

Harry Potter and the Criminal Liability of Werewolves

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It is an elemental principle of criminal law that to be found guilty of a crime, one must have performed the proscribed *actus reus*, coinciding at some point with the requisite *mens rea*.¹ A question that is not addressed by Canadian courts is how these concepts would be applied to a crime committed by a werewolf, as described in *Harry Potter*.²

While *mens rea* is typically thought of as the mental element of the crime, it is not the only mental element. Voluntariness, a component of the *actus reus*, must also be present on the part of the accused.³ If an act is not performed voluntarily there can be no *actus reus*.⁴ Would this element of voluntariness be present if someone were to commit a crime during a full moon, while in the form of a werewolf? After it is discovered that Professor Remus Lupin is a werewolf, he describes how he becomes “a fully fledged monster once a month”.⁵ Lupin becomes a great danger to himself and others while transformed due to his lack of control.⁶ Would it be just to find him, or any other werewolf, criminally liable for any action performed while in such a state? After all, “[i]t is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body...should attract the penalty and stigma of criminal liability.”⁷ The element of voluntariness even attracts *Charter* implications, as convicting the accused of a criminal offence that they did not voluntarily commit would infringe on their section 7 rights to life, liberty, and security of the person.⁸

¹ Simon N. Verdun-Jones, *Criminal Law in Canada: Cases, Questions, and the Code*, 6th ed (Toronto: Nelson, 2015) at 43.

² J.K. Rowling, *Harry Potter and the Prisoner of Azkaban* (Vancouver: Raincoast Books, 1999) [Rowling, *Prisoner of Azkaban*]; J.K. Rowling, *Harry Potter and the Half-Blood Prince* (New York: Arthur A. Levine Books, 2005) [Rowling, *Half-Blood Prince*].

³ *R v Théroux*, [1993] 2 SCR 5 at 17, 100 DLR (4th) 624.

⁴ *R v King*, [1962] SCR 746 at 747, 35 DLR (2d) 386.

⁵ Rowling, *Prisoner of Azkaban*, *supra* note 2 at 258.

⁶ *Ibid* at 259-60.

⁷ *R v Ruzic*, 2001 SCC 24 at para 47.

⁸ *R v Daviault*, [1994] 3 SCR 63 at 66, 118 DLR (4th) 469.

The state of mind of a werewolf during a full moon can best be described as a state of automatism, which is itself a subset of the voluntariness element of the *actus reus*.⁹ Automatism is “a state of impaired consciousness...in which an individual, though capable of action, has no voluntary control over that action.”¹⁰ If it can be shown that the accused was acting in a state of automatism, they may receive an outright acquittal.¹¹ The burden of proving this automatic state on a balance of probabilities rests with the accused, and even though this reverse onus is a violation of the presumption of innocence guaranteed by s. 11(d) of the *Charter*, it is saved by s. 1 because it would otherwise be too easy to feign and it would be difficult for the Crown to prove voluntariness.¹² If the accused can prove that they were acting in an automatic state due to their lycanthropy (the condition of being a werewolf), they still have another hurdle to overcome before they can be acquitted outright: they must establish that the automatic state was not due to a mental disorder.

If the courts were to categorize the accused’s lycanthropy as a mental disorder, the accused would be found not criminally responsible on account of mental disorder (NCRMD).¹³ If found to be NCRMD pursuant to s. 16 of the *Criminal Code*, the accused could be committed to a psychiatric facility.¹⁴ Another possibility is that they be released as long as they follow certain conditions.¹⁵ It is highly probable that the courts would label lycanthropy as a disease of the mind, for if we follow the reasoning in *Stone*, that would be the starting presumption and “it will only be in rare cases that automatism is not caused by mental disorder”.¹⁶ A test was outlined in *Stone* for determining whether a state of automatism is caused by mental disorder or not. This test combines the previously used internal cause theory and continuing danger theory into a more holistic approach, where each theory is thought of as a contributing factor to the categorization of the automatic state, and other policy factors can be considered as

⁹ *R v Parks*, [1992] 2 SCR 871 at 872, 95 DLR (4th) 27 [*Parks*].

¹⁰ *R v Stone*, [1999] 2 SCR 290 at para 156, 173 DLR. (4th) 66 [*Stone*].

¹¹ *Parks*, *supra* note 9 at 872.

¹² *Stone*, *supra* note 10 at para 180.

¹³ *R v Luedecke*, 2008 ONCA 716 at para 6 [*Luedecke*].

¹⁴ *Verdun-Jones*, *supra* note 1 at 226.

¹⁵ *Ibid* at 227.

¹⁶ *Supra* note 10 at para 199.

well.¹⁷ We can see from *Luedecke* that public safety concerns can be a strong foundation for determining that a mental disorder is present:

The criminal law uses the concept of mental disorder very differently than the medical profession. The concept of a mental disorder in the criminal law is used to describe those accused who have committed criminal acts but because of some abnormal mental state are unable to conform their behaviour to the dictates of the criminal law. A determination that an accused suffers from a mental disorder is more a reflection of the need for a further inquiry into the dangerousness of that accused than it is an assessment of his or her medical condition.¹⁸

Lycanthropy is both an internal cause and also constitutes an ongoing danger, both factors which would lead to the finding of a mental disorder. One important difference to note between lycanthropy and a condition like the *sexsomnia* described in *Luedecke* is that while it may be difficult to predict when the latter condition will occur, a werewolf's transformations are entirely foreseeable (occurring during every full moon). The predictability of the transformations may help lessen the perceived danger to the public since preventative safety measures (such as sequestering oneself) can be taken. The necessity of a finding of automatism caused by mental disorder would therefore be diminished.

It is important to note that there are circumstances that could preclude the automatism defense from applying, regardless of its classification. Professor Lupin notes that Fenrir Greyback, another werewolf, intentionally spreads the condition to as many people as possible.¹⁹ In order to accomplish this, "at the full moon, he positions himself close to victims, ensuring that he is near enough to strike. He plans it all."²⁰ Surely, intentionally putting yourself in a position to harm others would satisfy the voluntariness requirement of any crime committed thereafter. Furthermore, werewolves also have the option of taking the recently

¹⁷ *Ibid* at paras 203-18.

¹⁸ *Luedecke*, *supra* note 13 at para 7.

¹⁹ Rowling, *Half-Blood Prince*, *supra* note 2 at 334.

²⁰ *Ibid* at 335.

discovered Wolfsbane Potion, which allows them to remain in control of their faculties while transformed.²¹ Any crime committed while under the influence of this potion would negate any defense of automatism, as it would have been committed voluntarily (barring any other extenuating circumstances, such as acting under duress).

The question of whether a werewolf would be held criminally liable by the Canadian court system does not have one universal answer. There are many factors to consider, including whether the defense of automatism would apply, and whether it would be categorized as non-mental disorder or mental disorder automatism. There also may be other factors to consider that would preclude the accused from using such a defence. Thus, the perhaps unsatisfactory conclusion is that this is a matter that would have to be addressed on a case-by-case basis.

²¹ Rowling, *Prisoner of Azkaban*, *supra* note 2 at 258.