The Ontario Court of Appeal Takes a New Look at Automatism in *R v. Sullivan*

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Automatism has long been a significant topic of discussion between forensic psychiatry and the courts. In a recent case, the Ontario Court of Appeal addressed this concept in the setting of a Canadian law, s. 33.1 of the Criminal Code, that limits the defense of self-induced intoxication for any offense involving violence. The court found that s. 33.1 violated the presumption of innocence and the principles of fundamental justice and could not be saved by the Canadian Charter of Rights and Freedoms, as it was not demonstrably justifiable in a free and democratic society. Therefore, the court declared s. 33.1 to be of no force and effect. In this article, we describe the legal history of automatism in Canadian courts and the reasoning behind this important decision. Finally, we discuss some implications for forensic practice.

J Am Acad Psychiatry Law 50:450–59, 2022. DOI:10.29158/JAAPL.210138-21

Key words: automatism; self-induced intoxication; criminal responsibility

Courts have long wrestled with the concept of automatism. Recently, the Ontario Court of Appeal took a new look at this topic. Although this case was styled as *R v. Sullivan*,[1] it actually considered two cases together, those of David Sullivan and Thomas Chan. *R v. Chan* was the original case and *R v. Sullivan* was added, although the court left it as *R v. Sullivan*.

In this article, we review the facts of these two cases and the reasoning behind the decision. We then summarize the handling of automatism in the courts and review some of the landmark cases that precede this decision. We then analyze the decision itself. In Canada, a decision in one province is relevant to all the lower courts within that jurisdiction, through precedence, and may have persuasive authority in all other jurisdictions in Canada.

There are differences in statute and case law in this area in different jurisdictions. Watts[2] reviews and compares some of these differences in Anglo-Saxon, American, and Canadian jurisprudence. There appear to be differences in the perception between courts and the medical or scientific community with regard to voluntary intoxication.[3] In a paper that presents a case of caffeine-induced psychosis resulting in a successful defense, Hearn *et al.*[4] summarize the statutory approaches to voluntary intoxication and criminal responsibility in various states. Military courts in the United States have taken an approach akin to the one described below, emphasizing the foreseeability of harm in self-induced intoxication.[5] Mellsop *et al.*[6] note that there is similarity in how six Western Pacific nations deal with drug-induced psychosis and legal responsibility. A full comparison between jurisdictions is beyond the scope of the current article but would be of interest and academic value.

Published online June 15, 2022.

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Disclosures of financial or other potential conflicts of interest: None.

R v. Chan

In 2015, Thomas Chan consumed "magic mushrooms" with friends in the basement of his mother's home. Evidence showed that he had used magic mushrooms before, and the experience had been pleasant and uneventful. Soon, his friends were "high," but Mr. Chan experienced no effects, so he decided to ingest more mushrooms. A few hours later, he began speaking in gibberish and ran upstairs to his mother's room, where she was sleeping. He began calling his mother and sister "Satan" and "the Devil." He then went outside and ran to his father's

house, where he fought one of his friends, who had followed him. Neighbors reported that they heard him yelling, "I am God." He then broke into his father's house. He did not recognize his father and began stabbing him to death. He then attacked his father's partner, who testified that she did not think Mr. Chan recognized her. At trial, Mr. Chan claimed that s. 33.1 of the Criminal Code of Canada (which prevented him from raising a state of self-induced intoxication to negate general intent or the voluntariness required to commit the offense) was not constitutional.[1]

R v. Sullivan

Mr. Sullivan had been prescribed buproprion for smoking cessation. He occasionally abused it. He began to experience episodes in which he believed aliens were in his condominium. He took 30 to 80 buproprion tablets in a suicide attempt. Following this, he believed that he had captured an alien and brought his mother in to show her. When she disputed the presence of the alien, he stabbed her several times, believing her to be an alien. When emergency services were called, he was outside the apartment screaming incoherently and running around erratically. His mother survived the attack but died of unrelated causes before trial.[1]

At trial, Mr. Sullivan raised the defense of non-mental disorder automatism. It should be noted that Mr. Sullivan did not challenge the constitutional validity of s. 33.1. He argued that this section did not apply, since his intoxication was not voluntary, since it had been prescribed for medical purposes and was taken, in the final act, in a suicide attempt and not for the purpose of intoxication. As an alternative defense, he argued that he experienced mental disorder automatism. The trial judge concluded that, first, the cause of Mr. Sullivan's automatism was the ingestion of buproprion and, therefore, an external cause, and second, he did not pose a continuing danger. He concluded that the automatism was not caused by mental disorder but by intoxication; therefore, the defense of Not Criminally Responsible due to mental disorder (NCR-MD) did not apply. The trial judge then found that the defense of non-mental disorder automatism was excluded because the intoxication had been voluntary in that he ingested the medication deliberately (although with the intention of killing himself). Mr. Sullivan was convicted. The questions raised included whether s. 33.1 was constitutional and whether the test for voluntary intoxication had been correctly applied.[1]

Automatism

Automatism was defined in the courts as follows:

> An act which is done by the muscles without any control by the mind, such as spasm, a reflex action, or a convulsion; or an accident by a person who is not conscious of what he is doing such as an act done while suffering from concussion or while sleep walking (Ref. 7, p 409).

This definition places emphasis on involuntary muscle movements. Other examples could include a motorcyclist driving erratically while being stung by a swarm of bees or a person who knocks over a candle when sneezing, thereby starting a fire.[8] Examples could also include types of epilepsy, traumatic brain injury, somnambulism, and dissociation.

R v. Rabey

In *R v. Rabey*,[9] the court addressed automatism in a case of dissociation. In this case, Wayne Rabey, a 20-year-old student, became infatuated with a classmate. As he was leafing through her books to find an equation for an assignment that they were working on, he found a letter she had written, referring to Mr. Rabey as "one of a bunch of nothings" (Ref. 9, p 513). The next day, he confronted her about their relationship. He then struck her on the head with a rock he had taken from his geology lab, causing her to lose consciousness.

Expert evidence opined that Mr. Rabey was in a dissociative state comparable with that produced by a physical blow. The description of his state was testified to by witnesses. This case was appealed to the Supreme Court, which subsequently 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. 9, p 518). In its ruling, the Court also differentiated between insane automatism and non-insane automatism, the former arising from a disease of the mind. Non-insane automatism was described as a transient effect produced by some specific external factor.

R v. Parks

The Supreme Court addressed sleepwalking and automatism in *R v. Parks*.[10] In 1987, Kenneth Parks fell asleep in front of the television. Although he had a good job and worked hard, gambling had led to debt.

Mr. Parks was scheduled to meet with his in-laws, who were supportive, the following day to discuss solutions. During the night, Mr. Parks drove to his in-laws' house and stabbed his mother-in-law and father-in-law. Mr. Parks awoke over the dead body of his mother-in-law. He drove to the police station and turned himself in. He reported that he had "just killed someone with my bare hands" (Ref. 10, para 23). He was charged with first-degree murder and attempted murder.

Five experts specializing in neurology, sleep neurology, psychiatry, and forensic psychiatry established that Mr. Parks had been sleepwalking at the time of the offense. He had a long history of sleepwalking, nocturnal enuresis, unusually deep sleep, grogginess for some time after waking, and a strong family history of parasomnia. The jury found him to have been sleepwalking when he committed the offenses and, therefore, a finding of non-insane automatism followed, resulting in absolute acquittal.

The issue for the Supreme Court on appeal was whether sleepwalking should be classified as non-insane automatism, resulting in an acquittal, or whether it should be considered a disease of mind, resulting in what was then referred to as Not Guilty by Reason of Insanity. The Court noted that medical testimony demonstrated that Mr. Parks was sleepwalking at the time of the incident. The Court concluded that the chances of recurrence were low. They used a two-stage test to decide whether the condition was a disease of the mind. A disease of mind would have to be caused by something internal to the mind of the brain. It would result in recurrence and, therefore, represent a danger to the public. Bill C-30, which replaced Not Guilty by Reason of Insanity with NCR-MD, was enacted in 1991, as this case was proceeding through the courts.[11,12]

R v. Stone

In *R v. Stone*,[13] the Court ruled that a two-step process must be followed before automatism can be accepted as a defense and that expert evidence must be sought. In addition, a major change was made regarding the burden of proof. In *R v. Parks,*[10] the burden of proof for the voluntariness aspect of the act was on the Crown to prove it beyond a reasonable doubt. In *R v. Stone*,[13] the burden was transferred to the defense to prove involuntariness on a balance of probabilities. The case introduced a number of other factors that might support a claim of automatism, including the severity of the triggering stimulus, corroborating evidence by bystanders, previous medical history of such states, the absence of any motives that may explain the crime, and whether the trigger is also the victim of the crime.

R v. Daviault

In 1994, the Supreme Court ruled on *R v. Daviault.*[14] The question was whether self-induced intoxication could lead to such a severe state as to be considered automatism, such that the defendant could not possess the minimal intent necessary to commit the offense. Mr. Daviault had gone to visit a 65-year-old female friend who was partially paralyzed and wheelchair bound. He arrived carrying a 40-ounce bottle of brandy, and the friend drank a glass before falling asleep in her wheelchair. In the middle of the night, she awoke to go to the bathroom. Mr. Daviault suddenly appeared and sexually assaulted her.

Evidence concluded that Mr. Daviault had consumed the rest of the bottle of brandy during the night, plus six to eight bottles of beer earlier. A pharmacologist testified that such an amount might cause a blackout and loss of contact with reality, causing the brain to be temporarily dissociated from normal functioning, which would result in being unaware of one's actions and unable to recall them. Mr. Daviault was acquitted, and the case subsequently went to the Supreme Court.

In its decision, the Court referred to what was known as the *Leary* rule. In *R v. Leary*,[15] it was ruled that intoxication could be a defense for criminal offenses involving specific intent, but that it could not be used for crimes only involving general intent. Specific intent is also referred to as "ulterior intent," as in *R v. Daviault*,[14] which can be understood as the "state of mind contemplating consequences beyond those defined in the actus reus" (Ref. 16, para 63). Specific intent actions are understood as the "product of preconception" and are "deliberate steps . . . toward an illegal goal" (Ref. 17, p 890).

General intent offenses consider the "intention as applied to acts considered apart from their purposes" (Ref. 17, p 877), or intention "applied to acts done to achieve an immediate end" (Ref. 17, p 890). General intent actions do include "purely physical products of momentary passion" (Ref. 17, p 890). At its core, general intent requires only "a conscious doing of the prohibited act" (Ref. 18, para 35). The defense of intoxication was not available in *Daviault,*

as rape was considered a crime of general intent, not specific intent.

Under the prevailing *Leary* rule, the accused's intention to become intoxicated is substituted for the intention to commit a dangerous act. This means that recklessness demonstrated by an accused becoming voluntarily intoxicated is sufficiently blameworthy to find that the general intent offense has been committed.

Justice Cory, in *Daviault*, ruled that the strict application of the *Leary* rule offended the presumption of innocence and therefore contravened s. 11(d) of the Canadian Charter of Rights and Freedoms, which is the presumption of innocence. The judge said, "to deny that even a very minimal mental element is required for sexual assault offends the Charter in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the Charter" (Ref. 14, p 3). In other words, the intention to become intoxicated could not be substituted for the intention to commit a crime. The Court noted that automatism would apply only in rare cases of extreme intoxication. Mr. Daviault was therefore acquitted.

There was a swift public response to this decision. The press, police associations, and the Canadian Association of Sexual Assault Centers criticized the ruling as providing an excuse for male violence against women. Nine months later, Parliament enacted s. 33.1 of the Criminal Code of Canada.[19] Its purpose was specifically to protect women and children from male violence linked to intoxication. This law closed the door on a defense of self-intoxication for any offense related to the bodily integrity of the victim, if the offense is one requiring general but not specific intent.

Appeal Arguments in R v. Sullivan

Mr. Chan and Mr. Sullivan both relied on non-mental disorder automatism as their defense. The hurdle they faced was that their non-mental disorder automatism claims arose from self-intoxication, and each was charged with violent offenses. S. 33.1 removes automatism as a defense, whether based on mental disorder or non-mental disorder, where the automatism is self-induced by voluntary intoxication and the offense includes an assault.

Mr. Chan and Mr. Sullivan defended themselves by claiming that they were experiencing non-mental disorder automatism, rather than mental disorder automatism. Mr. Chan tried to overcome the impediment s. 33.1 presented to his non-mental disorder automatism defense by applying to have the section declared unconstitutional. The trial judge agreed with Mr. Chan that s. 33.1 was in violation of ss. 7 (right to life, liberty, and security of the person) and 11(d) (presumption of innocence) of the Charter but upheld the constitutionality of s. 33.1 under s. 1 of the Charter as a demonstrably justifiable limit on Charter rights.

In comparison, it was argued that s. 33.1 did not prevent Mr. Sullivan from relying on the non-mental disorder automatism defense because his intoxication was not voluntary, having resulted from a suicide attempt. The trial judge rejected this and found that s. 33.1 did indeed apply. Neither Mr. Chan's nor Mr. Sullivan's non-mental disorder defenses succeeded. Both men were convicted.

On appeal, both challenged their convictions, claiming that s. 33.1 unconstitutionally deprived them of access to the non-mental disorder automatism defense. Mr. Chan did so by challenging the trial judge's rulings. Mr. Sullivan raised the constitutional validity of s. 33.1 for the first time on appeal. The Crown conceded that if Mr. Chan's s. 33.1 challenge succeeded, Mr. Sullivan would also be entitled to the benefit of that ruling. For this reason, the appeals were heard together.

Mr. Chan argued that the trial judge erred in denying his Charter challenge to s. 33.1 and that, in any event, s. 33.1 could not be demonstrably justified under s. 1 of the Charter. He asked that acquittals be entered if either of these grounds of appeal succeeded. Alternatively, Mr. Chan also argued that the trial judge erred in rejecting the mental disorder defense and asked to set aside his convictions and substitute findings of NCR-MD. Mr. Sullivan also argued that the trial judge erred in defining "voluntary intoxication." He requested verdicts of acquittal on all charges.

Ruling by the Ontario Court of Appeal

The court ruled that the Charter principles outlined in *Daviault* (i.e., the voluntariness, improper substitution, and *mens rea* breaches) applied to both common law and statutory law (see further explanation below). The *Daviault* majority found that the identified Charter violations could not be justified under s. 1 of the Charter of Rights and Freedoms, which guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The court held that there was no

pressing and substantial purpose in preventing access to the "rare and limited defense" of automatism arising from self-induced intoxication, and that the deleterious effects of doing so could not be overcome by proportionate benefits. The *Daviault* majority held that it was a reasonable limitation to Charter rights to require accused persons to establish automatism, with the assistance of expert evidence, on the balance of probabilities.

Voluntariness Breach. With respect to the voluntariness breach, the court commented that s. 33.1 infringes upon ss. 7 and s. 11(d) of the Charter, as it is contrary to the voluntariness principle of fundamental justice and permits conviction without proof of voluntariness. They advised that it is contrary to the principle of fundamental justice to remove the voluntariness element from an offense and convict someone where there is reasonable doubt about voluntariness.

The Supreme Court has consistently affirmed that voluntariness, must be linked to the prohibited conduct. In the case of Mr. Chan, the prohibited conduct that constituted the offenses was the assaults, not the self-induced intoxication. Therefore, it is the assaults to which voluntariness must be attached to satisfy the Charter.

The Court of Appeal for Ontario stated that s. 33.1 represents a significant breach of the principle that if the Crown cannot prove the *mens rea*, nor the consciousness aspect of the *actus reus*, the very core of which involves the intention to commit the act, then this section breaches the voluntariness principle. The *actus reus* refers to the conscious, voluntary performance of the act (R v. Stone), and *mens rea* to the guilty mind necessary for a crime. The automatism defense affects both. The wording of s. 33.1 removes the defense of lack of voluntariness due to self-induced intoxication causing automatism and was passed to eliminate the defense of non-mental disorder automatism for offenses against persons. Parliament enacted s. 33.1 as a direct response to a common law rule that recognized involuntariness as a defense.

Improper Substitution Breach. The court noted that s. 33.1 substitutes the intention to become intoxicated with the intention to commit violence to another person. In other words, simply intentionally becoming intoxicated is sufficient proof of the intention to assault another person. With respect to the improper substitution breach, the court commented that s. 33.1 infringes upon the presumption of innocence guaranteed by s. 11(d) of the Charter by permitting conviction without proof of the requisite elements of the offense. Substituting voluntary intoxication for the required elements of a charged offense violates s. 11(d) because doing so permits conviction where a reasonable doubt remains about the substituted elements of the charged offense. In Mr. Chan's case, this illustrates the unconstitutional effect of s. 33.1, permitting him to be convicted of manslaughter without proof of the general intent required. Thus proving voluntary intoxication does not necessarily prove intention to commit assault.

Mens Rea Breach. With respect to *mens rea*, the court commented that s. 33.1 infringes upon s. 7 of the Charter by permitting convictions where the minimum level of constitutional fault is not met. In *R v. Creighton*,[20] the Supreme Court held that, where an offense provides no other *mens rea* or "fault" requirement, the Crown must at least establish "penal negligence" to satisfy the principles of fundamental justice. Penal negligence is the minimum constitutionally compliant level of fault for criminal offenses.

The Court of Appeal for Ontario noted that s. 33.1 is built on a theory of negligence. The underlying theory of fault supporting s. 33.1 rests on the irresponsibility of self-induced intoxication and the association between violence and intoxication. S. 33.1 also draws on the language of negligence, using an analogy from civil law, referring to a marked departure from reasonable standards of care.[20]

In a description of the elements of s. 33.1,[21] it is stated that there is no prescribed link between the voluntary intoxication and the violent act. It does not matter how unintentional, non-willful, unknowing, or unforeseeable the act is. So long as violence occurs, s. 33.1 operates. This is problematic because without a foreseeable risk arising from the allegedly negligent act, negligence cannot be established, and without negligence, the minimum constitutional standard of penal negligence cannot be met. The court concluded that a reasonable person in Mr. Chan's position could not have foreseen that his self-induced intoxication might lead to assaultive behavior, let alone a knife attack on his father and stepmother.

The idea that the allegedly negligent conduct be a marked departure from the standards of a reasonable person is absent in this case. The notion that it is a

marked departure from the standards of the norm to become intoxicated, let alone mildly intoxicated, is "untethered from social reality, particularly in a nation where the personal use of cannabis has recently been legalized" (Ref. 1, para 90). For this alone, they should not suffer penal, or indeed civil, consequences. It is only when they intentionally or voluntarily go on to commit violence that they should suffer legal consequences.

Reasonableness of a s. 33.1 Limit

The Court of Appeal for Ontario considered whether s. 33.1 could be saved by s. 1 of the Charter if it was a "reasonable limit . . . as can be demonstrably justified in a free and democratic society" (Ref. 1, para 95). The court concluded that s. 33.1 was applicable on the first limb of the *Oakes* test,[22] namely having a pressing and substantial objective, but that it failed on all three parts of the second limb, namely the rational connection, minimal impairment, and the proportionality that would be required to save the provision. The court's opinion was that Parliament did not have valid reasons for rejecting alternatives to s. 33.1. They commented that making it a crime to commit a prohibited act while drunk is the response invited in *Daviault* and was recommended by the Law Reform Commission of Canada.[19]

This would arguably be more effective in achieving the objective of protecting against acts of intoxicated violence, as it would better serve to deter voluntary intoxication than s. 33.1 does. Its reach would depend on whether the intoxication was dangerous, as demonstrated by the commission of a violent offense. Certainly, this option would also be less impairing than s. 33.1, since it does not infringe, let alone deny, the Charter rights that s. 33.1 disregards. It would criminalize the very act from which the Crown purports to derive the relevant moral fault, namely, the decision to become intoxicated in those cases where that intoxication proves, by the subsequent conduct of the accused, to be dangerous.

The alternative option that the Crown has not denied is simply to permit the *Daviault* decision to operate. By design, the automatism defense, whether due to mental disorder or non-mental disorder, is difficult to access. As with other defenses, if there is no air of reality to the defense based on the evidence, it should not be considered. It is also a reverse onus defense, and it requires expert evidence. If the defense is not established on the balance of probabilities, it fails.

According to evidence submitted to Parliament, alcohol intoxication is not capable, on its own, of inducing a state of automatism.[23] Had similar evidence been presented and accepted at Mr. Daviault's retrial, he would have been convicted. Even in those few cases in which defendants might succeed in demonstrating automatism as the result of the voluntary consumption of intoxicants, they may not be acquitted. Defendants who are unable to establish that the cause of the automatism was not a disease of the mind will not be acquitted but instead found NCR-MD.[13] The accused would then be subject to a disposition hearing driven by public safety considerations.[12]

In *R v. Sullivan*, the court opined that in the few cases where there might be some validity to the theory that extreme intoxication led to automatism and violence, the prospects of escaping liability are slim.

The court concluded that the trial judge in *R v. Chan* predicated this balancing on the proposition that "[t]hose who self-intoxicate and cause injury to others are not blameless" (Ref. 1, para 147). He did so without apparent recognition of the nature of the concept of self-induced intoxication, catching even those who would fall into a state of automatism after choosing to become mildly intoxicated, and perhaps even those who are complying with a prescribed drug that they know may cause intoxicating effects. The theory of moral fault that the judge originally relied upon cannot be sustained.

The court considered that the trial judge gave undue weight to the extent to which s. 33.1 provides for the safety of potential victims, including women and children. The court considered that the protection thesis could not be supported on a reasoned basis. The deterrence that the law achieves must come from the *Leary* rules, as modified in *Daviault*, not from the added and remote prospect that if a rare and unforeseen case of extreme intoxication akin to automatism should happen to occur and lead to violence, automatism may not be considered.

The court considered the deleterious effects of s. 33.1 to be profound. Specifically, s. 33.1 enables the conviction of individuals of violence-based offenses, even though the Crown cannot prove the requisite elements of those offenses, contrary to the principles of fundamental justice and the presumption of innocence. It enables the conviction of

individuals for acts they do not will. This is predicated on a theory of moral fault linked to self-induced intoxication, expressed by the Crown in language captured in *R v. Decaire*.[24] Yet, s. 33.1 is not confined to those who set out to become extremely intoxicated but catches anyone who has consumed an intoxicant, including with restraint or even for medically indicated purposes.

As stated in *Daviault*, it is not appropriate to substitute the mental element from the act of consuming intoxicants for the mental element required by the offense, particularly when the act of self-inducing intoxication is over before the *actus reus* of the offense occurs. This transplantation of fault is contrary to the principle of contemporaneity, which requires the *actus reus* and *mens rea* to coincide at some point.[25] The deleterious effects of s. 33.1 include the contravention of virtually all the principles that the law relies upon to protect the morally innocent, including the venerable presumption of innocence.

The court concluded that the Crown had not demonstrated that s. 33.1 was a demonstrably justifiable limit to the Charter rights at stake in a free and democratic society. Accordingly, they declared that s. 33.1 to be of no force or effect. The Court allowed Mr. Chan's appeal, set aside his convictions, and ordered a new trial. The court allowed Mr. Sullivan's appeal from his convictions of aggravated assault and substituted verdicts of acquittal.

Implications for Forensic Psychiatry Practice

Anglo-Saxon common law has held that voluntary intoxication may not be used to exonerate criminal behavior. In Canada, the United States, and other similar jurisdictions, the common law tradition has been to limit the application of intoxication defenses regarding the *mens rea* of an accused. For example, the insanity defense in the United States has historically been limited to those defendants whose mental disorder was due to an established condition.[2]

The potential defense of extreme intoxication akin to automatism may now have come out of *R v. Sullivan* through the restoration of the *Daviault* precedent. This would require expert evidence.[26,27] The courts in the above cases note that self-induced intoxication leading to automatism will remain a rare defense in that it is an affirmative defense, requiring expert evidence and, in particular, an air of reality.

We include some key points summarizing the evolution of voluntariness, intent, and automatism in Canada in Table 1. The forensic psychiatric assessment of these cases requires a full assessment, based on the first principles of forensic assessment.[28] Some points to be emphasized are summarized in Table 2. Readers may wish to reference Glancy and Regehr[29] for a fuller description.

Conclusion

Anglo-American courts have long recognized the concept of automatism, and in particular, medico-legal communities have wrestled with the concept of self-induced intoxication leading to automatism. In Canadian courts, automatism describes unconscious, involuntary behavior, the state of persons who, though capable of action, are not conscious of what they are doing. A distinction is drawn between nonmental disorder automatism and mental disorder automatism. The important distinction is that the former leads to an absolute acquittal, whereas the latter leads to placement under the jurisdiction of the provincial review board, which may choose to detain persons in hospital, discharge them with conditions, or discharge them absolutely.

The definition of disease of mind is a matter for the judge and is subject to a two-stage test whereby the first step is to determine whether the dysfunction is caused by an internal factor or an external factor, and the second, whether the dysfunction presents a recurring danger to the safety of the public.

Following significant dissatisfaction with the Supreme Court decision in the case of *R v. Daviault*, s. 33.1 was legislated. This excluded the defense of self-induced intoxication akin to automatism for general intent violent offenses. In this case, the Court of Appeal for Ontario struck down s. 33.1 on the grounds that it was antithetical to the presumption of innocence in that the person does not have the voluntariness to commit the act and offended the principles of fundamental justice. The court concluded that it was not demonstrably justified in a free and democratic society and, therefore, not saved by s. 1 of the *Charter*.

The rejection of s. 33.1 leads to two options. The first is the restoration of the *Daviault* precedent. Under this basis, extreme intoxication akin to automatism would require expert evidence, would be

Table 1 Summary of Key Points Regarding Voluntariness, Intent, and Automatism in Canadian Law

Legal Source and Topics	Key Points
R v. Rabey (1980)	
Definition of automatism	Unconscious, involuntary behavior The state of a person who is not conscious of what he is doing
Insane automatism	Malfunctioning of the mind arising from a cause internal to the accused, e.g., psychological makeup, emotional makeup, organic pathology
Non-insane automatism	Transient effect caused by an external factor, e.g. a blow to the head, exposure to toxic fumes
R v. Parks (1992)	
Insane automatism	Is a disease of the mind Positive finding results in an NCR-MD
Non-insane automatism	Is not a disease of the mind Positive finding results in acquittal
Burden of proof	Evidence supporting that the condition exists resides with the defense Evidence supporting that voluntariness was present at the time of the offense resides with the Crown
R v. Daviault (1994)	
Self-induced intoxication	The Leary Rule; *mens rea* of a general intent offense cannot be negated by self-induced intoxication, offends the presumption of innocence under the Charter Wrongful intention to become dangerously drunk cannot substitute for the intention to commit a crime of sexual assault Automatism may apply in rare cases of extreme intoxication
Bill C-72/s. 33.1 (1995)	
Voluntary intoxication	Self-intoxication is excluded as a defense for general intent in offenses related to bodily integrity
R v. Stone (1999)	
Two-step process for determination	First step is to determine existence of automatism (that the accused acted in an involuntary manner) Second step is to determine whether the involuntariness is due to a mental disorder or non-mental disorder automatism
Factors for consideration	Involuntariness Presence of psychiatric illness Severity of triggering stimulus Corroborating evidence of bystanders Corroborating medical history of automatistic-like dissociative states Evidence of motive for the crime Whether the alleged trigger of violence is also the victim
Burden of proof	The law presumes that people act voluntarily The burden of proof in regarding involuntariness resides with the defense
s. 33.1 (1995)	
Voluntary intoxication	Self-intoxication is excluded as a defense for general intent in offenses related to bodily integrity
R v. Sullivan (2020)	
Extreme intoxication	Extreme intoxication is akin to automatism
s. 33.1 struck down	Struck down because: Breach of the principle of voluntariness of an act Impinges upon presumption of innocence Does not reach minimum standard of penal neglience Not a reasonable limit as can be justified in society

(Adapted from Glancy and Regehr[29]).

under a reverse onus, and would continue to be difficult to access. The second is for Parliament to review alternatives to s. 33.1 and consider making it a crime to commit a prohibited act while drunk (or otherwise intoxicated). This was also supported by the Law Reform Commission of Canada.[11]

It should be noted that an appeal has been made against this decision to the Supreme Court. The decision by the Court of Appeal for Ontario will help clarify the expected next steps. In the cases discussed above, competent judges and courts of appeal at the provincial level have made such well-reasoned

Table 2 Forensic Assessment of Automatism

Areas of Assessment	Elements to Assess
Presence of automatistic state	Corroborating witnesses Corroborating history of dissociative states Consideration of possible malingering
Nature of the automatistic state (disease of the mind?)	Presence of psychiatric illness Presence of medical illness Presence of sleep disorder Effects of alcohol/drugs Medical and psychiatric history Family history Laboratory results
Precipitant or trigger	Severity of the triggering event Source (did the eventual victim trigger the event?) Context (accused's interpretation of the trigger)
Priming or vulnerability factors	Substance use Life stressors Sleep deprivation
Amnesia	Presence and duration Cause: organic, functional, alcohol blackout, conscious attempt to distort Incomprehension and possible horror on return to awareness
Motive	Possible gains Link between the victim and the trigger
Specific concerns in sleep-related violence	History of sleepwalking or other parasomnias Evidence the individual was asleep prior to the offense Duration of sleep Concurrent factors (fatigue, drugs, alcohol) Source of arousal (touch, noise) Proximity of offense to arousal
Specific concerns in severe intoxication and substance-induced psychosis	No independent psychotic disorder Symptoms did not precede substance use Symptoms do not persist after the cessation of acute withdrawal or severe intoxication Disturbance does not occur exclusively during the course of a delirium
Risk of recurrence	Unique nature of the trigger Treatment for disorder leading to automatism

(Adapted from Glancy and Regehr[29]).

judgments that it will be hard for the Supreme Court to reverse this decision.

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