The definition of automatism and insanity

Derived from the Greek word *automatos*, meaning "acting of its own accord," automatism is a term used to describe "unconscious, involuntary behaviour, the state of a person who though capable of action is not conscious of what he is doing."[1] Traditionally associated with a "lack of consciousness,"[2] automatism now refers to "a state of impaired consciousness … in which an individual, though capable of action, has no voluntary control over that action."[3] According to the Supreme Court of Canada in *R.* v. *Brown*: "Automatism is reflected in involuntary movements that may be associated with heart attacks, seizures or 'external' shock, or conditions such as sleepwalking or delirium, where the body moves but there is no link between mind and body." Quite simply, the individual is not aware of what he or she is doing; "Absent a willed movement of the body, the Crown cannot prove the *actus reus* beyond a reasonable doubt. … In addition, an automaton cannot form the *mens rea*, or guilty mind, if their actions are involuntary."[4] Obviously, psychosis manifested by profound delusions or hallucinations without impaired consciousness has never been regarded as a cause of automatism under Canadian criminal law, as illustrated in the decision rendered by the Supreme Court of Canada in *R.* v. *Oommen.*[5] In this case, the accused, Mathew Oommen, had been suffering from paranoid psychosis with delusions for a number of years. He became convinced that the woman he had allowed to stay in his apartment was involved in a conspiracy to kill him, and he therefore shot at her as she lay sleeping on the floor. Mr. Oommen, who was charged with second degree murder, raised the defence of mental disorder (rather than automatism of course). Based on the evidence presented at trial, the accused was fully aware of his actions at the time of the crime. He knew that he had been holding a firearm in his hands, that he had had a finger on the trigger and that he had fired a number of shots in the victim's direction. In addition to being aware of what he was doing, the accused was also able to appreciate and understand the real consequences of his actions, for example, that by shooting the victim at point blank range with a 22-calibre rifle, he would cause her bodily injuries that could lead to her death. Even though Mr. Oommen knew that killing a human being is a crime and that murder is considered an act that is morally reprehensible or wrong, based on the everyday standards of an ordinary person, he was not rationally capable of applying this knowledge in the circumstances of the case. He had to kill the victim in order to avoid being killed! The accused did not have the capacity "for rational perception and hence rational choice about the rightness or wrongness of the act"[6] and therefore, the accused

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[1] R. v. *K.*, (1971) 3 C.C.C. (2d) 84, 84 (C.A. Ont.), cited in *R.* v. *Rabey*, [1980] 2 S.C.R. 513, para. 6.

[2] *Bratty* v. *Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523, 532 (H.L.).

[3] *R.* v. *Stone*, [1999] 2 S.C.R. 290, para. 156:
Indeed, the expert evidence in the present case reveals that medically speaking, "unconscious" means "flat on the floor," that is, in a comatose-type state. I therefore prefer to define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

[4] *R.* v. *Brown*, [2022] A.C.S. No. 18, paras. 47 and 48.

[5] *R.* v. *Oommen*, [1994] 2 S.C.R. 507.

[6] *R.* v. *Oommen*, [1994] 2 S.C.R. 507, para. 30.

was found not criminally responsible on account of mental disorder within the meaning of section 16 of the Code. We fully agree with this decision. Delusions or hallucinations without impaired consciousness do not render the person "unaware of, or incapable of consciously controlling, their behaviour," however, depending on the circumstances, they prevent that person from appreciating the nature and quality of the act or of knowing that it is wrong within the meaning of section 16 of the *Criminal Code*. Therefore, psychosis without altered consciousness is not a cause of automatism under Canadian criminal law, but a cause of insanity itself (psychotic episode where physical voluntariness remains intact).

Extreme intoxication akin to automatism or insanity

Extreme intoxication can generally be manifested in two ways. First, extreme intoxication may, on rare occasions, result in a decreased level of consciousness and therefore prevent the subject from being aware of his or her actions. This is referred to as *extreme intoxication akin to automatism*. *Substance-induced delirium* is one example of extreme intoxication akin to automatism. This was the diagnosis retained by the Supreme Court in *R*. v. *Brown*. The second manifestation of extreme intoxication occurs when the person is under the influence of profound delusions and/or hallucinations following voluntary consumption of drugs. In this case, the person remains aware of his/her actions in the physical sense of the word, but is incapable of appreciating the nature and quality of the acts or of knowing that they are wrong. This describes *extreme intoxication akin to insanity*. In order to understand the distinction between the two types of extreme intoxication, let us consider the following example: **A** takes cocaine and develops delusions of persecution. As a result of his delusions, **A** is convinced that his neighbour is a member of a criminal organization that wants to kill him. In order to avoid being killed, **A** obtains a firearm, goes to his neighbour's house and shoots at his neighbour. In this case, the accused is not in a state of automatism. On the contrary, **A** is fully aware of his actions insofar as he is aware that he is holding a firearm, has his finger on the trigger and is shooting in the victim's direction. Far from being unconscious, **A's** actions are directly intended to achieve the objective imposed by his delusions: to save his own life by killing his attacker. Even though he is consciously able to control his conduct, the accused is not in a position to appreciate that his actions are wrong, because of his delusions. This is an example of extreme *intoxication akin to insanity*.

Extreme intoxication in medicine

Psychotic episodes without disturbances of consciousness are a well-known manifestation of drug intoxication. Dr. Marie-Frédérique Allard wrote the following while discussing the symptoms associated with acute intoxication and the importance of giving due consideration to psychotic episodes without disturbances of consciousness:

> [TRANSLATION]
> In my capacity as a forensic psychiatrist over the past several years, I regularly assess individuals who presented signs of severe intoxication while committing a crime.

There could be an altered state of consciousness in very specific situations (severe intoxication due to alcohol or benzodiazepines, delirium) but that is not the case in general.

In cases of acute intoxication caused by drugs such as amphetamines and cocaine, substances often associated with behavioural problems, the level of consciousness is not altered. On the contrary, psychostimulants contain properties which stimulate vigilance. These substances also have a high potential to induce psychotic symptoms that may even persist well beyond the period of intoxication.

When individuals suffer from a psychotic issue caused by stimulants, cannabis, or other substances, they are generally able to remain in control of their actions and aware of their conduct.

Losing touch with reality due to substance use primarily affects their ability to understand that their actions are wrong under the circumstances.

In my opinion, as a clinician and expert in forensic psychiatry, I believe there is a need to clarify extreme intoxication akin to automatism and extreme intoxication akin to insanity, because these are two very different situations from a medical point of view.

The state of the law

Under section 33.1 of the *Criminal Code*:

33.1 (1) Offences of violence by negligence

- **33.1 (1)** A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
    - **(a)** all the other elements of the offence are present; and
    - **(b)** before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

- **Marked departure — foreseeability of risk and other circumstances**

  (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

Offences

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

Definition of extreme intoxication

(4) In this section, **extreme intoxication means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour**.

By defining extreme intoxication as "intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour," the Canadian Parliament limits section 33.1 to *extreme intoxication akin to automatism*. As indicated by Minister David Lametti in his address to the Senate, section 33.1 is a direct response to the Supreme Court's comments in *R*. v. *Brown*. Indeed, in this judgment, the Honourable Justice Kasirer states that "Only the highest form of intoxication — that which results in a person losing voluntary control of their actions — is at issue here: extreme intoxication akin to automatism as a defence to violent crimes of general intent."[7] Therefore, section 33.1 is designed to apply **solely** to extreme intoxication akin to automatism.

Issue

By limiting the definition of extreme intoxication to cases akin to automatism, the government focused solely on one facet or manifestation of extreme intoxication: *automatism*. It leaves out cases of intoxication that do not affect the accused's ability to consciously control behaviour but which prevent that person from appreciating that his/her act is wrong (psychotic episode where physical voluntariness remains intact). Therefore, in the example where **A** caused his neighbour's death while under the influence of delusions that led him to believe that his life was in danger, **A** could get around the rule set out in section 33.1 simply by saying that his intoxication, although extreme, was not akin to automatism. As explained by the Honourable Justice Lamer in *R*. v. *McIntosh*, "where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the 'golden rule' of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise."[8] Subsection 33.1(4) defines extreme intoxication as "intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour" and "I fail to see how anyone could conclude that it is, on its face, ambiguous in any way."[9] Consequently, if we look at subsection 33.1(4), anyone in a state of extreme intoxication which prevents that person from appreciating the nature and

[7] *R*. v. *Brown*, [2022] A.C.S. No. 18, para. 45.
[8] *R*. v. *McIntosh*, [1995] 1 S.C.R. 686, para. 18.
[9] *R*. v. *McIntosh*, [1995] 1 S.C.R. 686, para. 19.

quality of the act or of knowing that it is wrong, without rendering the person "unaware of, or incapable of consciously controlling, their behaviour" can get around the rule set out in section 33.1 and claim extreme intoxication.

Arguments against this interpretation

The argument that section 33.1 only applies to intoxication akin to automatism can be countered by the fact that the judgment rendered in *Bouchard Lebrun* applies the former version of section 33.1 to a case of toxic psychosis. The argument is appealing but fails to take the following into consideration: (1) the specific language of the provision at issue; (2) the Department of Justice's clearly expressed intention to apply the principles set out by the Supreme Court in *R*. v. *Brown*; and (3) the specific subject matter of the issue addressed in the judgment rendered in *Bouchard-Lebrun*. We will explain. In this case, the accused, who was in a profound state of psychotic delirium, accompanied a friend to Dany Lévesque's home in order to beat the latter up for wearing an "upside-down cross" around his neck. During this assault, the accused violently kicked the head of someone who had tried to intervene. After making a number of incoherent statements about the coming Apocalypse, he allegedly "raised his arms in the air and asked the victims and the helpless witnesses to the attack whether they believed in him. After referring a few times to God and the Devil once the attack was over, he blessed Mr. Dumas's spouse by making the sign of the cross on her forehead."[10] Lebrun was charged with common assault, aggravated assault, breaking and entering a dwelling-house and attempting to break and enter a place. After summarizing the evidence presented by the defence, the Honourable Justice Decoste addressed the diagnoses provided by Dr. Turmel and Dr. Faucher:

> [TRANSLATION]
> Dr. Roger Turmel, affiliated with the Rimouski Regional Health Centre, was called by the defence and supported the view that at the time of his actions, the accused had been under the effects of a psychotic condition induced by the influence of his friend, Yohann Schmouth. Dr. Turmel had seen the accused a few days after October 24 and had produced the opinion on October 28, 2005, further to an order issued under paragraph 672.11(a) of the Cr. C., indicating that the latter was fit to stand trial (Exhibit D-1). On November 4, 2005 (Exhibit D-2), in response to an order issued under paragraph 672.11(b), he found that the accused was not criminally responsible, because .... [TRANSLATION] "**That evening, as a result of his psychotic state**, Mr. Bouchard-Lebrun **lacked the judgement to assess the impact that drugs or alcohol would have on future recourse to hetero-aggression; therefore, he was not in a position to properly assess whether the actions he could have or may have taken were right or wrong."**
>
> Dr. Sylvain Faucher is a psychiatrist affiliated with the Centre Robert Giffard de Québec. He shared his colleague's opinion on the following point: **when he committed the criminal actions, the accused was suffering from a severe psychosis that made him incapable of distinguishing between right and wrong**. However, Dr. Faucher had a different opinion about the source of this psychosis, and

[10] *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575, para. 9.

> did not believe that the accused had become psychotic solely because of Mr. Schmouth's influence.[11]

As clearly indicated in these two passages excerpted from the decision rendered in the first instance, the psychiatric evidence never mentions "impaired consciousness," "involuntary behaviour" or "automatism." On the contrary, it refers to "psychosis," "losing touch with reality" and an inability to "distinguish between right and wrong."[12] Therefore, the issue in this case was not to determine whether the accused had lapsed into a state of automatism, since this question was **never** raised by the psychiatrists; instead, it was to determine whether his *inability to distinguish between right and wrong* resulted from a mental disorder or from voluntary intoxication. However, because the psychotic episode that the accused experienced when committing the crime had been triggered by the drugs he had consumed some time earlier, [TRANSLATION] "insanity must be rejected and replaced by voluntary intoxication."[13] Since the intoxication was extreme, it automatically fell under the third category of voluntary intoxication listed by the Supreme Court in *R*. v. *Daley*, a category which, of course, reflects the language in section 33.1 of the *Criminal Code*. According to the Honourable Justice Bastarache in *R*. v. *Daley:*

> Third, there is extreme intoxication akin to automatism, which negates voluntariness and thus is a complete defence to criminal responsibility, but such a defence would be extremely rare and, by operation of s. 33.1 of The Criminal Code, limited to non-violent types of offences. [40-44][14]

Based on his finding that the accused was in a psychotic state following voluntary consumption of drugs, the Honourable Justice Lacoste should have classified the accused's voluntary intoxication under the third category of intoxication listed in *R.* v. *Daley*. Reflecting the language in the judgment rendered in *Daley*, Lacoste J. wrote the following: [TRANSLATION] "the accused's mental state was such that *he was not aware of the implications of his actions*, and he must therefore be acquitted of the two charges filed against him under case No 120-01-003400-052. At the time, the accused was in a state of 'extreme intoxication akin to automatism,' which rendered him incapable of 'voluntarily'

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[11] *R*. c. *Lebrun*, [2008] J.Q. No. 6218, paras.30, 32 and 33 (C.Q.).

[12] *Bouchard-Lebrun* c. *R*., [2010] J.Q. No. 1672, para. 30 (C.A.):

[TRANSLATION] Before reviewing the appellant's arguments, I have identified a number of key facts arising from the decision rendered in the first instance that must be assumed barring a palpable and overriding error in the trial judge's assessment:

- The appellant was in a state of psychosis when he committed the crimes for which he was charged;

- This state rendered him incapable of distinguishing between right and wrong;

- This state was caused by consumption of drugs;

- The appellant consumed the drugs voluntarily.

[13]

[14] *R*. v. *Daley*, [2007] 3 S.C.R. 523, para. 43.

committing any criminal act."[15] It is important to note that Lacoste J. does not say that the accused "**was not aware of his actions**" as in cases of automatism; instead, he says the accused "**was not aware of the implications of his actions**" which instead points to the defence of insanity. This finding is fully self-explanatory since none of the evidence makes reference to "impaired consciousness which renders a person unaware of, or incapable of consciously controlling, their behaviour," but instead makes reference to losing touch with reality, which, according to Dr. Faucher, rendered the accused incapable of distinguishing between right and wrong. This explains the trial judge's finding that the accused was not aware of the **implications** of his actions rather than the **perpetration** of his actions. The rest of his motives are simply derived from a mechanical application of the description offered in *R*. v. *Daley*. **The defence never raised the fact that section 33.1 would not apply because of its limited scope.** In fact, at trial, the defence maintained that the accused had suffered a psychotic episode triggered by the spiritual influence of his friend, and then argued, on appeal, that because of his toxic psychosis, "the defence of mental disorder should have been applicable as a result of this condition, since the evidence at trial showed that he had been incapable of distinguishing right from wrong at the material time."[16]

The absence of automatism and the presence of a psychotic disorder that prevented the accused from appreciating that the act committed was wrong has been confirmed by the Supreme Court judgment rendered in *Bouchard-Lebrun*. Writing on behalf of the Court, the Honourable Justice Lebel indicated that: "In the instant case, it is not in dispute that the appellant was incapable of distinguishing right from wrong at the material time. The trial judge wrote that [TRANSLATION] '[a]t the time the criminal acts were committed, the accused did not realize what he was doing and was in a serious psychotic condition; there is no real dispute about this' (para. 2). Therefore, the only issue in this appeal is whether the psychosis resulted from a 'mental disorder' within the meaning of s. 16 *Cr. C.*"[17]*;* in that case, insanity will apply instead of a defence of voluntary intoxication. Since Lebel J. found that the psychosis in this case "seems to be nothing more than a symptom, albeit an extreme one, of the accused person's state of self-induced intoxication,"[18] he rejected section 16 in favour of voluntary intoxication, a defence whose scope of application was paralyzed, in part, by the adoption of section 33.1 of the *Criminal Code*. Indeed, "[t]his provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person (see, generally, *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.); *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99). Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence."[19] Even though section 33.1 was cited in this case in order to prevent the accused from invoking extreme intoxication for committing the offences of aggravated assault and common assault, the question of an absence of automatism and, therefore, of establishing whether or not this

[15] *R.* c. *Lebrun*, [2008] J.Q. no 6218, para. 50 (C.Q.).
[16] *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R.575, para. 16.
[17] *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575, para. 57.
[18] *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575, para. 85.
[19] *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575, para. 89.

fact would justify the application of section 33.1 **was never addressed** by the Supreme Court. The entire matter proceeded as if it was assumed that section 33.1 would cover all of the manifestations of extreme intoxication, irrespective of symptoms. Of course, this is not true. The former version of section 33.1 would only apply to intoxication which renders accused persons "unaware of, or incapable of consciously controlling, their behaviour." This section is clear on this point and cannot be interpreted otherwise. Intoxication which does not affect the subject's consciousness is not covered by section 33.1. Since psychosis does not prevent individuals from being aware of, or capable of consciously controlling, their behaviour, but instead makes them incapable of distinguishing between right and wrong (as repeatedly affirmed by the Court), section 33.1 could not have applied if the above question had been raised in the context of the appeal. Arguing otherwise fails to give due consideration to the symptoms associated with a psychotic disorder or to the definition of automatism in Canada. In fact, psychosis without impaired consciousness has never been recognized as a cause of automatism in Canada (psychotic episode where physical voluntariness remains intact). Based on the rationale of government advisors, one must therefore conclude that experiencing delusions and/or hallucinations, without impaired consciousness, is a cause of insanity when triggered by a mental disorder, but a cause of automatism when attributable to self-induced intoxication, which is completely incoherent. Worse still, one would be compelled to describe individuals who are aware of, or capable of consciously controlling, their behaviour as being in a state of automatism if they act under the influence of delusions or hallucinations caused by voluntary consumption of drugs …which, of course, is incorrect!

Conclusion: extreme intoxication akin to automatism does not apply to psychotic episodes without impaired consciousness. If there were any lingering doubts among those who had difficulty distinguishing between automatism and psychotic disorders, those doubts were definitively dispelled in the judgment rendered in *Brown*. **According to the Supreme Court, extreme intoxication akin to automatism does not apply to psychotic episodes, without impaired consciousness**. Indeed:

> **50** I note that the defence has been referred to as "rare" in the case law (*Daviault*, at pp. 92-93; *Sullivan*, at para. 118). The Attorney General of Manitoba disputes that and points to instances of violence involving street drugs with known psychosis-inducing properties. It is certainly plain that intoxicated violence is a serious social problem. Whatever proportion of this phenomenon relates to involuntary conduct, it is notable that extreme intoxication akin to automatism is an exigent defence requiring the accused to show that their consciousness was so impaired as to deprive them of all willed control over their actions. This is not the same as simply waking up with no memory of committing a crime. A failure to remember does not prove that an individual was acting involuntarily. Nor is it the same as suffering a psychotic episode where physical voluntariness remains intact. … And it is equally chilling to think that denying the defence to a person who is morally and physically incapable of committing a crime is somehow palatable in that it is a rare occurrence.

Therefore, the exception to raising the defence of extreme intoxication provided in section 33.1 only applies in cases where the intoxication renders a person unaware of, or incapable of consciously controlling, their behaviour, which has the effect of excluding the most serious and the most frequent manifestations associated with self-induced intoxication: a "psychotic episode where physical voluntariness remains intact." Since a person who is in a psychotic state is generally not in a position to know that his/her actions are wrong, **convicting such a person would offend the principles of fundamental justice just as much as convicting a person who committed a crime when in a state of automatism**. According to LeBel J. in the judgment rendered in *R.* v. *Bouchard-Lebrun:*[20]

> Insanity is an exception to the general criminal law principle that an accused is deemed to be autonomous and rational. A person suffering from a mental disorder within the meaning of s. 16 *Cr. C.* is not considered to be capable of appreciating the nature of his or her acts or understanding that they are inherently wrong. This is why Lamer C.J. stated in *Chaulk* that the insanity provisions of the *Criminal Code* "operate, at the most fundamental level, as an exemption from criminal liability which is predicated on an incapacity for criminal intent" (p. 1321 (emphasis deleted)).
>
> The logic of *Ruzic* is that it can also be said that an insane person is **incapable of morally voluntary conduct. The person's actions are not actually the product of his or her free will. It is therefore consistent with the principles of fundamental justice for a person whose mental condition at the relevant time is covered by s. 16 *Cr. C.* not to be criminally responsible under Canadian law. Convicting a person who acted involuntarily would undermine the foundations of the criminal law and the integrity of the judicial system**.[21]

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20. *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575.

21. *R.* v. *Bouchard-Lebrun*, [2011] 3 S.C.R. 575., paras. 50 and 51. On this point, see the analysis proposed by the Honourable Justice McLachlin in the judgment rendered in *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303, paras. 193-195 and 201:

> The requirement of moral blameworthiness for attribution of responsibility and punishment dates back to the origins of western ethical and legal thought: I. Keilitz and J. P. Fulton, *The Insanity Defense and its Alternatives: A Guide for Policymakers* (1984), at p. 5. Aristotle, for example, reasoned that capacity for choice was central to the issue of moral culpability: J. M. Quen, "Anglo-American Concepts of Criminal Responsibility: A Brief History," in S. J. Hucker, C. D. Webster, M. H. Ben-Aron, eds., *Mental Disorder and Criminal Responsibility* (1981), 1, at p. 1. Where a person lacks this capacity for choice because he or she is not capable of knowing that his or her acts are wrong, the moral justification for attribution of responsibility and punishment will be absent for, as Ferguson, op. cit., observes at p. 140, "It is immoral to punish those who do not have the capacity to reason or to choose right from wrong."
>
> The long history of insanity provisions in Anglo-Canadian criminal law reflects this fundamental nexus between capacity for rational choice and legal blameworthiness. In explaining the rationale underlying the present s. 16 of the *Criminal Code*, the Law Reform Commission of Canada fastened on this consideration (Working Paper 29, *Criminal Law: The General Part -- Liability and Defences* (1982), at p. 42):
>
> > [T]he defence of insanity rests on the fundamental moral view that insane persons are not responsible for their actions and are not therefore fit subjects for punishment].
>
> Parliament, through s. 16, has defined "fitness for punishment" in terms of capacity for the knowledge of right and wrong rather than volitional impairment (see Ferguson, op. cit., at p. 143). These then are the historical and philosophical underpinnings of the universal notion that insane persons should not be held criminally responsible for their acts and omissions in the same way that sane persons are. They reflect a fundamental conviction that

Since extreme intoxication does not apply to a "psychotic episode where physical voluntariness remains intact," the exception provided under section 33.1 will not apply in such cases. It would therefore be easy to demonstrate that, like a person in a state of automatism, convicting anyone in such a state violates section 7 and paragraph 11(d) of the Charter, because this would allow for the conviction of someone who was incapable of acting voluntarily from a moral point of view. Those concerned would then be able to get around the rule set out in section 33.1 and present a defence of extreme intoxication in matters related to crimes of general intent.

Solution:

1) Section 33.1 should define *extreme intoxication* as "intoxication akin to automatism (incapable of consciously controlling behaviour) or insanity (incapable of appreciating the nature and quality of the act or of knowing that it is wrong). This is the exact expression used in the Supreme Court judgment rendered in the landmark case of *R*. v. *Daviault.* This would cover the two forms or manifestations of extreme intoxication. Since the Department of Justice advisers appear to indicate that intoxication which "renders a person unaware of, or incapable of consciously controlling, their behaviour" covers episodes of psychoses which prevent an accused from knowing that his or her act is wrong, I see no reason why they stubbornly refuse to subsume intoxication akin to insanity under intoxication akin to automatism. With respect to the dangers related to this expression, I fail to see how barring extreme intoxication from being raised when the accused is in a state akin to insanity could create additional problems.

The new provision would read as follows:

33.1 (1) Offences of violence by negligence

- **33.1 (1)** A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
    - **(a)** all the other elements of the offence are present; and
    - **(b)** before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in

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criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong. This is the fundamental pre-condition for imposition of criminal liability …
The claim of insanity, however, pre-empts the traditional inference-drawing process on the ground that a person without the capacity for choice as defined in s. 16 of the *Criminal Code* is not morally culpable. Because of lack of capacity, therefore, the issue of *actus reus* and *mens rea* never arises.

the circumstances with respect to the consumption of intoxicating substances.

- **Marked departure — foreseeability of risk and other circumstances**

  (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

  Offences

  (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

  Definition of extreme intoxication

(4) In this section, ***extreme intoxication*** means intoxication akin to automatism or insanity.