

# An International Comparison and Review of Self-Induced Intoxication Causing Automatism

Graham D. Glancy, MB, ChB, Kiran Patel, MBBS, Marissa Heintzman, MLitt, and Richard M. Schneider, MA, PhD, LLB, LLM

The topic of self-induced intoxication causing automatism is a complex legal question that straddles the border of psychiatry, the law, and social policy. It has been argued that women and children are predominantly positioned as victims of sexual and domestic violence, in which substances often play a part. This consideration sensitizes society to any legal measures that may potentially excuse, mitigate, or absolve perpetrators. The legal systems in Canada, the United States, and the United Kingdom have dealt with these situations as best as they can, sometimes inconsistently and sometimes coming into conflict with the public discourse and subsequent legislation. This article presents a comparison of case law and legislation among these three countries. We review the concept of automatism and self-induced intoxication leading to automatism, and we show how the courts have dealt with this subject.

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The automatism defense straddles the border of psychiatry, the law, and social policy, making a complex legal topic considerably more complicated. It has been argued that sexual and domestic violence, often fueled by drugs or alcohol, predominantly positions women and children as victims, sensitizing society to any legal measures that excuse, mitigate, or absolve perpetrators.<sup>1-3</sup>

These competing concerns are prominent in public discourse and continue to pose difficult questions for legal and psychiatric experts. This article

compares how Canada, the United Kingdom, and the United States have dealt with these concerns within their legal systems. When discussing the concept of self-induced intoxication, we inevitably touch on cases where other factors have contributed to automatism. We include some cases that have been important in developing the law and refining an understanding of the concept of automatism. Some of these do not directly deal with self-induced automatism, but we considered it important to include them to set up the discussion on self-induced automatism by introducing the reader to the basic principles that have developed in the law pertaining to automatism.

For the act to be considered criminal, a defendant must have the requisite *mens rea* (or mental element) at the time of the act and must have acted voluntarily (*actus reus*). To be voluntary, the actor must be conscious and must be directing rather than merely observing the action.

Most Western systems agree with these two general requirements. Automatism is a common-law defense available where a condition negates the volitional requirement of the otherwise criminal act. Self-induced automatism is automatism resulting from the voluntary consumption of drugs or alcohol.

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Dr. Glancy is Founder, Forensic Psychiatry (Canada), and Forensic Division Director, Professor, Department of Psychiatry, University of Toronto, Ontario, Canada. Dr. Patel is an Assistant Professor, Department of Psychiatry, University of Toronto, Ontario, Canada, and Staff Psychiatrist, Forensic Division, Complex Care and Recovery Program, Centre for Mental Health and Addiction, Toronto, Ontario, Canada. M. Heintzman is a Research Assistant, University of Toronto, Ontario, Canada. Dr. Schneider is Justice of the Ontario Court of Justice and Chair of the Ontario Review Board, Ontario, Canada, and Adjunct Professor, Department of Psychiatry, Faculty of Medicine and Faculty of Law, University of Toronto, Ontario, Canada. Address correspondence to: Graham D. Glancy, MB, ChB. E-mail: graham.glancy@utoronto.ca.

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Differences in the law emerge primarily as a result of intermingling public policy, sometimes overriding the body of psychiatric and legal opinion. When this happens it may result in a compromise between disparate realities concerning the impact of drugs and alcohol on one's behavior and public policy regarding culpability. Distinctions often appear to be arbitrary and confused. One British judge once referred to the law on automatism as a real "quagmire" (*R v. Quick*, 1973<sup>4</sup>).<sup>5</sup>

A distillation of the case law, as will be discussed, reveals that there is a great reluctance to permit defenses based on states arising from self-induced intoxication and that outright acquittals will only be granted where there is no evidence of continuing danger. The latter states are often seen as being caused by "nonmental disorder," "noninsane" conditions (referred to as "non-NCR automatism" in Canada), or external factors. Owing to the volume of case law that exists in each jurisdiction, it is not possible to include all cases that impinge on this topic. Rather, particular cases that allow important jurisdictional comparisons are highlighted.

### Canadian Case Law

In the Canadian legal system, decisions of the Supreme Court of Canada are binding on all courts. Decisions of provincial courts of appeal are subject to the principle of vertical *stare decisis*, which binds the trial courts within that jurisdiction. According to the concept of horizontal *stare decisis*, there should be consistency between courts of parallel jurisdiction, implying that courts of the same level should be consistent.<sup>6,7</sup> Cases from the upper courts in the United Kingdom, other Commonwealth countries, and the United States may be considered and may have persuasive authority.

Accordingly, the Supreme Court of Canada (SCC) referred to a case decided by the UK House of Lords in 1920 (*DPP v. Beard*).<sup>8</sup> The court articulated that intoxication could be grounds for an insanity defense if it produced a disease of the mind. In the alternative, evidence of drunkenness could be considered a factor rendering the defendant incapable of forming the requisite specific intent and should be considered. Finally, evidence of intoxication falling short of proving incapacity to form the necessary intent, thereby "merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut

the presumption that a man intends the natural consequences of his acts" (as cited in Ref. 9, p 589).

A later decision involved whether drunkenness was a defense to a charge of rape (*Leary v. The Queen*, 1978).<sup>10</sup> The SCC reasoned that the recklessness shown by a defendant in voluntarily becoming intoxicated was sufficient to constitute the fault element needed to find that the general intent offense of rape had been committed. This case relied on a UK House of Lords case (*DPP v. Majewski*, 1976).<sup>11</sup> This rule, known in Canada as the "Leary rule," served to remove the defense of intoxication from a person accused of dangerous acts.

### *R v. Rabey* (1980)

In 1980, the SCC attempted to clarify the distinction between insane automatism and noninsane automatism in the case of *R v. Rabey* (1980).<sup>12</sup> In this case, Mr. Rabey, a 20-year-old university student, had become infatuated with a classmate. After confronting the classmate about the nature of their relationship, he violently assaulted her. Psychiatrists at trial opined that he was in a dissociative state and compared it with a physical blow. Mr. Rabey was acquitted on the grounds of noninsane automatism caused by a "psychological blow." The SCC defined automatism as "unconscious, involuntary behavior, the state of the person who though capable of action is not conscious of what he is doing" (Ref. 12, p 514). The court also clarified the distinction between "a malfunctioning of the mind arising from some cause that is primarily internal to the defendant, as opposed to a malfunctioning of the mind, which is a transient effect produced by some specific external factor and which does not fall within the concept of disease of mind" (Ref. 12, p 514).

### *R v. Parks* (1992)

Mr. Parks planned to meet with his in-laws the next day to discuss a resolution to his substantial gambling debt. In the middle of the night, however, he drove 23 kilometers to his in-laws' house, where he then stabbed his mother-in-law to death and almost killed his father-in-law. He then drove to a police station and confessed.<sup>13</sup> Five physicians specializing in neurology, sleep neurology, psychiatry, and forensic psychiatry agreed, based on clinical interviews, sleep laboratory studies, and psychological testing, that Mr. Parks had a sleep disorder and was sleepwalking at the material time. He did not have a

history of mental illness but did have a history of previous sleepwalking episodes, childhood nocturnal enuresis, and a strong family history of sleep disorders. The trial judge instructed the jury that if they found that he was sleepwalking at the material time, a finding of noninsane automatism would follow, resulting in an acquittal. The jury found this to be the case. The SCC considered the critical question to be whether sleepwalking was a disease of the mind. There was uncontested evidence that sleepwalking is classified as a sleep disorder, not a psychiatric illness (although this is a purely medical distinction).

From a public policy point of view, the court noted that the chances of recurrence were “infinitesimal,” supported by the fact that the offense had occurred five years prior. Therefore, because the automatism was externally caused and did not present a recurring danger, noninsane automatism was the proper verdict. Finally, the court noted that there is a presumption of sanity, and it is the responsibility of the defense to prove otherwise. The Crown has the burden of proving voluntariness beyond a reasonable doubt. This fundamental principle was reversed in *R v. Stone* (1999),<sup>14</sup> as discussed below. Although this case and *R v. Stone* below do not involve self-induced intoxication, they are important in clarifying rules on automatism generally.

### ***R v. Stone* (1999)**

On the day in question, Mr. Stone left to see his sons from a previous marriage. His wife pursued him. After visiting Mr. Stone’s sons, the couple drove to an abandoned parking lot where Mrs. Stone verbally abused her husband.<sup>7</sup> He testified that he felt a “whooshing feeling” wash over him. His next conscious awareness was sitting and staring straight ahead with a hunting knife in his hand, his wife dead. Mr. Stone admitted to killing his wife but claimed that he was in a state of automatism brought on by her verbal assaults. A forensic psychiatrist testified that Mr. Stone had no awareness or intent as he was in an extreme dissociative state at the time. Nevertheless, he was found guilty of manslaughter. The case resulted in a great deal of public discourse<sup>7</sup>; the Attorney General of British Columbia made legal history by arguing the case himself before the SCC.

The court reasoned that the law presumes people act voluntarily.<sup>14</sup> Therefore, if defendants wish to assert that their actions were not voluntary, they bear the burden of proof on a balance of probabilities.

This reasoning modified the decision in *Parks*,<sup>13</sup> as described above. The SCC ruled that if a defendant claims automatism, then a two-step process must be followed. First, the defense must prove automatism, and the prosecution must prove *mens rea* beyond a reasonable doubt. They noted that this typically involves psychiatric evidence. The court also noted some factors that the trial judge must consider that go to proving automatism, including the severity of the triggering stimulus, corroborating evidence of bystanders, a previous medical history of similar states, any motives that might otherwise explain the act, and whether the alleged trigger is the victim of the crime. The second step involves the judicial determination of whether the automatism is mental disorder or non-mental disorder (NCR or non-NCR) automatism. This analysis includes whether a “normal” person would have reacted by entering an automatistic state.

### ***R v. Daviault* (1994)**

In *R v. Daviault*,<sup>15</sup> the SCC ruled on the availability of intoxication as a defense in a criminal offense involving general intent. Mr. Daviault had gone to visit a 65-year-old friend who was wheelchair-bound, taking with him a 40-ounce bottle of brandy. He had consumed eight bottles of beer earlier. The woman shared a glass of brandy with him before falling asleep in her wheelchair. When she woke later in the night, Mr. Daviault appeared and sexually assaulted her. It was established at trial that he had consumed the rest of the bottle of brandy. A pharmacologist testified that an individual who had consumed that amount of alcohol might experience a blackout and lose contact with reality. Mr. Daviault was initially acquitted because there was reasonable doubt that he could form the minimal intent necessary to commit the offense owing to his extreme intoxication. The Quebec Court of Appeal reversed the decision on the basis that self-induced intoxication is not available as a defense to rape, which is a crime of general intent. The SCC ordered a new trial, reasoning that it was unconstitutional to deny the defense of extreme intoxication such that he could not form the minimal intent necessary to commit sexual assault.

The SCC found that the strict application of the Leary rule, which states that self-induced intoxication cannot negate the *mens rea* of a general intent offense, offends the presumption of innocence specified in the Canadian Charter of Rights and Freedoms (1982).<sup>16</sup> The court stated: “to deny that even a very minimal

mental element is required for sexual assault offenses the Charter in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified” (Ref. 15, p 65). The court explained that substituting the intention of *mens rea* to commit a crime with the intention to become drunk is not acceptable. The court noted that involuntariness or the absence of volition must lead to an acquittal. They stated that the defense of automatism would only apply in rare cases of extreme intoxication.

As a result of considerable public outcry, the government enacted s.33.1 of the Criminal Code of Canada,<sup>17</sup> which effectively re-enacted the Leary rule. Section 33.1 states that it is not a defense to an offense that includes an element of assault to say that the defendant lacks the general intent or the voluntariness to commit the offense because of self-induced intoxication. The section says that where a person departs markedly from the standard of reasonable care generally recognized in Canadian society, they are criminally at fault even if the state of self-induced intoxication renders them unaware of or incapable of consciously controlling their behavior. This determination appears to be an instance of public policy overriding medical consensus.

### **R v. Sullivan (2020)**

In 2020, the Ontario Court of Appeal reviewed the law on the topic of self-induced intoxication leading to an automatism defense (*R v. Sullivan*, 2020).<sup>18,19</sup> The case considered two defendants, Mr. Sullivan and Mr. Chan, because their cases involved similar situations.

Mr. Sullivan had been prescribed bupropion to help him give up smoking. He began experiencing delusional episodes during which he believed that aliens were living in his condominium. On the night in question, he overdosed on 30 to 80 tablets in a suicide attempt. Believing he had captured an alien, Mr. Sullivan then brought his mother into the room to show her. When she did not believe him, Mr. Sullivan concluded that his mother was also an alien and stabbed her several times. His mother survived the attack but died of unrelated causes before the trial. Mr. Sullivan did not argue that s.33.1 was not constitutional but that his intoxication was not voluntary because he had not taken the substance to induce intoxication but as a suicide attempt. The trial judge rejected this argument.

Mr. Chan was a 19-year-old male who consumed some “magic mushrooms” with friends in his mother’s basement. He had used similar substances previously and found the effect to be mild and pleasant. On this occasion, however, he began speaking irrationally, calling his mother and sister “Satan.” He then ran to his (separated) father’s house, shouting, “This is God’s will,” and stabbed him to death. At trial, he argued that s.33.1 was not constitutional because it prevented him from raising a state of self-induced intoxication to negate general intent or the voluntariness required to commit the offense.

The Ontario Court of Appeal found that if the Crown could not prove *mens rea*, nor the consciousness requirement of the *actus reus*, which the court noted was the very core of the intention to commit the act, then this was contrary to the principles of fundamental justice guaranteed by the Constitution. The court, citing the language of the section that uses a reasonable person standard analogous to that used in civil law, noted that becoming intoxicated, even perhaps mildly intoxicated, is not a marked departure from the standards of a reasonable person. Therefore, this could not satisfy the standard to be considered “penal negligence.” It is only when one goes on to commit violence, either intentionally or voluntarily, that the person should experience legal consequences. They noted that s.33.1 substituted the intention to become intoxicated with the intention to commit violence to another person, which infringes on the presumption of innocence. The SCC addressed only constitutional concerns and affirmed the Court of Appeal.<sup>20</sup>

### **American Case Law**

The American position on this topic is difficult to articulate in that there are 50 different criminal law jurisdictions with much heterogeneity. Nevertheless, the sampling below gives a sense of the disparate approaches taken by the courts. It should be noted that although the courts often recognize the volitional requirement, it is rarely referred to as “automatism.” Indeed, many of the American decisions reviewed do not focus so much on a distinction between insanity and automatism as they do with what circumstances will afford a defense where the automatistic state (negated *actus reus*) or insanity (lack of *mens rea*) is caused by intoxication.

The notion of “settled insanity,” an underlying permanent mental condition, which may be triggered by



intoxication rather than a temporary state brought on by intoxication, is vital in many American jurisdictions. Some jurisdictions allow that self-induced intoxication may be considered only where the offense requires proof of specific intent (*State v. Bush*, 1994).<sup>21</sup> Other courts have found that if intoxication and other factors combine to produce insanity, it does not afford a defense where the intoxication was within the defendant's control (e.g., *United States v. Burnim*, 1978).<sup>22</sup> In a curious case (*United States v. Knott*, 1990),<sup>23</sup> it was determined that if the defendant was already "insane" (a finding based simply on the defendant's diagnosis of schizophrenia), then consideration of intoxication should not occur until the defendant showed that it was not just his schizophrenia that drove the criminal act. This case seems to say that a person diagnosed with schizophrenia who is intoxicated has less of a defense than a defendant who is merely diagnosed with schizophrenia.

### **People v. Skinner (1985)**

In *Skinner*,<sup>24</sup> the California Supreme Court set out criteria for determining settled insanity. The condition must be fixed and stable, last for a reasonable time, not be solely dependent on the ingestion of or the duration of the effects of the drug, and meet the jurisdiction's legal definition of insanity.

To add to the lack of clarity, the court indicated that a threshold condition for the insanity defense may exist when a permanent impairment is caused by chronic substance abuse in a person with a pre-existing mental illness unrelated to substance abuse but aggravated or set off voluntary intoxication.

### **People v. Kelly (1973)**

In the case of *People v. Kelly* (1973),<sup>25</sup> the court appeared to ignore the relevant California law (Criminal Law §40) that states that "Settled insanity produced by a long-continued intoxication affects criminal responsibility in the same way as insanity produced by any other cause, but it must be settled insanity, and not merely a temporary mental condition produced by the recent use of intoxicating liquor" (cited in Ref. 25, p 2). The defense argued that the defendant, who had a history of drug abuse and mental health problems (possibly schizophrenia), had stabbed her mother in a state of temporary psychosis brought on by a voluntary and repeated ingestion of drugs over the two months preceding the attack. The court found that insanity need not be

permanent to establish a defense, apparently finding that a defendant's history of temporary psychosis was a form of settled insanity.

In *Herbin v. Commonwealth* (1998),<sup>26</sup> the appellate court in Virginia found that substance abuse alone, even where chronic, does not constitute settled insanity if not accompanied by an underlying mental disorder.

### **State v. Wicks (1983)**

In *State v. Wicks* (1983),<sup>27</sup> intoxication was accepted as part of an insanity defense where it triggered an underlying disorder. Mr. Wicks had a history of psychotic episodes known to be triggered by drugs and alcohol. The court went on to say that intoxication may be part of an insanity defense only where it triggers an underlying psychotic disorder of a "settled nature." It is difficult to understand why this finding should be so in that a defendant might be expected to recognize the danger of ingesting substances where the defendant knows of an underlying disorder of a settled nature. Unanticipated states will occur more often where the defendant's proclivities or vulnerabilities are not known, and these are surely more sympathetic scenarios from a culpability perspective.

### **Downing v. Commonwealth (1998)**

In *Downing v. Commonwealth of Virginia* (1998),<sup>28</sup> Mr. Downing was convicted of murdering his sister-in-law after an evening of drinking. He appealed his conviction on the grounds that the trial court denied his motion to appoint a neurologist to assist in his defense of not guilty by reason of insanity owing to "pathological intoxication." The court found that even where pathological intoxication (caused by the voluntary ingestion of alcohol) gave rise to temporary insanity, this could not provide a complete defense because the resulting state was temporary rather than settled (permanent) insanity. It is unclear whether the defense was attempting to negate the requisite mental element or the volitional requirement of the act in question.

### **Montana v. Egelhoff (1996)**

Charged with two counts of homicide, Mr. Egelhoff claimed that extreme intoxication rendered him physically incapable of the crimes. A Montana law prohibited Mr. Egelhoff's intoxicated condition from being considered at trial, stating that it could not be considered "in determining the existence of a

mental state which is an element of the offense” (cited in Ref. 29, para 4). In reversing the verdict, the Supreme Court of Montana rejected the doctrine of settled insanity, finding that due process required the court to hear evidence on all elements of the offense and that evidence of voluntary intoxication was “clearly relevant” to the question of whether the defendant acted knowingly and purposely. After this decision, the U.S. Supreme Court held that state statutes limiting the consideration of certain evidence do not violate due process. Justice Scalia declared that defendants do not have an absolute constitutional right to present all relevant evidence in their defense. Mr. Egelhoff failed to satisfy the court that a failure to consider evidence of intoxication on the matter of intent violated his right to due process.

## UK Case Law

The United Kingdom has three separate legal systems, one each for England and Wales, Scotland, and Northern Ireland. The focus here will be on the law of England and Wales, the largest of the three systems, but with the inclusion of specific relevant cases from Scotland. The highest court of the land, covering all three jurisdictions, is the UK Supreme Court, which took over this role from the UK House of Lords upon its creation in October 2009. UK case law on self-induced intoxication causing automatism largely mirrors that of Canada in the early period.

### *DPP v. Beard (1920)*

In the early 20th century, Arthur Beard raped and killed 12-year-old Ivy Wood in Hyde, Cheshire. During the act of rape, he placed his hand on her throat and the other one on her mouth, resulting in death from suffocation. The Director of Public Prosecution (DPP) filed a suit against Mr. Beard, and he was convicted of murder. The contention was that Mr. Beard had raped and murdered the victim in a state of intoxication and that this shall be punishable under the charge of murder. Mr. Beard contended that he was so drunk he was unable to comprehend the severity of his actions and claimed that being convicted for the crime of murder was very different and independent from the intended act of rape.

The UK House of Lords opined on the rules for an intoxication defense. Lord Birkenhead commented:

Under the law of England as it prevailed until early in the 19th century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man.

Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime that was committed only if the intent was proved. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter (Ref. 8, p 1).

### *DPP v. Majewski (1977)*

In *DPP v. Majewski*,<sup>11</sup> Mr. Majewski had taken a substantial quantity of drugs over a 48-hour period. He then went to a pub and had a drink. He got into a fight with two others. The landlord went to break up the fight, and Mr. Majewski attacked him. When the police arrived, he assaulted the arresting officer and then struck another officer when he was being driven to the police station. The next morning, he attacked a police inspector in his cell. He was charged with four counts of occasioning actual bodily harm and three counts of assaulting a police constable in the execution of his duty. Mr. Majewski claimed he had no recollection of the events because of his intoxication. He was found guilty on all counts and appealed, contending that he could not be convicted when he lacked the *mens rea* of the offenses owing to his intoxicated state. The conviction was upheld, with the court opining that the crime was one of basic intent and, therefore, his intoxication could not be relied on as a defense.

### *R v. Woods (1982)*

In *R v. Woods*,<sup>30</sup> Mr. Woods committed rape while intoxicated. He sought to rely on the defense of intoxication. His conviction was upheld with the opinion that the crime of rape is one of basic (general) intent, and therefore a defense of intoxication

was not open to him. Lord Justice Griffiths, Lord Justice of Appeal, commented:

If Parliament had meant to provide in future that a man whose lust was so inflamed by drink that he ravished a woman, should nevertheless be able to pray in aid his drunken state to avoid the consequences we would have expected them to have used the clearest words to express such a surprising result, which we believe would be utterly repugnant to the great majority of people. We are satisfied that Parliament had no such intention (Ref. 30, quoted at <http://www.e-lawresources.co.uk/R-v-Woods.php>)

### **Brennan v. HM Advocate (1977)**

In a Scottish case, *Brennan v. HM Advocate* (1977),<sup>31</sup> Mr. Brennan had been convicted of murdering his father during a state of intoxication. He appealed the conviction, but it was subsequently upheld. The Court opined that the act did not qualify as automatism because Mr. Brennan had entered his state of intoxication voluntarily. Additionally, his intoxicated state did not meet the requirements of the special defense of insanity. Similarly, in *R v. Woods*,<sup>30</sup> it was stated that voluntary intoxication, whether foreseen or not, cannot provide the basis for an insanity defense nor a plea of diminished responsibility.

These two English cases, and the Scots case, cemented the position that voluntary intoxication is not a defense to crimes requiring only general or basic intent, no matter how extreme the resulting condition that would otherwise amount to automatism.

The required general intent for the offense is satisfied by the recklessness in putting oneself into a decompensated state. Intoxication may be advanced as a defense to an offense requiring specific intent,<sup>8</sup> whether the self-induced intoxication arose as a result of ingesting alcohol or drugs.<sup>32</sup>

### **R v. O'Grady (1987)**

In the case of *R v. O'Grady* (1987),<sup>33</sup> Mr. O'Grady had a history of alcohol dependence. He had spent the day drinking large quantities of alcohol. He then went to sleep. He claimed he was woken by one of his friends, Mr. McCloskey, hitting him on the head. He said that he picked up some broken glass and started hitting Mr. McCloskey to defend himself. He said he only recalled hitting him a few times, and a fight developed during which Mr. McCloskey had the better of him throughout. He said the fight subsided, and he cooked them both some food and went to sleep. In the morning, he found Mr. McCloskey dead. His death was caused

by loss of blood. He had 20 wounds to his face, in addition to injuries to the hands and a fractured rib, bruising to the head, brain, neck, and chest, and a fracture of the spine caused by the head being forced backwards. The blows to the body had been delivered by both sharp and blunt objects. The trial judge, Judge Underhill, stated that if Mr. O'Grady, because of alcohol, thought he was under attack and defended himself, he may claim self-defense. If the defensive measures, however, went beyond what is reasonable because of intoxication, he would not be entitled to that same defense.<sup>33</sup>

The jury convicted him of manslaughter, and he appealed. The appeal was dismissed, and the conviction was upheld. The decision of the court was that a defendant is not entitled to rely on, as self-defense, a mistake of fact that has been induced by voluntary intoxication.<sup>33</sup> Further cases have distinguished between voluntary and involuntary consumption, stating that even if the first drink was "not involuntary," neither were the subsequent drinks (*Tandy* (1989)<sup>34</sup>).

### **Finegan v. Heywood (2000) and R v. Gilbert (2006)**

In *Finegan v. Heywood* (2000),<sup>35</sup> Mr. Finegan drove a motor vehicle following the consumption of excess alcohol. He had a history of parasomnia and said he was experiencing noninsane automatism as he had driven the car in a state of parasomnia. Mr. Finegan had experienced three previous similar incidents. It was held that the defense of automatism was not available where alcohol had induced his condition and where he knew from previous experience that his parasomnia was precipitated by the consumption of alcohol. The court held that the ingestion of alcohol followed by automatism was a foreseeable consequence of his drinking.

In *R v. Gilbert* (2006),<sup>36</sup> however, the court found that hypoglycemia could form the basis for an automatism defense (to dangerous driving causing death) even though Ms. Gilbert had experienced three previous episodes without warning and had been advised to check her glucose levels before driving. Even where hypoglycemia is proven, there still must be evidence that automatism was created as a result (see *Watmore v. Jenkins* (1962)<sup>37</sup>). The difference between *Gilbert* and *Finegan* appears to be that in *Gilbert*, the defendant did not voluntarily ingest a substance or engage in an activity that increased the probability of an automatism occurring. Arguably,



Ms. Gilbert should have known, based on previous experience, that she was vulnerable to these unpredictable events and, therefore, should not be driving. This was the apparent logic in *R v. Marison* (1977),<sup>38</sup> where the defense of automatism caused by hypoglycemia was declined given the defendant's experience with similar incidents.

### **HM Advocate v. Ross (1991)**

In *HM Advocate v. Ross* (1991),<sup>31</sup> Mr. Ross was charged with attacking others at a pub after an evening of drinking with friends. During the evening, others had drugged Mr. Ross' drink. Although he had voluntarily consumed the beer, it was without knowing that he was consuming other drugs. The court indicated that defendants may claim automatism if they can prove on a balance of probabilities that their intoxication was not self-induced because they did not voluntarily and knowingly take and did not know they were under the influence of a substance when they committed the violent act.

The courts are clearly concerned with whether defendants could have anticipated the state that they put themselves in (e.g., *R v. Hardie* (1985)<sup>39</sup>). Not knowing how intoxicating an intoxicant might be, however, may not afford a defense (*R v. Allen*, 1988<sup>40</sup>). The courts appear to find that recklessness as to the effects of ingesting drugs or alcohol will defeat the defense even where the specifics or magnitude of the effect may not have been precisely known (e.g., *R v. Caldwell* (1982)<sup>41</sup>; *R v. Bailey* (1983)<sup>42</sup>). Not surprisingly, a compromised state will not be considered where the requisite intent is formed before the self-induced intoxication (e.g., *A-G For N. Ireland v. Gallagher* (1963)<sup>43</sup>; *R v. Kingston* (1994)<sup>44</sup>).

### **McGhee, Harris, and Coley (2013)**

A trilogy of cases dealing with self-induced intoxication (*R v. McGhee*, *R v. Harris*, *R v. Coley*)<sup>45</sup> was released in 2013. Mr. McGhee attacked several people at a convenience store with a knife in a state of apparent intoxication after consuming alcohol and prescription tranquilizers. He was convicted of wounding with intent but sought an appeal on the basis that the trial judge had not made a defense of automatism available. The Appeal Court found that self-induced intoxication mixed with prescribed medications causing a state of disinhibition did not amount to automatism. Given that Mr. McGhee was aware of the dangers of mixing alcohol with his

medications, even if the resulting state did amount to automatism, it could not be relied on because of its foreseeability.

Mr. Coley was a heavy cannabis user who, after smoking cannabis all day, went to his neighbor's house at night and stabbed her repeatedly. He claimed to have "blacked out" and to have no memory of the attack, although he exhibited logical behaviors, such as donning a balaclava before the attack. At trial, three psychiatrists gave evidence that although Mr. Coley had no underlying mental disorder, he may have been experiencing a "brief psychotic episode" induced by cannabis. His defense of insanity failed because any mental abnormality was caused by external factors. The alternative defense of automatism failed because his intoxication was voluntary and did not result in a complete loss of control.

Mr. Harris had a history of binge drinking followed by a sudden cessation of drinking, triggering psychotic episodes. He drank heavily on the weekend before the offense, suddenly stopping on Sunday. On Tuesday, he fell ill. His family was concerned and had sought medical assistance after he complained of hearing voices and exhibited other concerning behavior. On Friday, he attempted to burn down his house. The court found that Mr. Harris' previous history of voluntary intoxication caused the mental abnormality and that he was not in any way intoxicated at the time of the offense. Although he was affected by mental disorder, he did express an understanding of what he was doing and that it was wrong. The Appeal Court found that Mr. Harris was nevertheless entitled to have tried the matter of whether he was aware at the time of the act that he was creating a risk to others (his neighbors) by setting his house alight. Notably, a later case suggested that if the defendant had previous experiences of psychotic episodes related to intoxication, this should be considered (*R v. Marison* (1977)<sup>38</sup>).

### **Discussion**

The distinction between the two types of automatism (internal–external, noninsane–insane, NCR–non-NCR) is inescapably theoretically unstable and driven by a desire to contain those defendants who are seen as constituting a continuing risk. The thinking is that the risk is greater if the condition is the product of a persisting underlying condition (e.g., hypoglycemia, schizophrenia). This simplistic dichotomization of causes is mostly inconsistent with medical theory, which



generally agrees that most actions are the product of a complexity of causes, both internal and external.

Nevertheless, in Canada, the defense of automatism may lead to a verdict of either NCR automatism or non-NCR automatism. The critical distinction is that non-NCR automatism leads to an absolute acquittal, whereas NCR automatism puts the defendant under the jurisdiction of the provincial review boards. In this regime, if they are judged to be a significant threat to public safety,<sup>46</sup> defendants can be held in detention at a forensic psychiatric hospital or discharged with conditions until they are no longer a danger.

In testing for automatism, the judge determines whether an internal or external factor causes the dysfunction. Also considered is whether the defendant presents a recurring danger to the safety of the public. Recently, the Ontario Court of Appeal eliminated the public policy override, ruling that self-induced extreme intoxication leading to automatism may be a defense for a crime of violence. The court states that this defense would require expert evidence, be proven by the defendant, and have an air of reality.

Because the United States is divided into 50 different criminal law jurisdictions, it is difficult to summarize an American position. Nevertheless, it seems clear that the establishment of a settled or permanent insanity, perhaps triggered by intoxication, appears important in American rulings. As we have outlined, this matter is complicated by several competing factors. It is not surprising that the range of cases found show inconsistency related to the complexity of this concern. Some cases appear to indicate that temporary insanity caused by self-induced ingestion of substances may qualify for a defense if the effect of the substance triggers an underlying psychotic disorder. Although a California law rules out the defense produced by intoxicating liquor, case law states that the insanity need not be necessarily permanent.

In the UK, case law has suggested that intoxication is not a defense to cases involving a general intent but may be advanced as a defense if the crime requires a specific intent (e.g., *Beard*,<sup>8</sup> *Majewski*,<sup>11</sup> *Woods*<sup>30</sup>). Some decisions seem to suggest that voluntary intoxication creates foreseeability even if there is an underlying mental abnormality. Still, the question of the defendants' awareness that they may be creating a risk is a matter to be resolved at trial (*Harris*<sup>45</sup>).

Self-induced intoxication leading to automatism is a complicated concept that stands at the crossroads of the legal system, psychiatry, public discourse, and the legislature, resulting in inconsistent and sometimes contradictory handling of these subjects in Canadian, American, and British courts and legislatures. Additionally, most recently in Canada, the law continues to evolve. From a psychiatric point of view, it is important to be aware of the current case law in one's own jurisdiction. A thorough and careful psychiatric assessment, with attention to collateral information, is demanded of the forensic assessor. (We refer the reader to a fuller discussion of the assessment process.<sup>7</sup>)

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