

## Case Comment

# NON-INSANE AUTOMATISM AND THE SINGAPORE PENAL CODE

### *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37

Decisions from the lowest tier of the judicial hierarchy are normally ignored because they do not have precedential value. However, the case of *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 should be studied closely as this is the first time that the concept of automatism (*ie*, involuntariness) in general, and non-insane automatism in particular, have been analysed by the Singapore Judiciary in a criminal case. This comment argues that there is a need for intervention by the Legislature to clarify if non-insane automatism is in fact recognised in Singapore's criminal law and if so, what its precise parameters are.

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## I. Introduction

1 A fundamental principle of criminal law is that, for persons to be held criminally liable, their conduct must have been performed voluntarily, by which is meant that they were in control of their bodily movements. Conversely, where such control was absent, the person's conduct would have been involuntary. The term "automatism" has been devised to refer to involuntariness in law.

2 In the 1956 Malayan case of *Sinnasamy v Public Prosecutor*,<sup>2</sup> it was argued by the appellant that he had killed his 21-month-old daughter while in a state of epilepsy. Both the Court of Appeal and the appellant assumed that the only defence applicable in that situation was

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1 The author thanks Professor Stanley Yeo for his comments on an earlier draft of this case comment.

2 [1956] MLJ 36.

unsoundness of mind under s 84 of the Penal Code.<sup>3</sup> There are difficulties with this assumption because s 84 (at the time) only encompassed cognitive and not volitional defects.<sup>4</sup>

3 Section 84 has since been amended in 2019.<sup>5</sup> Persons who have no control over their acts due to mental disorder are now clearly covered by s 84(1)(c) of the Penal Code<sup>6</sup> but the law is still unclear about involuntariness caused by factors apart from mental disorder. This is because the recent amendments to the Penal Code did not introduce a general provision defining voluntariness. In sum, while the Penal Code clearly recognises what the common law refers to as insane automatism,<sup>7</sup> it is silent about non-insane automatism.<sup>8</sup>

4 This stands in contrast to the common law which recognises insane automatism as well as non-insane automatism. Instances of non-insane automatism at common law include somnambulism,<sup>9</sup> hypoglycaemia,<sup>10</sup> concussion<sup>11</sup> and a reflex action.<sup>12</sup>

5 Local commentators such as Yeo, Morgan and Chan have stated that “[i]t is a fundamental principle of criminal law that a person is liable for an act or omission only if it is performed with volition”.<sup>13</sup> Similarly, Tan

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3 See Penal Code 1871 (2020 Rev Ed) s 84 for the current version of this provision.

4 Stanley Yeo, “Fleshing Out Malaysian Perspectives on Automatism: *Abdul Razak bin Dalek v Public Prosecutor*” [2011] *Singapore Journal of Legal Studies* 289 at 294.

5 Criminal Law Reform Act 2019 (Act 15 of 2019). Section 84 was subsequently amended again by the Criminal Law (Miscellaneous Amendments) Act 2021 (Act 23 of 2021) to clarify certain aspects of the unsoundness of mind defence but the new subsection (1)(c) was left untouched.

6 Section 84(1)(c) of the Penal Code reads: “Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is – ... completely deprived of any power to control his actions.”

7 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386. A person will be found not guilty by reason of insanity for involuntary acts arising from a disease of the mind and consequently detained in a mental institution. There could be differences between common law’s insane automatism and s 84(1)(c) of the Penal Code, but it is submitted that any differences are minimal due to the broad meaning ascribed to “unsoundness of mind” in s 84.

8 Also sometimes referred to as sane automatism.

9 *R v Parks* (1992) 15 CR (4th) 289, but see *R v Burgess* [1991] 2 QB 92.

10 *R v Quick* [1973] QB 910.

11 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 at 409.

12 *Hill v Baxter* [1958] 1 QB 277 at 283.

13 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 3, at para 3.26. The Penal Code Review Committee in 2018 also referred to “the fundamental principle that a person is not to be held criminally responsible for involuntary conduct” caused by mental disorders: see *Penal Code Review Committee Report* (August 2018) at p 277 (Co-Chairpersons: Indraneel  
(cont’d on the next page)

says that “[w]henver an offence has a conduct-type physical element, the Prosecution also has to prove that the offender had acted voluntarily”.<sup>14</sup>

6 Apart from these statements by academics, the question remains whether Singapore’s criminal law recognises non-insane automatism and, if so, what is its scope? Is it the same as the common law concept? If it is the same, how is it possible for the common law to be read into Singapore’s codified criminal law?<sup>15</sup>

7 In *Public Prosecutor v Ong Jun Yong*<sup>16</sup> (“*Ong Jun Yong*”), the accused was charged with having committed outrage of modesty by slipping his hand into the victim’s dress and touching her left breast over her bra at a nightclub. The accused denied that he committed the act, and that even if he did it, it was committed without his control.<sup>17</sup> Significantly, both the Prosecution and the Defence accepted that an accused person cannot be held criminally liable for an involuntary act.<sup>18</sup> District Judge Kow Keng Siong (the “Judge”) held, as a preliminary issue, that the common law’s concept of non-insane automatism<sup>19</sup> cannot apply in Singapore. Additionally, he held that an involuntary act was “one where the doer is not acting consciously, intentionally, and/or purposefully”<sup>20</sup> [emphasis in original].

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Rajah SC & Amrin Amin). It is not clear if the committee meant that the fundamental principle did not apply to involuntary conduct caused by other reasons.

- 14 Benny Tan, *Foundations of Criminal Law in Singapore* (Academy Publishing, 2022) ch 3, at para 03.022.
- 15 For the effect of a codified system, see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 1, at paras 1.37–1.44 and 1.55; and *Chee Soon Juan v Public Prosecutor* [2012] 3 SLR 648 at [57].
- 16 [2022] SGMC 37. The facts happened in 2019 before s 84 of the Penal Code was amended. It could be argued that by providing for automatism arising from unsoundness of mind only in the 2019 amendments, Parliament implicitly did not accept non-insane automatism. However, it can equally be argued that Parliament intended to allow judges to develop the concept of non-insane automatism since the Judiciary had referred to it in earlier cases, see n 36 below and the cases discussed in this comment.
- 17 The cause of the non-insane automatism was argued to be hypoglycaemia due to “acute alcohol intoxication”. The court did not decide if the causal connection had been shown since there was uncertainty in the nature and basis of the accused’s case: see *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [2], [8] and [36]–[41]. In relation to use of alcohol, the restriction in s 85(1) of the Penal Code that “intoxication shall not constitute a defence to any criminal charge” except as provided by ss 85 and 86 will also need to be dealt with at trial.
- 18 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [3] and [5].
- 19 The elements of non-insane automatism at common law are summarised in *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [10] and [11].
- 20 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [7(a)] and [7(c)(ii)]. A voluntary act is accordingly “one done consciously, intentionally and purposefully by the doer” [emphasis in original]: *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [7(c)(i)].  
(cont’d on the next page)

8 Even though *Ong Jun Yong* is a decision from the Singapore Magistrate's Court, it is worthy of close analysis because this is the first time that automatism in general, and non-insane automatism in particular, has received extended judicial discussion in a criminal case.<sup>21</sup> The sections below discuss the concept of automatism followed by an analysis of the reasons given by the Judge in coming to his decision, and finally concludes with a plea for legislative intervention in this area.

## II. Concept of automatism

9 The Judge summarised the common law concept of non-insane automatism as one where the accused's "criminal act was committed without his control ... and was hence involuntary".<sup>22</sup> This is correct because automatism is "involuntariness" or "unwilled" conduct in the sense of a person lacking mental capacity to control his or her conduct rather than knowing what he or she was doing or intending the consequences of his or her conduct.<sup>23</sup> It is different from what we normally understand as being "unconscious" or not being aware of what is happening. As pointed out by Yeo:<sup>24</sup>

A person experiencing a state of automatism may be conscious of what he is doing, and even intend the consequences of his conduct, while lacking any mental capacity to restrain himself from such conduct.

... A person who is unconscious will invariably have been unable to control his conduct. However, it is that inability rather than his unconsciousness *per se*, which renders his conduct involuntary.

10 This understanding of involuntary conduct may be contrasted with the Prosecution's submission in *Ong Jun Yong* that "[a]n act is involuntary if it is done without the doer *exercising deliberative functions of the mind*. ... If the evidence shows that the accused person

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Even though the Judge referred to the common law defence of automatism in general (*ie*, both insane and non-insane automatism), the decision is only important with regards to non-insane automatism since s 84(1)(c) of the Penal Code now provides for a person who is unable to control his actions due to unsoundness of mind.

21 There appears to have been only one case so far (in which a written judgment was issued) where automatism was pleaded in the civil context, and it was also decided by the lower courts. That case involved a civil negligence claim by three persons who were injured by a car driven by the defendant. The defendant argued that he suffered a stroke which caused him to lose control of his car: see *Stephanie Tang Swan Leen v Tan Su San* [2018] SGDC 218.

22 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [10].

23 Stanley Yeo, "Fleshing Out Malaysian Perspectives on Automatism: *Abdul Razak bin Dalek v Public Prosecutor*" [2011] *Singapore Journal of Legal Studies* 289 at 292.

24 Stanley Yeo, "Fleshing Out Malaysian Perspectives on Automatism: *Abdul Razak bin Dalek v Public Prosecutor*" [2011] *Singapore Journal of Legal Studies* 289 at 292–293.

is *sufficiently conscious* of what he is doing, then he cannot be said to be acting involuntarily”<sup>25</sup> [emphasis in original].

11 The first part of the Prosecution’s submission is correct, but the latter part may mislead readers in thinking that a person who is aware or conscious of what is happening must necessarily be able to control their actions. This is not correct because a person could be aware of what is happening and yet be unable to control his or her actions such as in cases of physical compulsion (eg, being pushed down a flight of stairs) or reflexive movements (eg, being attacked by a swarm of bees).

12 Furthermore, care must be taken in reading the Judge’s definition of an involuntary act as “one where the doer is not acting consciously, intentionally, *and/or* purposefully”<sup>26</sup> [emphasis in original]. It should not be read in a way that elides the difference between the physical and fault elements of a crime. As explained by Yeo, Morgan and Chan:<sup>27</sup>

Although voluntariness is a physical element of a crime, it also has a mental component. This is because ‘control’ of conduct involves *willed* behaviour. If an accused stabs a victim with a knife, they have willed their hand to grasp the knife and thrust it at the victim. It is important to distinguish the intent to do an act from the intent to cause a result. For example, the accused may intentionally stab the victim but not intend death. Likewise, taking hold of a bag and carrying it away involves the exercise of the will to perform these acts, but the accused is not guilty of theft unless there is an intention to take the bag ‘dishonestly’. [emphasis in original]

13 It is submitted that this is what the Judge meant by his definition of what is a voluntary or involuntary act. Referring to the offence of outrage of modesty, the Judge explained that for the physical element of use of criminal force, “the mental elements involved in voluntarily performing the act is the conscious, intentional and purposeful use of force”<sup>28</sup> This is different from the required fault element which is “the intention to outrage the modesty of the victim or the knowledge that the assault or criminal

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25 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [4(a)]. Some cases have also said that a conscious act is inconsistent with a plea of automatism, see for example *Law Society of Singapore v Choy Chee Yean* [2010] 3 SLR 560 at [29]; *Public Prosecutor v Ahmed Salim* [2021] SGHC 68 at [121]; and *Public Prosecutor v Mohamed Aliff bin Mohamed Yusoff* [2022] SGHC 295 at [119].

26 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [7(c)(ii)]. The Judge extracted this idea from James Fitzjames Stephen, *A History of the Criminal Law of England* vol 2 (MacMillan and Co, 1883) at pp 99–107; see *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [31]–[33].

27 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 3, at para 3.27.

28 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [35].

force is likely to thereby cause such outrage”.<sup>29</sup> However, what the Judge had in mind could be better expressed if an involuntary act is described as one which is not “a product of the will of that person” rather than an act which is not done “consciously, intentionally, *and/or* purposefully”.

### III. No local precedent

14 The Defence argued that the defence of automatism had been accepted in the Singapore High Court case of *Koh Jing Kwang v Public Prosecutor*<sup>30</sup> (“*Koh Jing Kwang*”). In *Koh Jing Kwang*, it was said:<sup>31</sup>

The general description of voluntariness in s 39 of the [Penal Code] is premised on a more fundamental principle in common law, which is that a person should not be liable for *involuntary* behaviour. This principle has its roots in the common law concept of automatism. [emphasis in original]

15 The Judge pointed out that in the very brief passage in *Koh Jing Kwang*, the High Court did not analyse the scope of automatism and also did not expressly say that the common law on automatism was “directly applicable under Singapore criminal law”.<sup>32</sup> Similarly, other Singapore cases had also referred to the concept of automatism in a general way without expressly saying that it was applicable.<sup>33</sup>

16 However, in this author’s view, there is no doubt that the reference in *Koh Jing Kwang* to s 39 (now s 26A) of the Penal Code is a mistake. That provision defines the word “voluntarily” to encompass three fault terms (intention, knowledge and reason to believe). It does not address the need for volitional control.<sup>34</sup>

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29 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [35]. It is submitted that this is what *Public Prosecutor v Yong Heng Yew* [1996] 3 SLR(R) 22 at [10] meant where it was said that “an offence under s 18(1)(a) [of the Environmental Public Health Act] requires the presence of a mental element, namely, the basic intent to commit the physical act of depositing, dropping, placing or throwing refuse”.

30 [2015] 1 SLR 7.

31 *Koh Jing Kwang v Public Prosecutor* [2015] 1 SLR 7 at [44]. Unfortunately, the point was repeated in *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [32]. The former s 39 of the Penal Code is now numbered s 26A.

32 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [18].

33 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [21]. The cases referred to are *Pathip Selvan s/o Sugumaran v Public Prosecutor* [2012] 4 SLR 453 at [39]; *Public Prosecutor v Yong Heng Yew* [1996] 3 SLR(R) 22 at [10] and [14]; and *Bander Yahya A Alzahrani v Public Prosecutor* [2018] 3 SLR 925 at [27].

34 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 3, at para 3.29; Benny Tan, *Foundations of Criminal Law in Singapore* (Academy Publishing, 2022) ch 3, at paras 03.026–03.027.

17 The Judge also expressed surprise that there had not been any extensive consideration of automatism in Singapore case law – at least in the last 70 years after the use of the term “automatism” was first used in English law – if it is indeed applicable in Singapore criminal law.<sup>35</sup> It is submitted that this judicial observation is neutral at best. It can be argued that there has not been any extensive judicial discussion simply because automatism was not pleaded before the courts owing to its uncertain status. Furthermore, even though there has not been extensive discussion, there is no shortage of cases where the concept of automatism had been referred to.<sup>36</sup>

#### **IV. Penal Code already deals with uncontrolled acts**

18 The Judge pointed out that uncontrolled acts are already dealt with in various provisions in the Penal Code, *ie*, in s 84(1)(c), Exceptions 1 and 7 to s 300, and s 80. His Honour concluded:<sup>37</sup>

... it is clear that the Penal Code drafters and Parliament had provided that only uncontrolled acts committed in specific scenarios can amount to a defence. If the mere loss of self-control is a defence, then the above defences will have been unnecessary – an accused person can evade criminal liability by simply showing that his criminal act was committed whilst deprived of self-control. There is no need for him to additionally show that his uncontrolled act was due to an unsound mind, grave and sudden provocation, diminished responsibility or an accident.

19 According to this view, there is no free-standing concept of non-insane automatism. The defendant’s claim will have to meet the requirements of one of the existing defences in the Penal Code.

20 On the other hand, there could be situations of non-insane automatism which will simply not come within any of the Penal Code defences. For example, where a person has no control over his actions when he or she is pushed down a flight of stairs.

21 Furthermore, if the defendant needs to rely on a Penal Code defence, he or she will have to prove it on a balance of probabilities.<sup>38</sup>

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35 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [20].

36 See for example, *Kok Seng Chong v Bukit Turf Club* [1992] 3 SLR(R) 772 at [82]; *Public Prosecutor v Yong Heng Yew* [1996] 3 SLR(R) 22 at [10]; *Public Prosecutor v Lim Niah Liang* [1996] 3 SLR(R) 702 at [23]; and *Roszaidi bin Osman v Public Prosecutor* [2022] SGCA 75 at [84(a)].

37 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [27].

38 Evidence Act 1893 (2020 Rev Ed) s 107.

By contrast, for non-insane automatism under the common law, it is the Prosecution who has to disprove it beyond a reasonable doubt.

22 It can also be noted that the common law recognises non-insane automatism alongside the defences of insanity, diminished responsibility and provocation. In any case, it is not a simple matter to allege non-insane automatism due to the many restrictions imposed by common law such as the need to show (a) complete loss of control which was (b) due to an external cause that was (c) not due to their own fault.<sup>39</sup> The danger of the situation recurring must also be considered.<sup>40</sup> Finally, the defendant also bears an evidential burden of non-insane automatism.<sup>41</sup>

## V. No defence of automatism under the Penal Code

23 It is not surprising that the Penal Code does not contain a general provision about automatism since this concept was only developed by the common law “some 80 years *after* the Penal Code had been drafted”<sup>42</sup> [emphasis in original]. The Judge held that since there is no provision in the Penal Code allowing for continuing reception of the common law, the common law defence of automatism is not directly applicable to the Penal Code offences.<sup>43</sup> Instead, the Penal Code provides for specific situations where uncontrolled acts amount to a defence.<sup>44</sup>

24 However, this would lead to an intractable problem. If the common law is not directly applicable to the Penal Code and there is no provision in the Penal Code for non-insane automatism, what basis does the judge rely on to define an “involuntary act” such that there is no criminal liability in this situation?<sup>45</sup>

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39 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [11].

40 This factor was not mentioned by the Judge in *Public Prosecutor v Ong Jun Yong*, but see *R v Burgess* [1991] 2 QB 92 and *Stone v The Queen* [1999] 2 SCR 290 for discussion of its role.

41 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *Dourin bin Murah v Public Prosecutor* [2013] 5 MLJ 856.

42 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [22(e)].

43 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [22].

44 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [26]–[27].

45 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [28]–[33]. The statement that “the drafters would presumably have intended for the prevailing common law position on [automatism] to apply to the code” (*Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [30]) directly contradicts the Judge’s earlier statements regarding the interpretation of the Penal Code and in particular his statement that “the Penal Code is not a codification of the common law” (*Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [22(c)]).



25 It is submitted that the key to unravelling the problem is by considering what is meant by the “defence” of automatism.<sup>46</sup> This description may be correct in a loose way in that defendants cannot be convicted for acts done under automatism. However, it is not correct if the term suggests that defendants have to find a provision in either Chapter 4 or 4A of the Penal Code for the defence of automatism or that they have a legal burden to prove that they suffered from non-insane automatism at the time on a balance of probabilities. At common law, the defendant only has an evidential burden with regard to non-insane automatism and the Prosecution has the legal burden to prove beyond a reasonable doubt that the act was committed voluntarily.<sup>47</sup>

26 As pointed out by Yeo:<sup>48</sup>

... the voluntariness of the accused’s conduct should be regarded as an essential constituent of the act, which is part of the *actus reus*. ... [O]nce an accused suggests he may have acted automatically, the prosecution is left to discharge the ultimate burden. When non-insane automatism is treated in this manner, it raises the contention that the prosecution has not proved its case; it is therefore not a defence which the accused himself has to prove, such as those defences prescribed in the Code. It may then be argued that that the Code was meant to be exhaustive only in respect of defences which negate the *mens rea* of an offence. Accordingly, submissions that the prosecution has not proved the *actus reus* of an offence (such as when automatism is pleaded) have not been ruled out by the Code. [references omitted]

27 Accordingly, it may be possible to argue that the common law concept of automatism could be imported into the Penal Code via the requirement that the defendant has committed a criminal “act”.<sup>49</sup> While this argument is applicable to many Penal Code offences, for example s 299 (“[w]hoever causes death by doing an act ...”) and s 321 (“[w]hoever does any act ...”), not all offences use such phrases.

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46 This term is used in *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [7(a)], [10], [13], [18], [21], [22] and [25].

47 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [12]. But in the case of insane automatism, the elements must be proven by the defendant on a balance of probabilities. This applies to the defence under s 84(1)(c) of the Penal Code as well: see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 3, at para 3.28 and ch 24, at para 24.40; and Benny Tan, *Foundations of Criminal Law in Singapore* (Academy Publishing, 2022) ch 17, at paras 17.010–17.011.

48 Stanley Yeo, “The Application of Common Law Defences to the Penal Code in Singapore and Malaysia” in *The Common Law in Singapore and Malaysia* (AJ Harding ed) (Butterworths, 1985) at p 150.

49 KL Koh, CMV Clarkson & NA Morgan, *Criminal Law in Singapore and Malaysia* (Malayan Law Journal Pte Ltd, 1989) at pp 42–43.

## VI. Malaysian case law

28 In seeking to persuade the Judge to accept the argument that non-insane automatism should be recognised in Singapore, the accused argued that some Malaysian courts have accepted it.<sup>50</sup> The Judge noted that in *Public Prosecutor v Kenneth Fook Mun Lee (No 2)*<sup>51</sup> and *Abdul Razak bin Dalek v Public Prosecutor*<sup>52</sup> (“*Abdul Razak bin Dalek*”), the Malaysian courts had treated non-insane automatism as synonymous with involuntary acts and insane automatism as amounting to a defence of unsoundness of mind.<sup>53</sup>

29 The Judge found that these two Malaysian cases were no longer good law based on the more recent case of *Hoo Ah Tee v Public Prosecutor*<sup>54</sup> where the Malaysian Court of Appeal appeared to have rejected non-insane automatism because the Malaysian Penal Code did not specifically provide for it.<sup>55</sup>

30 However, it is submitted that it may be too soon to decide on the applicability of automatism in Malaysian criminal law until the Federal Court rules on what the Court of Appeal has said.<sup>56</sup> In *Kenneth Fook Mun Lee*, the Court of Appeal<sup>57</sup> and the Federal Court<sup>58</sup> also seemed to endorse the High Court’s rulings on automatism.<sup>59</sup> At most, the Malaysian case law can only be described as inconsistent.

31 The more interesting question is whether the two Malaysian cases provided sound reasons for adopting the concept of non-insane automatism into their codified criminal law. Unfortunately, no sound

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50 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [2(b)(iii)]. The Malaysian Penal Code, like its Singapore counterpart and other Codes which descended from the Indian Penal Code, does not contain any provisions on automatism.

51 [2003] 3 MLJ 581. See also *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563 regarding the burden of proof.

52 [2010] 4 MLJ 725.

53 *Public Prosecutor v Ong Jun Yong* [2022] SGMC 37 at [19]. The latter point was also adopted in *Sinnasamy v Public Prosecutor* [1956] MLJ 36 and *Dourin bin Murah v Public Prosecutor* [2013] 5 MLJ 856. As mentioned in para 3 above, involuntary acts due to mental disorder are now covered by s 84(1)(c) of the Penal Code, so there is no difficulty in recognising insane automatism in Singapore.

54 [2013] 4 MLJ 636.

55 *Hoo Ah Tee v Public Prosecutor* [2013] 4 MLJ 636 at [18]–[19].

56 *Hoo Ah Tee v Public Prosecutor* [2013] 4 MLJ 636 is a decision of the Court of Appeal, whereas *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725 is a decision of the Federal Court.

57 *Public Prosecutor v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah* [2007] 1 MLJ 334 at [109]–[113].

58 *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130 at [46].

59 *Public Prosecutor v Kenneth Fook Mun Lee (No 2)* [2003] 3 MLJ 581.

reasons were given in *Kenneth Fook Mun Lee* except that the common law concept of automatism “harmonises with s 39 of our Penal Code”.<sup>60</sup> As explained above,<sup>61</sup> s 39 describes the meaning of “voluntarily” in terms of the fault elements for an offence rather than the requirement of volitional control.

32 There was even less explanation on how non-insane automatism could be adopted into the Malaysian Penal Code in *Abdul Razak bin Dalek*. After acknowledging the appellant’s argument that he was relying on the defence of non-insane automatism as shown in two common law cases,<sup>62</sup> the court said “we have no issue on the principle of law established in the two cases”.<sup>63</sup> However, as correctly noted by the Judge in *Ong Jun Yong*, “it is wrong in principle to unquestioningly treat the common law defence of automatism as being directly applicable to the Penal Code offences [since] *Singapore criminal law is based on statute and not the common law*”<sup>64</sup> [emphasis in original]. The same point applies to the criminal law in Malaysia as well.

33 Hence, although the Malaysian case law should not be dismissed so quickly as having been superseded by a later case, it is nevertheless true that they do not adequately justify how non-insane automatism could be adopted into the Penal Code.

## VII. Conclusion

34 In *Public Prosecutor v Yong Heng Yew*,<sup>65</sup> the former Chief Justice Yong Pung How noted that it was unjust and pointless to punish persons for “acts committed not of their own volition”.<sup>66</sup> It was also common ground for the Prosecution and Defence in *Ong Jun Yong* that there is no criminal liability for involuntary acts.<sup>67</sup> However, there has not been any judicial discussion until now on how the Penal Code can incorporate the concept of non-insane automatism.

35 *Ong Jun Yong* has focused attention on the neglected area of non-insane automatism in Singapore criminal law. As pointed out by the

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60 *Public Prosecutor v Kenneth Fook Mun Lee (No 2)* [2003] 3 MLJ 581.

61 See para 16 above.

62 *R v Rabey* [1980] 2 SCR 513; *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.

63 *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725 at [25].

64 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [22(b)].

65 [1996] 3 SLR(R) 22.

66 *Public Prosecutor v Yong Heng Yew* [1996] 3 SLR(R) 22 at [10].

67 *Public Prosecutor v Ong Jun Yong* [2022] SGM 37 at [3] and [5].

Judge, there is no need for Singapore law to follow the common law on this matter. However, this does not dispense with the need for clarity and certainty in the Singapore law. Yeo pointed out nearly 40 years ago that:<sup>68</sup>

... the defence of automatism is a recent one which was never in the contemplation of the 19th Century jurists concerned with criminal law. Had the defence then been present in English law, it is probable that Macaulay and the other Indian Commissioners would have expressly included it in the Penal Code. It is however never too late for the legislature to do so. [references omitted]

36 It can be reasonably expected that pleas of non-insane automatism may be made in other cases in the future. While *Ong Jun Yong* has attempted to give answers to whether the common law concept of non-insane automatism is relevant in Singapore criminal law and its scope, there are difficulties with its reasoning and conclusion. There is therefore a great need for legislative intervention to set out the applicability and parameters of non-insane automatism in Singapore. In this regard, the Legislature could seriously consider adopting the following provision in the Penal Code, which has been proposed by Yeo, Morgan and Chan:<sup>69</sup>

- (1) No person is criminally responsible for involuntary conduct.
- (2) A person's conduct is involuntary if it involves an act that is beyond his control or an omission to perform an act which he is physically incapable of doing.
- (3) An act is within a person's control only if it is a product of the will of that person.
- (4) If the act constituting the offence consists only of a state of affairs, the person must be capable of exercising control over the state of affairs and given an opportunity to do so.
- (5) Sub-section (1) does not apply where the lack of control is due to the person's fault, and this is equivalent to, or more serious than, the fault level for the offence charged.
- (6) Involuntary conduct arising out of unsoundness of mind shall be dealt with under section 84.
- (7) Involuntary conduct arising out of intoxication shall be dealt with, as the case may be, under sections 85 or 86.

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68 Stanley Yeo, "The Application of Common Law Defences to the Penal Code in Singapore and Malaysia" in *The Common Law in Singapore and Malaysia* (AJ Harding ed) (Butterworths, 1985) at p 150.

69 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis, 2022) ch 3, at para 3.51, and see further explanatory notes at paras 3.52–3.56.

## Non-Insane Automatism and the Singapore Penal Code

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*Explanation.*—Examples of acts beyond a person's control include a reflex action, a spasm or convulsion, and acts done while in a state of unconsciousness and hypnosis.

### *Illustrations*

(a) A is involved in a road traffic accident. A is under a duty to provide information concerning the accident within 7 days when required to do so. However, if he is rendered unconscious in the accident and remains in this state for 7 days, he is not guilty of failing to furnish the required information.

(b) A, a diabetic, negligently fails to take sufficient food after her insulin injection and consequently suffers a hypoglycaemic episode during which she strikes Z, causing hurt. A will not be liable for voluntarily causing hurt to Z under section 323 but may be liable for negligently causing hurt under section 337.

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