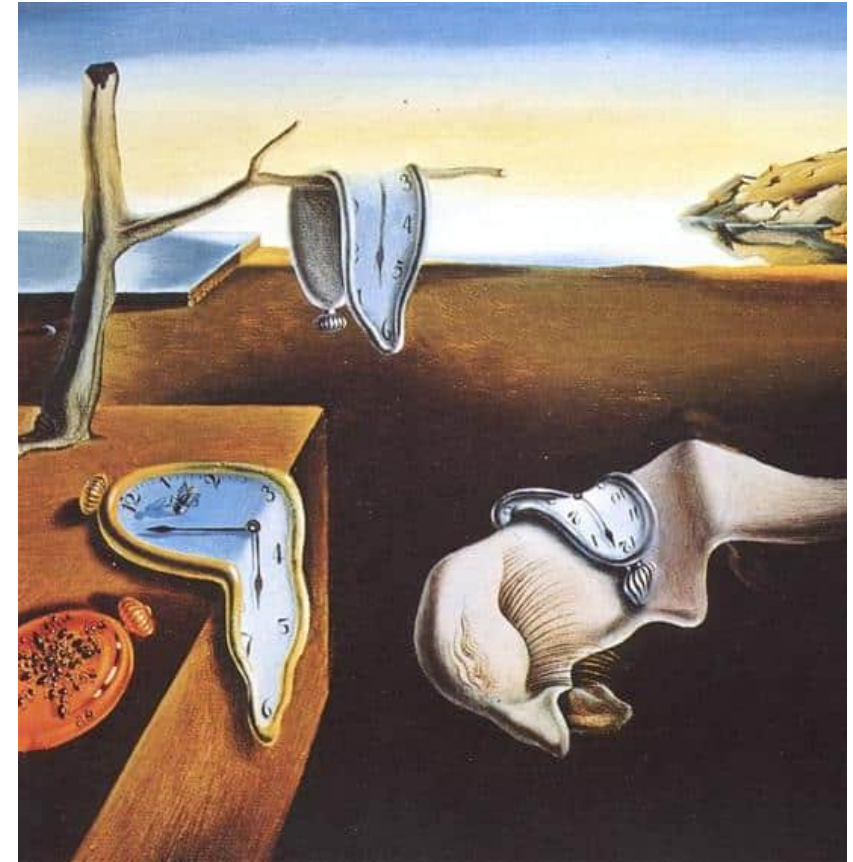
(a) of understanding the nature and quality of the act or omission; or

b) of knowing that the act or omission was morally wrong,

having regard to the commonly accepted standards of right and wrong.

The Major Recent Australian Authority: R v DB [2022] NSWCCA 87

- Case was that the accused sexually touched his daughter
- The Crown accepted that when he did so he was asleep and it was a manifestation of sexsomnia, a parasomnia or form of somnambulism and that his acts were not voluntary
- The trial judge found that the Crown had failed to prove that the charged acts were voluntary and that he was entitled to acquittal
- He found DB not to have a mental health impairment
- Brereton JA: It is plain that in law the acts of a person who is asleep and engaging in somnambulistic activity are not willed acts; and the accused is not legally responsible for them. At common law the accused would have been entitled to the outright acquittal that he received



R v DB [2022] NSWCCA 87 at [33] per Brereton JA

- Unconscious acts attributable not to mental illness but to the transitory effects on a person of ordinary sound mind of conditions such as concussion, post traumatic epilepsy, hypoglycaemia, and somnambulism, characterise, although they do not necessarily define, “sane automatism”. In any event, for present purposes it is a notable feature of the cases to which reference has been made that “sleepwalking” is treated, effectively, as a paradigm case of sane automatism.
- Accused entitled to outright acquittal, as no evidence of mental impairment
- Ierace J agreed; Wilson J dissented

R v DB [2022] NSWCCA 87 at [59] per Brereton JA

It is ... a mistake to ask whether a parasomnia such as sexsomnia, unaccompanied by other psychopathology, constitutes a disturbance of volition. The labels parasomnia and sexsomnia, like somnambulism, describe the phenomena of a person performing, while asleep, various acts usually associated with willed behaviour of an awake person; they do not describe a person lacking while asleep the volition which every person lacks while asleep. **The true issue is not whether sexsomnia is a mental health impairment, but whether the respondent had a disturbance of volition** within s 4(1)(a) [a form of mental impairment in NSW]. That issue is not assisted by argument over whether sexsomnia is a physiological or psychological disorder. Whatever accounts for the acts of the sleepwalker, it is not a lack of volition, but presumably **the action of the subconscious mind**.

Expert Evidence: Hill v Baxter [1958] 1 QB 277

- “I do not doubt that there are genuine cases of automatism, but I do not see how the layman can safely attempt, without the help of some medical or scientific evidence, to distinguish the genuine from the fraudulent”



Expert Evidence: *T v The Queen* [2-23] NZCA 299 at [42], [43]

- A finding of automatism founded on sexsomnia could not be reached without expert evidence
- Classification of the defendant's condition as insane or sane automatism is a decision for the trial judge, **guided by expert evidence**, and, depending on the classification, the defendant faces a legal or evidential burden.



Expert Evidence on Sexsomnia: *T v The Queen* [2023] NZCA 299

A sleep expert is generally necessary in a sexsomnia case who expresses opinions on the basis of a detailed clinical history and collateral information, addressing the potential for feigning



T v The Queen [2023] NZCA 299

Finding of little collateral information supporting sexsomnia in T's case:

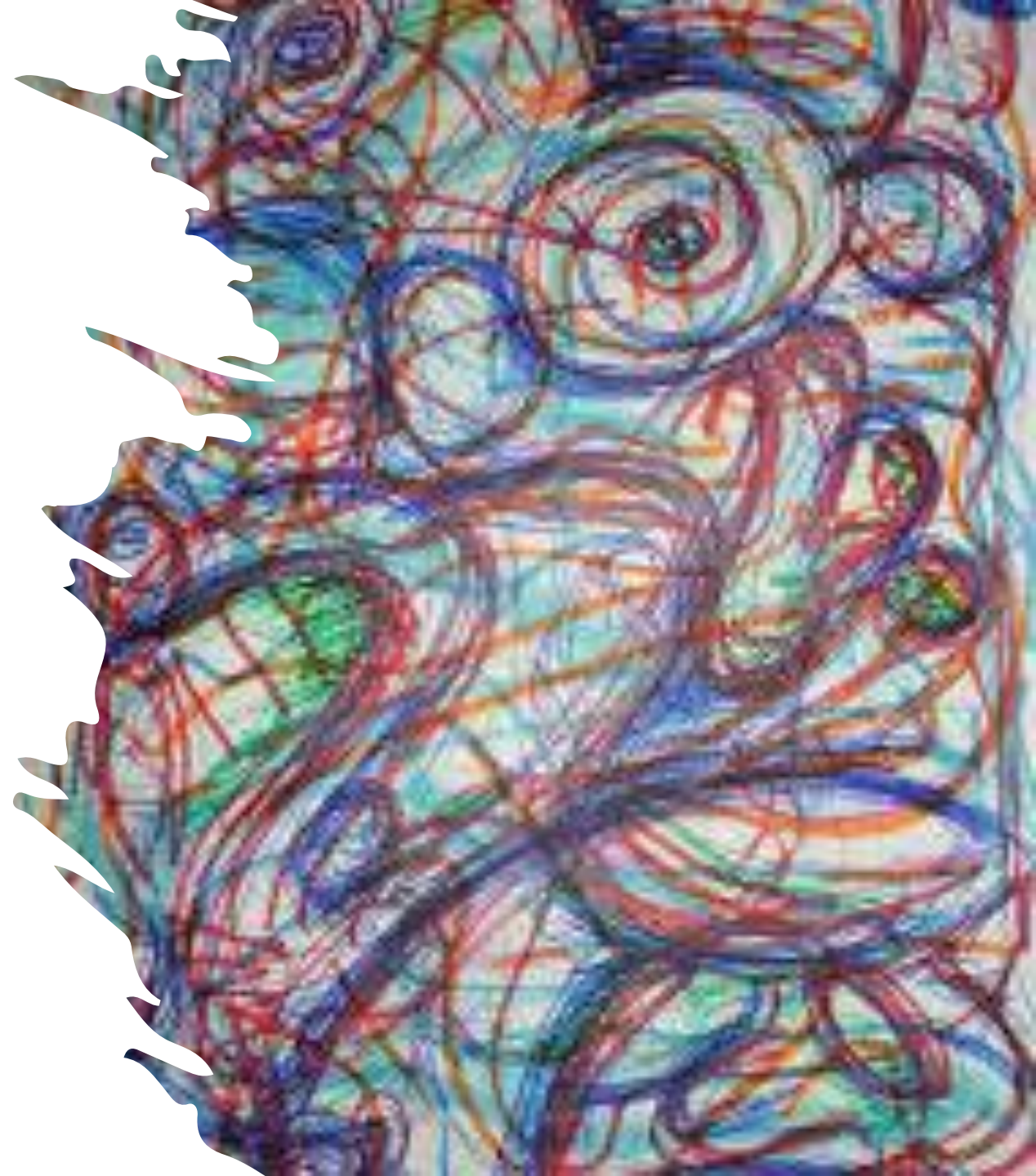
- T had no history of sleepwalking or sleep talking;
- There was only one prior incident that might be explained as sexsomnia – there was an alternative medical explanation for this;
- The sleep study neither confirmed nor excluded sexsomnia
- The index offending differed significantly from the prior incident
- There was no triggering incident, as there often is;
- The conduct did not occur in the early phase of sleep
- Thus, no diagnosis of sexsomnia could be confirmed

R v Mendis [2024] NSWDC 420 at [27] per Mahony SC DCJ

Case of multiple counts of sexual intercourse by a youth minister with minors

Dr Fernando asserted need for formulating a diagnosis of sexsomnia:

- Thorough clinical history,
- sleep history
- collateral history
- overnight sleep study for EEG and video monitoring, although NREM parasomnia behaviours are rarely captured in sleep laboratories
- Is there bruxism, sleep talking, sleep walking?



R v Mendis [2024] NSWDC 420 at [35]: Opinion of Dr Fernando

- “Aaron’s symptoms are suggestive of NREM parasomnia, specifically sleep talking (somniloquy) and sexsomnia or sleep related sexual behaviour. He also had bruxism, another type of parasomnia, which has been associated with sexsomnia. It is common for patients suffering from one type of parasomnia to have other types of parasomnias.
- Typically, sexsomnia behaviours are overt sexual behaviours including fondling, masturbation, sexual intercourse and sexual vocalisations. In Aaron’s case, the behaviours commenced mostly with hugging, and some sexual touching. Intercourse occurred when JR facilitated the process.
- Parasomnias at least in the form of sleep talking and bruxism are common in Aaron’s family. Familial tendency for parasomnias has been documented but the actual genetics are still unclear.
- His overnight sleep study confirms findings that suggest the presence of NREM parasomnia.
- Dentist made a provisional diagnosis of bruxism, another type of parasomnia.”
- “No doubt that Aaron suffers from parasomnias including sleep talking, bruxism and sexsomnia”.

R v Mendis [2024] NSWDC 420 per Mahony SC DCJ

151. I find that it was a reasonable possibility at the time of each alleged offence that the accused was asleep, and suffering from sexsomnia and therefore the acts carried out were not either willed or voluntary acts of the accused.

152. The Crown has failed to negate beyond reasonable doubt the defence of automatism and there will therefore be verdicts of not guilty

Major New Zealand Authority: Cook v The Queen [2025] NZSC 44

- Birthday party at flat of Mr C (41).
- A 27 year old participant became intoxicated and passed out. She was put to bed in Mr C's room while he kept partying.
- She later awoke to find him having penetrative sex with her
- Mr C was affected by alcohol and Tramadol
- C advanced a defence of sexsomnia
- Argued by prosecution that sexsomnia is insane automatism where it stems from internal predisposition and is prone to recur: it is a disease of the mind, engaging insanity defence
- Trial judge classified the defence as **insane automatism**, rejecting the defence argument of sane automatism, and requiring Mr C to establish on the balance of probabilities he was in an automatic state
- Convicted and sentenced to 8 years' imprisonment
- Appeal in Court of Appeal failed, but sentence reduced to 7 years

Cook v The Queen [2025] NZSC 44

- Mr C's mother gave evidence his father had undiagnosed sexsomnia
- Ms C's son gave evidence Mr C had headbutted him while they were sleeping in the same bed
- Mr C called 2 former partners who said he had initiated sex with them while apparently asleep
- The Crown called a 3rd partner who said he initiated sex while asleep on a regular basis

Cook v The Queen [2025] NZSC 4: The Expert Evidence: Dr Fernando

- Patients, when engaged in sexsomnia, are more direct, aggressive, less inhibited, less focused on the partner, and sometimes display sexual behaviour that is atypical for the individual
- Mr C had a family history
- Mr C had moderate to severe apnoea, a common trigger for sexsomnia
- Mr C was intoxicated, also a common trigger

Cook v The Queen [2025] NZSC 4: The Expert Evidence: Dr Dean

- Mr C not mentally disordered
- Very difficult to be sure whether sexsomnia exists in an individual
- The accounts of Mr C not necessarily supportive
- Mr C's consumption of alcohol and Tramadol should exclude diagnosis: they could account for the amnesia

Cook v The Queen [2025] NZSC 4

- Sanity is presumed until the contrary is proved
- Where a positive defence involving a disease of the mind is offered, the defence is insanity
- Automatism is an excuse or defence based on the offending having occurred without conscious volition, a temporary eclipse of consciousness that leaves the person able to exercise bodily movements
- In Australia insanity is not premised on being a disease of the mind
- Parasomnias are sleep disorders, not mental disorders: they are non-pathological, unlike epilepsy or diabetes
- Automatism has to be classified as sane or insane: that depends on whether it involves a disease of the mind

Cook v The Queen [2025] NZSC 4

- In its modern guide, insanity encompasses a wide range of inherent causes of incapacity impairing will
- The verdict is not criminally responsible on account of insanity
- It is not appropriate to elevate disease of the mind to serious mental illness
- Giving a broad meaning, not an artificially narrow construction to 'disease of the mind' is justified
- We decline to follow Australian authority
- What is required is civil proof of a **disease or functional psychological disorder**, whether permanent or temporary, curable or incurable, recurring or non-recurring which **so affected the defendant's mental faculties as to render them incapable of understanding the nature and quality of their action**
- **The defence of sane automatism is available only where the absence of conscious volition arises from some events or condition not properly classified as a disease of the mind; otherwise where it comes from a disease of the mind, it has to be classified as the defence of insanity**

Cook v The Queen [2025] NZSC 4

- Diseases of the mind almost inevitably will be attributable to an internal condition of some sort but the issue is whether there is a disease or functional disorder, rather than focussing on the cause
- Trial judge was correct to rule the defence as insane automatism, imposing an onus of proof on Mr C
- Appeal dismissed

The Onus and Expert Evidence

- To raise the issue of automatism, the accused carries an evidentiary onus
- Generally this is discharged by expert evidence and can result in a reasonable doubt about whether the actus reus was willed & therefore entitled to an acquittal
- Expert evidence needs to address the considerations which suggest that the person lacked voluntariness and therefore acted as an automaton
- The expert must also address whether the cause of the automatism was a disease of the mind that was internal and prone to recur – if it was, the issue of insanity/mental impairment arises which needs to be proved on the balance of probabilities by the accused.
- **Sexsomnia** is regarded in NZ but not Aus as a disease of the mind: the solution – focus on the effect of the condition and be rigorous as to the expert evidence!

