

Emotionally Triggered Involuntary Violent Behaviour not Attributed to A Mental Disorder

Pierre Joubert¹

Introduction

The construct of emotionally triggered involuntary violent behaviour not attributable to a mental disorder (ETIVB) was conceived as part of a PhD study that was successfully completed in 2014 (Joubert 2015). The construct was an attempt to move beyond two confusing concepts in South African law namely, automatism (further divided into sane and insane automatism) and non-pathological criminal incapacity (NPCI) (Joubert, Van Staden 2016). Insane automatism need not be dealt with any further, because it refers to an automatism attributable to a mental disorder: If the requirements of Sec 78 (2) of the Criminal Procedure Act 51 of 1977 as amended are met, the accused is further dealt with according to the procedures of Sec 79 of Act 51/1977. However, if a defence of 'sane automatism' or NPCI is successful, an accused is found not guilty and free to leave, because the provisions of Sec 79 of Act 51/1977 are then not applicable. Not surprisingly, 'sane automatism' and especially NPCI became very popular defences in criminal courts.

NPCI could mean anything other than a mental illness that incapacitates an accused's criminal capacity. It includes 'sane automatism', but also youthful age and, before 1997, severe intoxication (Snyman 2008:224-226; S v Chretien 1981 (1) SA 1097 (A)). The problems arising from intoxication as a defence were later addressed by the Criminal Law Amendment Act 105 of 1997. The interpretation of criminal defendants that NPCI did not necessarily mean automatism, was clarified in S v Eadie 2002 (1) SACR 663 (SCA). In Eadie, the Supreme Court of Appeal ruled, in no uncertain terms, that NPCI means automatism. But, what is automatism?

Definition of "Automatism"

Automatism is considered to be mere mechanical behaviour without the involvement of the mind (Snyman 2008:56). That however, is not the end of it. There is also a requirement for the automatism to be unconscious. Peter Fenwick (2019, pp 271-285) rightly criticized the requirement for being unconscious, because that term is also loaded with different meanings. Yeo (2002:446) criticises defining automatism in terms of not being conscious rather than there being an inability to control or contain

¹ Credentials and affiliation

one's action (the stance that is also prominent in the concept, ETIVB). Arboleda-Florez (2002:569) paraphrases the controversy about automatism in law as follows:

“Automatism in law, therefore, is fraught with deep social and political implications, let alone scientific controversies about its existence outside of a narrow range of neurological and psychiatric conditions.” There are some examples of automatism that are unlikely to be controversial, for example an involuntary limb movements during an epileptic seizure, and even the behaviour occurring during rapid eye movement sleep behaviour disorder. But what about the so-called “psychological blow automatism”?

Psychological blow automatism denotes involuntary behaviour (usually in the context of violence) attributed to a severely distressing emotional trigger (Samuels, O'Driscoll, Allnutt, 2007; Wells, Wilson 2004; Bourget, Whitehurst 2007). This is the automatism that psychiatrists are required to evaluate: Where seemingly involuntary violent behaviour seems to have been precipitated by very distressing emotions. Courts approach automatism with scepticism (Snyman 2002:57) and few concepts have caused so much confusion in courts (Kaliski 2006:93-112).

The construct, ETIVB, aims to provide psychiatrists with greater conceptual clarity in dealing with criminal violent behaviour in the context of overwhelmingly negative emotions. The legal defence in such cases is that the accused was so overcome by negative emotions (“emotional storm”) that he or she completely lacked the capacity to form a criminal intent. In developing criteria for ETIVB, the requirements of jurisprudence was ignored in favour of focusing on the behaviour under scrutiny with the intention of establishing by means of abductive reasoning whether an incidence of violent behaviour was indeed involuntary. Another way of saying it would be to ask whether the violent behaviour was completely involuntary on a balance of the evidence (and not beyond a reasonable doubt; see *S v Wiid* 1990 (1) SACR 561 (A))?” That being so, it is important to note that the behaviour is not assessed in a statistically probabilistic way. Note that this also holds true for making most psychiatric diagnoses. But, before we get to the nitty gritty of ETIVB, let's look at two real life dramas.

Drama on A Tennis Court

I am watching Roland Garros, 2010, on television as the tennis game is being played. It is the second set between the legendary Roger Federer and the hopeful Stanislav Wawrinka. Both men want to win and move on to the next round. The game is intense, both men being under pressure and working hard for their points and a possible shot at the prestigious tennis title. The first set went to Federer, but it looks like Wawrinka might make a come-back by winning the second set being played now. However, Federer holds on doggedly and the second set goes to a tie-break. During the tie-break Wawrinka loses a very important point. He lifts up his racket as if to hit it on the court, but he controls himself. But now Wawrinka loses a second

very important point. Negative emotions shows immediately in his body language and at the same time he rapidly smashes the racket against the court, breaking it.

A television replay reveals that Wawrinka smashed the racket thrice onto the court in very quick succession. The racket broke on the third smash, after which Wawrinka stared at it, for a moment looking perplexed. My assessment was in favour of ETIVB. Nevertheless, the umpire cited Wawrinka for racket abuse. The commentator said that the umpire was, “a bit unfair”, because (even to the commentator) Wawrinka’s behaviour was just reflexive and unintended. Now we also find a good example of the distinction between assessing the behaviour and a “legal” judgment. From the umpire’s point of view tennis players are responsible for their behaviour – end of story. Unfortunately, I can’t refer you to a video that recorded the event.

Drama in A Radio Studio

I am listening to Jacaranda 94.2 on 23 October 2009. The particular show played a series of pranks on various people in the past, but today they are about to a prank on Corrie Sanders, a professional boxer nicknamed “The Sniper”. He won the WBO heavyweight title in 2003.(BoxRec 2013) There are jokes and laughter over the radio, and it seems like everyone is having fun. Now a strange buzzing noise sounds over the radio. Corrie expresses his concern about this strange noise. He does not know (but the listeners do) that someone in the studio is stealthily approaching him with a live wire and is about to give him an electric shock. The host pacifies Corrie and it seems to work. But, the shock is delivered (a video that was later posted showed that it was to the neck). Sanders yells three words of profanity and (as the video showed) immediately hits the person next to him (John Walland, who did not inflict the shock, but happened to stand in the wrong place) once, knocking him unconscious. All of this happens in rapid succession.

The next day the radio station filed the following apology: “Jacaranda 94.2 would like to apologize to both John Walland and Corrie Sanders for this morning’s incident during “The Shock Machine”. The unprovoked, physical attack on John Walland this morning was due to an involuntary movement by Mr. Sanders that was expedited by the intensity of “The Shock Machine” mechanism.” I doubt that the shock per se explains the blow. I think the transient intense negative emotions and the fact Sanders is a skilled boxer does. The video of the event has been removed many years ago, but I was able to view it within the context of what I heard over the radio “in real time”. In this case too, ETIVB criteria favoured involuntary violent behaviour triggered by intense negative emotions.

What Is ETIVB?

Having read two rather “simple” case studies, let’s look at what ETIVB is about. ETIVB is about identifying involuntary violent behaviour that is triggered by a severely to extremely severely distressing incident and which cannot be attributed to a mental disorder. The ETIVB-criteria are meant to assist psychiatrist in evaluating relevant referrals for assessment by a criminal court.

The construct, ETIVB, was developed using a qualitative, conceptual analysis. This qualitative analysis was informed by a functional (behaviour) analysis (Martin, Pear 2015:201 – 213). The ETIVB construct was developed into criteria by first developing preliminary criteria and then testing the preliminary criteria with multiple iterations against 27 published cases in South African case law with charges of murder. The ETIVB-criteria were constructed for use by psychiatrists. Thus, the reliability of the ETIVB-criteria was quantitatively tested by requesting 25 willing participants, made up of psychiatrists and psychiatrists in training, to each apply the criteria to a precis of Sanders and Jacaranda 94.2 (mentioned above) and precis of 4 studies in South African case law: R v Dhlamini 1955 (1) SA 120 (T); S v Mahlinza 1967 (1) SA 408 A; S v Gesualdo 1997 SACR 68 (W); S v Campher 1987 (1) SA 940 (A). A modified Fleiss' kappa was used to assess participant agreement on the ETIVB-criteria excluding the attributive criteria. Participant agreement in rating the cases overall varied from fair to substantial: S v Campher (0.636); S v Dhlamini (0.514), S v Gesualdo (0.590), S v Mahlinza (0.388); Sanders (0.636). A number of participants identified ETIVB based on their completion of the criteria for 3 cases: Sanders, (16, 64%); S v Dhlamini (3, 12%); Sv Campher (8, 32%). No participant identified ETIVB for S v Mahlinza or S v Gesualdo. There is room for improvement, which perhaps includes making the instrument more user friendly and better training in the application of the instrument. The ETIVB-criteria were later refined, but not tested. Let's now take a closer look at the components of ETIVB.

The Triggering Event

The triggering event of ETIVB is defined in terms of the potential impact it has on emotions, namely to be severely to extremely distressing within the relevant sociocultural context. The triggering event must be an overt, real-life event and not a covert event, for example a memory, thought, fantasy etc. That is, the triggering event is potentially observable. The triggering event may be a single severely to extremely distressing event or series of rapidly successive severely or extremely distressing events that clearly form a whole.

The triggering event must be severely to extremely distressing irrespective of the emotional state of the defendant before the triggering event. It may be that the person involved had been upset due to something unrelated to the triggering event, but that does not allow for a less severe triggering event in ETIVB. This issue may be argued, but the criteria demands it, in the same way that the criteria of posttraumatic stress disorder insist on a limited number of traumatic events. The absence of an ETIVB-defining triggering event already disqualifies any consequent violent behaviour from meeting ETIVB-criteria.

The triggering event should, at least potentially, evoke overwhelmingly distressing emotions for any person of the same sociocultural background. Thus, it should be socioculturally sanctioned in the sense that it is understandable within that person's background. While the triggering event should have the potential to emotionally overwhelm a person, there should also be evidence that such severely to extremely distressing emotions were actually evoked. That evidence may be from collateral

information or a history obtained from the defendant. Evaluating the triggering event with its potential and actual emotional impact calls for clinical judgment. Such clinical judgment is already inherent in the practice of psychiatry.

Where triggers are included in the criteria of mental disorders, the emotions and/or behaviours they trigger may be mild to severe. When the trigger is mild to moderate, the psychiatrist should consider the emotional and/behavioural reaction excessive. When the trigger (traumatic event) is severe, for example in posttraumatic stress disorder (APA 2022:301-313) it substantially threatens the physical integrity of the person. Thus, evaluating triggering events and emotional and/or behaviours consequences within the context of a patient's sociocultural circumstances, is already common practice. In ETIVB the emotions and behaviours consequent to the triggering event are assessed as NOT being excessive in the sense that the triggering event can be considered, taking the defendant's culture and all other relevant information into account, to have been substantial enough to trigger severe to extreme emotional distress.

Involuntary Behaviour

The behaviour in ETIVB is defined by its consequences, namely as violent. The consequences are overt, physical injury or damage. Within the context of the application of ETIVB, it would involve criminal charges like assault, murder and attempted murder. This violent behaviour becomes the focus of scrutiny in ETIVB, because, together with emotionally triggered, an analysis of the behaviour will guide the assessment as to whether the behaviour was involuntary.

Involuntariness is assessed from two angles: the inability to make a choice and the inability to control behaviour (Fitzgerald1968:120-124). There are other ways to refer to involuntary behaviour (which are not used in ETIVB) for example: behaviour that cannot be helped; behaviour that lacks inner effort (Fitzgerald 1968: 120-124); behaviour not accompanied by willing (Snyman 2002:56-57); behaviour that is unconscious (Briscoe, Carson, D 'Orban 1993:21-117). All of the depictions of involuntariness are captured by the presence of both an inability to make a choice and an inability to control behaviour.

Let's take a breathing as an example. Breathing usually occurs without conscious effort, but we have limited voluntary control over breathing. We can choose to hold our breath and control our breathing – that is, we do so voluntarily. Note that it requires inner effort. Let's imagine that someone decides to hold their breath until they collapse. What is likely to happen? At some point urge to breathe will overwhelm the person so much that they will for all intents and purposes lose their ability to maintain the choice to control their breathing further. Thus, the person had, according to this take on involuntariness (and on a balance of the evidence), breathed out and in involuntarily. Most people will be unable to hold their breath voluntarily long before the point of passing out, in all likelihood less than one minute. They may report, "I could not help it." Note that although a sense of inner effort is required to continue holding one's breath, but discontinuing the holding and the consequent breath related movement require no such inner effort. May this inability to control and choose something other than breathing again be called an

automatism? I don't know and neither is it necessary to know. I described a common human experience with a high degree of self-evidence.

Next, let's consider divers who practice, sometimes from childhood, to hold their breath for many minutes in order to stay under water for a longer period. All else being equal, if one of them declare after one minute that they could not hold their breath any longer, we would have reason to doubt the truth of it. The latter is a specific other (cultural) factor that should be taken into account. The same goes for ETIVB: distressing emotions overwhelm the person to such an extent that the action they perform is for all intents and purposes involuntary. Whether that counts as an excuse for legal purposes is a different matter.

Note that in the example of the person holding their breath that person was fully aware, but nonetheless failed to hold their breath voluntarily. It helps to illustrate that unconsciousness is not necessary for involuntary behaviour (whether the behaviour is remembered afterward is another matter). There are many such conscious, involuntary behaviours: spasm, cramps, sneezing, hiccups and more. There are also examples of more complex involuntary behaviours that occur while being conscious and aware. I shall name two: Focal seizures with awareness and the alien hand syndrome. The listed examples are all examples where people cannot choose or control their behaviour.

In the example of holding one's breath, the person could choose, but could not control the breathing behaviour. No matter how much the person may choose to continue holding their breathing, the ability to control breaks down. One may argue that choice also breaks down in the end. *If* the person could *both* choose and control the breathing behaviour until they collapsed, that would have been voluntary behaviour (and an unusual case of voluntary behaviour). The idea behind evaluating the ability to choose and control is to provide two perspectives from which to investigate involuntary behaviour: in some cases it may be easier to identify lost choice and at other times lost control. If either are lost, then, for the purposes of ETIVB, the behaviour is involuntary, and furthermore, on closer inspection, that control is lost.

ETIVB deals with acts of commission and not acts of omission. Being acts of commission it can be described in terms of a functional analysis with regards to latency, topography, frequency, duration, and intensity. Using such an analysis for an act of omission is not possible, which does not mean to say that acts of omission are always voluntary, just that ETIVB does not take them into account.

It is important to differentiate involuntariness in ETIVB from other types of involuntariness for example acting under duress, acting out of necessity, or being compelled to act by a specific law. Note that in all these examples the person still has a choice and exercises a choice and control of behaviour, albeit something they would rather not do and may say or think that they had no choice and no control. Involuntariness in the context of ETIVB also does not mean not being culpable in terms of the law. It is for courts of law to decide whether a specific instance of ETIVB is a legal excuse or not.

Involuntary Violent Behaviour

Once the triggering event and the necessary distressing emotions has been identified, one should consider the whether the violent behavior was involuntary. Voluntary behaviour is behaviour that a person chooses and controls.

To decide whether a person was unable to choose and control their behaviour, a behaviour analysis is done namely with regards to latency, topography, frequency, duration and intensity. I shall disperse with intensity immediately by say it must be intense enough to be considered violent – resulting in damage, injury or death.

The topography will vary, depending on how the violent behaviour is executed. What is important is that the topography of the behaviour should be such that it should not indicate mental or physical effort, because that would be choosing and controlling the behaviour. In general, it means that the violent behaviour would be easy to perform and relatively unsophisticated. If, after a triggering event, a person picks up a heavy rock to perform violent behaviour with, it would, on a balance of the evidence indicate that a plan was formed and an action was executed with some effort. All of that would indicate choosing and controlling the violent behaviour. So would a number of other actions: reaching for a gun, picking up a knife, grabbing baseball bat and so on. It means that, if a weapon was used at all, it should have been readily available – in the persons hands and then, mostly incidental, not for the purpose of a possible attack.

The latency of the violent behaviour is measured from the cessation of the triggering event. Taking into consideration that the overwhelming emotions are immediately present (and not some indefinite time later) and should immediately overwhelm the ability to choose and control behaviour, the latency should be brief. Thus, the first violent behaviour (a shot, a stab, a punch etc.) should occur within 5 seconds. That is already a long time and is justifiably debatable. It is impossible to do controlled studies on this issue and the two example I mentions happened within a second. Equally debatable is the duration of the violent behaviour which is given as 10 seconds. Again, the examples I gave lasted probably no more than a second. The reason for the lenient time frames is that I have greater uncertainty about them and thus would rather err on the longer duration side. During the 5 and 10 seconds mentioned much voluntary behaviour may occur. But, there are still the limitation of how this behaviour should look: no mental or physical effort and so on.

Not Attributed to A Mental Disorder

Taking into account that our classification and criteria for mental disorders are far from perfect, in ETIVB, mental disorder means a pathological condition of the mind that is identified and described as such in a classification system accepted by the psychiatric profession. However, some mental disorders, like voluntary intoxication, is not considered an excuse in law and so, for all intents and purposes, do not count as mental disorders in terms of Act 51/1977 as amended.

In order to find ETIVB one has to conclude that the involuntary violent behaviour is not better (on a balance of the evidence) attributed to an idiopathic mental disorder,

a mental disorder due to another medical condition, a substance (or medication) induced mental disorder, or (if there is no clear substance (or medication) induced mental disorder, whether the violent behaviour cannot be attributed to a substance or medication nonetheless. Furthermore if any of the previous conditions were present at the time of the alleged offence, whether the involuntary violent behaviour can be fully, partially, or not at all attributed to such a condition. There is also the possibility of being uncertain.

The above having been said, keep in mind that the severely mentally ill (or intoxicated) may display violent behaviour after having been provoked by a relatively minor triggering event or by no overt triggering event at all. In such cases the evaluation would go no further the first step, since the criteria of the triggering event are not met.

Examples would be:

- A severely manic man with a history of violent behaviour is severely provoked by a family member. Within a second he hits that person (or stabs them with a knife if a knife happened to be in his hand). Question: What if this man had no previous history of violent behaviour? Then the question irrespective of the situation still is: Did a mental disorder (on a balance of the evidence) impair his ability he at the time of the alleged offence to such an extent that he was unable to appreciate the unlawfulness of his behaviour and act accordingly? In my opinion a severely manic man would be thus impaired.
- A woman becomes psychotically suspicious after having taken oral corticosteroids for 7 days to treat a skin condition. She confronts her husband whom she unreasonably suspects of having an extramarital affair. One day she comes home after having bought a cold drink. At home she finds her husband in the doorway having a friendly conversation with the woman living next door. She hits him with a 2 L bottle of cold drink she happened to hold in her hand.
- A accused man, X, with no history of violence is at an outdoor office party. He is busy barbecuing meat. He has a knife in his right hand and fork in his left for that purpose. He has been drinking a number of beers but does not appear intoxicated. He is having amicable conversations with those around him except for one man, Y, who has also been drinking alcohol and does appear mildly intoxicated. Over a period of about 30 minutes Y repeatedly grabs X disrespectfully by the left arm and angrily and abusively belittles and swear at X for a small mistake X previously made at the office. That mistake irritated X unreasonable from the start. X and the others tell Y to let it go. Y leaves, but soon comes back. X pleads with him repeatedly, and X is visibly getting upset. The others warn Y too, but he keeps coming back. The last time Y approaches, X walks away, but Y follows him, grabs X disrespectfully by the left arm and starts the abuse. X suddenly yells and stabs Y with the knife he is holding in his right hand

Thus, emotionally triggered involuntary violent behaviour not attributed to a mental disorder is a finding based on excluding any mental disorder (and the like) that would better account for the violent behaviour.

BIBLIOGRAPHY

American Psychiatric Association. 2022. Diagnostic and Statistical Manual of Mental Disorders Fifth Edition Text Revision. Washington, DC: American Psychiatric Publishing.

Arboleda-Flórez J. On automatism. *Curr Opin Psychiatry*. 2002;15:569-76

BoxRec. Corrie Sanders. 2013. https://boxrec.com/wiki/index.php/Corrie_Sanders accessed 2024-12-18).

Briscoe O, Carson D, D'Orban P, Grubin D, Gunn J, Mullen P, et al. 1993. The law, adult mental disorder, and the psychiatrist in England and Wales. In: Gunn J, Taylor PJ, editors. *Forensic psychiatry clinical, legal and ethical issues*. Oxford: Butterworths Heineman.

Fenwick P. Automatism. In: Bluglass P, Bowden P, editors. 1990. *Principles and practice of forensic psychiatry*. Edinburgh: Churchill Livingstone.

Fitzgerald PJ. 1968. Voluntary and involuntary acts. In: White AR, editor. *The philosophy of action*. Oxford: Oxford University Press.

Joubert PM, Van Staden CW. 2016. Behaviour that underpins non-pathological criminal incapacity and automatism: Toward clarity for psychiatric testimony. *International Journal of Law and Psychiatry*. 49(A):10-16. <https://doi.org/10.1016/j.ijlp.2016.04.007>

Joubert PM. 2015. Emotionally triggered involuntary violent behaviour not attributed to a mental disorder : conceptual criteria and their reliability. <https://repository.up.ac.za/handle/2263/44329?show=full> (accessed, 2025-01-29)

Martin G, Pear J. *Behavior modification: what it is and how to do it*. 2015. 10th ed. New Jersey: Prentice Hall.

Samuels A, O'Driscoll C, Allnutt. 2007. When killing isn't murder: psychiatric and psychological defences to murder when the insanity defence is not applicable. *Australas Psychiatry*. 15(6):474-9.

Snyman CR. *Criminal law*. 4th ed. 2002. Durban: LexisNexis Butterworths.

Yeo S 2002. Clarifying automatism. *International Journal of Law and Psychiatry*. 25:445–458