March 13, 2020

Does the Criminal Law Have the Capacity to Respond to the Intoxicated Automaton?

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Case Commented On: *R v Brown*, 220 ABQB 166

I am at the point in my 1L criminal law class where we start talking about capacity issues, namely whether a person by virtue of mental disorder, automatism and/or intoxication has the capacity to commit a criminal offence. This is a complex and controversial area of the law. In discussing these issues, we criss-cross across the lines between legal, medical and policy concerns. We wade through case law stretching back decades that sometimes fundamentally change the common law and at other times hold strictly to it. Although each capacity issue involves detailed legal tests, when these issues arise together, the legal directions become overly complex and downright confusing. This "perfect storm" of capacity issues arise in the recent decision of *R v Brown*, 220 ABQB 166, challenging our legal conception of capacity and leaving us wondering whether the criminal law has the capacity to adequately respond.

The facts of the *Brown* case are straightforward, albeit, disturbing. Brown was a twenty-seven-year old elite athlete, who at the time of the offences, was serving as captain of the University hockey team. He had no prior criminal record and no disposition for violence. On the night in question he consumed alcohol and a quantity of "magic mushrooms" containing psilocybin, a prohibited substance under Schedule III of the *Controlled Drugs and Substances Act*. Psilocybin, according to a Government of Canada website on illegal drugs, is a known hallucinogen that results in an altered state of consciousness. The strength of the drug varies and is not readily detectable. A person on such a drug may experience a distortion of reality, of senses, and of time. They may also experience anxiety, confusion and paranoia. A person experiencing a "bad trip" on the drug may perform risk-taking activities. A person predisposed to psychiatric conditions may be at an "elevated risk" for these side effects.

According to Brown, he had consumed magic mushrooms once before but it was a "positive" experience. That night, however, Brown did not have a positive experience, in fact he had a very bad one. After consuming an undisclosed number of mushrooms his behaviour became wild and unpredictable. He stripped naked and ran into the neighbourhood, ultimately breaking into two homes by smashing windows. In the first home, he violently attacked the occupant, a professor at the university he was attending, with a broken broom handle. He was ultimately charged with breaking and entering while committing mischief and assault with a weapon (at paras 35-52).

The trial judge, Justice Hollins, acquitted, believing "the testimony of every witness" (at para 94). The trial judge also concluded the accused had no motive for the crime and the offence was totally out of character. According to the medical evidence, Brown was likely experiencing a

form of drug-induced delirium at the time of the offence. The forensic psychologist, relying on diagnostic information in the DSM-5 (at para 66), an interview of Mr. Brown including a personality assessment, the police reports, and third-party interviews concluded there was "no evidence" of mental disorder before, during or after the offence (at paras 64 and 67-71). Rather, the psychologist opined, Brown was under the influence of the psilocybin at the time of the events and suffering from short-term acute delirium as described by the DSM-5 (at paras 70-71). In short, the cause of Mr. Brown's behaviour was the drug.

The psychologist "completely rejected" the suggestion Mr. Brown was simply exhibiting drunken behaviour and "vehemently rejected" Mr. Brown intended to commit the offences (at para 77). Justice Hollins, in dismissing the Crown's argument that the psychologist's position relied on "circular reasoning" (at para 78), found support for the psychologist's position in the medical literature, the DSM-5 and the totality of the expert evidence at trial (at para 79). This finding was also based on Mr. Brown's evidence that his behaviour was not feigned, that he could not explain his actions and had no motive for them (at para 93).

The facts are therefore easily discernible, but the legal basis for the acquittal is not as clear. In the first paragraph of the decision, Justice Hollins states the "case raises the rare defence of extreme intoxication akin to automatism." A little further, in paragraph 7, she characterizes the defence as "non-mental disorder automatism". In conclusion, she acquits on the "rarely available" (at para 95) basis of automatism. Although, at paragraph 11, Justice Hollins describes the differing outcomes of a successful non-mental disorder automatism defence (acquittal) and mental disorder automatism defence (the application of s 16 of the *Criminal Code* resulting in a finding of not criminally responsible by reason of mental disorder to be dealt with under the mental health regime described in Part XX.1 of the *Code*), she does not enter into a s.16 mental disorder analysis. In paragraphs 17 to 18, she does recognize how "public and judicial skepticism" of the defence of automatism resulted in many courts finding a disease of the mind pursuant to s 16 to avoid an acquittal. At paragraph 19, she discusses briefly the Canadian position confining non-mental disorder to "involuntary conduct not arising from the disease of the mind." But she does not extend the analysis by discussing the role s. 16 does have, according to case authority, in the automatism analysis.

The legal analysis does segue into intoxication issues, particularly the law regarding extreme intoxication as an exception to the general rule that intoxication is not a defence to a general intent offence. Justice Hollins mentions, at paragraph 21, the differing treatment of self-induced automatism in the availability of the automatism defence but she does not directly or fully connect self-induced extreme intoxication to this concept.

The discussion of both issues, how non-mental disorder automatism fits into the automatism analysis and how self-induced intoxication automatism differs from non-self-induced automatism, was critical to the outcome of this case. It is this intersection between capacity issues that creates a difficult analysis into the issues, despite the clearly defined facts of the case.

Before, I enter into the analysis of the issues, it is important to generally explain capacity, or as it is often framed in the negative, incapacity issues and how mental disorder, automatism and, intoxication issues are interrelated. First, a brief primer on incapacity in criminal law. Incapacity

involves the primary question of scope of criminal liability and who in our society should be deemed incapable of committing a crime. Capacity is a meta-issue, larger than the elemental issue of whether the accused had committed the *mens rea* and *actus reus* of an offence. The issue becomes one of whether the accused is even capable of forming the requisite intent or even capable, due to their altered mental state, of acting in a voluntary manner. To consider these issues, the law must do much more than get into the mind of the accused to determine intention, the law must get at the root cause of the altered state. This requires, as Justice Dickson explained in *Cooper v R*, [1980] 1 SCR 1149, the use of a legal test with a medical component. It also requires a deep dive into policy, re-focusing the legal issue as a concern for public safety. Criminal responsibility is at the core of capacity. Yet, criminal responsibility and moral blameworthiness become fuzzy concepts when viewed through the medical-legal lens. The perspective becomes even more obscured when the court boldly exclaims that mental disorder (a shorthand for "disease of the mind", see s 2 definition of "mental disorder"), is neither "a term of art" in law or psychiatry (*Cooper* at 1153). Clearly, in considering capacity, the criminal law extends beyond the law and into the medical, social, political and policy spheres.

Age is also a capacity issue, requiring a determination of when a child is incapable of committing a crime. Currently, section 13 of the *Criminal Code* deems the minimum age a person is capable of committing an offence as twelve years (for further discussion see episode 15 of the Ideablawg Podcasts on the *Criminal Code* entitled "Age as a Defence"). This minimum age seems to be a moving target often based more on policy than evidence-based decision-making. For instance, under section 9 of the first *Criminal Code* of 1892, the age for capacity was seven years old. In 1980, it was raised to twelve years with changes to our approach to youthful offenders, where it still stands, despite grumblings by the previous Conservative government to lower the age to ten years of age (this was attempted by a private member's Bill C-68 sponsored by the then Justice Minister Peter McKay in 1999). Age, however, is a binary statutory requirement – either you fall within the criminal law or you do not – purely on the basis of birth date. The other capacity issues I consider in this post require the application of a legal test involving a multitude of factors.

Mental disorder, for instance, and the finding of not criminally responsible by reason of a mental disorder under s 16 of the *Code*, has a long and chequered history in English common law, in statutory amendments to the *Code*, and in case authority. The term "mental disorder" was not used as a defined term in the *Criminal Code* until amendments in 1991. In terms of the legal test outlined under s 16, the only change was one of terminology. Instead of a finding of insanity, the court made a finding of not criminally responsible. This was an attempt to decrease the stigma attached to an insanity finding. Although the shift away from insanity is a welcome attempt to breakdown negative perceptions and stereotypes, in some ways, the name change has simply downloaded the negativity onto the term "mental disorder." In *R v Luedecke*, 2008 ONCA 716, the defence made a compelling argument that the finding of NCRMD is fraught with stereotyping and negative societal labelling. Specifically, the defence argued that Luedecke's disorder of parasomnia not be considered under the NCRMD label due to that stereotyping. In response, Justice Doherty, writing for the Court, found that such a fine distinction was itself founded on stereotyping; by suggesting not all mental disorders are alike, the inference is that some mental disorders are more deserving of the negative NCR label. However, Justice Doherty recommended, at paragraph 117, that the NCRMD label indicate the kind of mental disability

being suffered at the time of the offence to promote "proper labelling." Although this suggestion has not found any traction, it cannot be disputed that the NCRMD label does involve adverse stigmatization of those suffering from, either currently or in the past, with a mental disability. For a broader and more historical discussion on s 16, see my previous article and podcast on the issue here.

The test under s 16 requires two steps. The first step requires a finding that the accused, at the time of the commission of the offence, was suffering from a mental disorder. The second step requires that the accused, as a result of the mental disorder, was, at the time of the offence, incapable of either appreciating the nature and quality of their acts or knowing that the acts were wrong. The step one mental disorder or disease of the mind finding involves the application of the legal test from *Cooper* together with the holistic approach described in the *R v Stone* case ([1999] 2 SCR 290). In *Stone*, Justice Bastarache for the slim 5:4 majority, described a contextual and functional approach to the mental disorder determination. Using the *Cooper* test, which provided a broad-based definition of disease of the mind, Justice Bastarache incorporated three factors that would assist the trial judge in applying the *Cooper* test. The *Cooper* test defines "disease of the mind" as including "any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion" (*Cooper* at 1159).

The holistic approach from *Stone* brings together a number of factors to be considered in the *Cooper* context. Those factors involve considerations of continuing danger, internal cause, and public policy as a mechanism to fulfill the legal and policy objectives of the NCRMD regime. Those objectives emphasize, as indicated by Justice Martin in the Ontario Court of Appeal decision in *Regina v Rabey*, 1977 CanLII 48, the scope of the exemption from criminal responsibility by virtue of mental disorder and the protection of the public "by the control and treatment of persons who have caused serious harms" while in a mentally disordered state. It is this dual concern with scope and public policy that will impact how the law deals with automatism and, in some respects, intoxication. The continuing danger factor reviews the potential risk for societal harm should the accused face the same triggers that initiated the conduct in question. The internal/external cause discussion looks at whether the accused's reaction to those triggers arose from the subjective make-up of the accused as compared with the "normal," or what I prefer to call "ordinary," person or whether it was caused by an extraordinary external event. That inquiry involves a comparison of the accused's reaction to the trigger event and how an ordinary person would react in similar circumstances. Finally, the policy factor emphasizes the objectives of NCRMD and is particularly helpful when the continuing danger factor and internal cause factor are inconclusive (*Stone* at para 218). Policy concerns are an open category depending on the circumstances of the case but are directed at "whether society requires protection from the accused and, consequently, whether the accused should be subject to evaluation under the regime contained in Part XX.1 of the *Code*" (*Stone* at para 218).

I will not discuss here the legal interpretative details for the second step of the s 16 analysis other than to highlight the differences between the two steps. Step one involves a modernization of the *Cooper* test in light of accumulated case law in which the courts were using one factor over another. In contrast, step two involves specific court interpretation of the meaning of the two

prongs such as Chief Justice Lamer's decision, as he then was, in *R v Chaulk*, [1990] 3 SCR 1303, on the meaning of "wrong" in the second prong. Needless to say, step one is a robust "big tent" inquiry that is purposely left broad and encompassing. While step two restricts the exemption from criminal responsibility and confines it to very specific circumstances. In law, we are familiar with such two-step tests such as in the factual and legal tests for causation, where moral blameworthiness seeks to confine the factual outcome (See e.g. *R v Maybin*, [2012] 2 SCR 30).

Stone does not just re-fashion the step one section 16 inquiry, it also considers automatism within that inquiry. The ostensible issue in *Stone* was whether mental disorder automatism should have been left for the jury's consideration. But the real issue was the general legal approach to automatism in light of the high-profile acquittal, upheld by the SCC, in *R v Parks*, [1992] 2 SCR 871. The accused, Parks, who was tried for murder, was acquitted on the basis of parasomnia or sleepwalking as the automatistic event. The acquittal caught the attention of the public and the concern that the door was opened far too wide for further acquittals based on the automatism defence. Justice Bastarache in *Stone*, with *Parks* in mind, created a different approach to automatism, anchored in s. 16 and the mental disorder finding under step one. Recognizing that "automatism may arise in different circumstances" including extreme intoxication, Justice Bastarache created "a single approach to all cases involving claims of automatism" (at para 162). The approach requires two steps with the first step considering whether the claim has an air of reality or evidential foundation. This requires an assertion by the accused that they were acting involuntary, as automatism is a "subset of the voluntariness *actus reus* requirement" (see *Parks* at 896, La Forest J).That assertion must also be supported by expert evidence (*Stone* at para 192). In considering this threshold issue, the trial judge reviews a number of case specific factors (*Stone* at para 192).

Justice Bastarache articulates this first step in the air of reality language, finding the defence will discharge the evidentiary burden where there is "evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities" (at para 192). Yet, the details involved in reaching this conclusion read more like a final determination of the matter. This is particularly so when Justice Bastarache leaves it to the "discretion and experience of trial judges to weigh all of the evidence" (at para 192). This admonishment runs contrary to other SCC descriptions of the air of reality test such as in *R v Cinous*, 2002 SCC 29 (CanLII), in which Bastarache J was a member of the majority. In *Cinous*, the SCC explains "the trial judge does not make determinations about the credibility of the witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences" as those matters are within the province of the trier of fact (at para 54).

In any event, step two of the automatism determination requires the trial judge to decide which form of automatism – non-mental disorder automatism or mental disorder automatism – should be left to the trier of fact in deciding the ultimate substantive issue. Citing a brief filed by the Canadian Psychiatric Association (CPA) on possible revisions to the *Code* on the automatism defence, Bastarache J took "judicial notice that it will only be in rare cases that automatism is not caused by mental disorder" (at para 199). The CPA called for all automatism claims to be classified as mental disorders consistent with the "medical perspective" (at para 198 and for further information see the selected bibliography compiling the information before the House of

Commons on the issue). Thus, step two requires the trial judge to view the automatism through the lens of mental disorder and to delineate on the basis of various factors whether the root cause of the automatistic behaviour arose from mental disorder or from non-mental disorder. This requires the trial judge to determine the issue by applying step one of the s. 16 mental disorder analysis from *Cooper* and the *Stone* holistic approach. Continuing danger concerns, internal cause factors, policy considerations and the objectives behind s 16 would also be relevant. Again, it must be emphasized that it is a legal test to be determined by the trial judge.

Although Justice Hollins references dimensions of the *Stone* decision in her analysis, albeit not by name (see paras 86-87), she does not start with the presumption that the automatism arose from mental disorder. Rather, she goes directly to a non-mental disorder automatism analysis. The closest she gets to implementing the mental disorder inquiry is when she makes conclusionary findings at paragraphs 86 to 87 that the automatism was not internal but externally acquired from the use of drugs. She also finds there is no likelihood of re-occurrence as there was no evidence of the accused had a "particular susceptibility" to the drug (at para 87). Although these may be sound findings based on the evidence, they are conclusions and are not a result of applying the full *Stone* test. For instance, one of the factors in the internal cause analysis is whether a "normal" or "ordinary" person would have reacted similarly to the accused when ingesting the drug. The forensic psychologist agreed he had never seen such a reaction to psilocybin where the person hurt others as opposed to themselves (at para 72). Surely this was evidence to consider in the context of mental disorder and whether the event was as a result of the subjective make-up of the accused, making it more likely it was a mental disorder.

In *R v Luedecke*, 2008 ONCA 716 (Canlii)., Justice Doherty, reaffirms the view of non-mental disorder automatism as "very rare 'one-off' cases'" involving "single incident of automatism...specific external event...unlikely to reoccur and... produced a dissociative state in an otherwise 'normal' person" " (at para 63). He also suggests that the likelihood of recurrence of normal triggering events such as alcohol, fatigue and stress suggests mental disorder. In *R v Bouchard-Lebrun*, [2011] 3 SCR 575, Justice Lebel clarified that the trigger discussion under the internal cause factor considers the "state a normal person might have entered after consuming the same substances in the same quantities as the accused" (at para 71). In the *Brown* case, the evidence supports this as a unique reaction to a drug, particularly considering Brown did not have a similar experience when using it previously. Although, there was also evidence that some type of aggressive behaviour was likely from anyone ingesting the drug. In any event, in terms of continuing danger, the consumption of this kind of drug would not be a "normal triggering event." Considering the knowledge Brown would now have of the terrible effects of the drug, the assumption must be that it will not be a normal or usual part of his lifestyle choices.

The *Stone* approach to automatism, by preferring mental disorder, also furthers the underlying objective of the newly fashioned test that confines and restricts the use of the non-mental automatism to only rare cases. Viewing the automatism issue through the mental disorder lens ensures that non-mental disorder automatism is kept at a minimum; the broader the definition mental disorder becomes, the narrower the range of non-mental disorder scenarios (see *Luedecke*, at paras 60 and 63). This fulfills concerns with scope of the defence and refines the meaning of criminal responsibility. However, the *Stone* approach is cumbersome and overly complex, particularly the so-called air of reality step one. Instead of trying to shoehorn all forms

of capacity under one umbrella, it may be time to open the door even wider and consider diminished responsibility in a larger context in our *Criminal Code*. This, of course, would require a thoughtful and meaningful response by our lawmakers, looking at the entire criminal responsibility structure in the *Code*.

In the end, Justice Hollins did accept the psychologist's evidence that Mr. Brown was not suffering from a mental disorder but again, the finding was a conclusion used to dismiss the relevance of mental disorder in the legal analysis. Although Justice Dickson in *Cooper* recognized the medical "knowledge is directly linked to the legal conclusion" in arriving at whether a disease of the mind or mental disorder is a factor, he also acknowledged that medical and legal perspectives can differ. In other words, the psychiatrist or psychologist may describe the mental state but it is for the judge to decide whether the condition is a disease of the mind by applying the legal/policy test. Disease of the mind is a "legal term" not a medical one. The ultimate decision rests with the judge.

The other main concern with Justice Hollins legal analysis in this case is her treatment of intoxication. The decision does carefully summarize some of the issues with intoxication as a defence. Historically, intoxication was not a defence except in very limited circumstances dependent on the type of offence. Intoxication, according to this compendium of case law, could be a defence to a specific intent offence but not a general intent offence. Although the distinction between specific and general intent is itself an issue, the categorization has been retained for the applicability of intoxication. Justice Moldaver in the *R v Tatton* 2015 SCC 33 (CanLII) expands on the meaning and purpose of the distinction. Specific intent offences, like murder, are those offences that have a "heightened mental element" or an ulterior intent and/or tend to require more complex cognition (at para 28 and paras 37-39). In contrast, general intent offences, such as assault, require minimal thought processes and "little mental acuity" (at paras 35-36). This explains why intoxication by a mind-altering drug would be relevant to the intention to commit an offence requiring more complex thinking.

Justice Moldaver made further observations on the policy dimension of the categorization while commenting on the self-induced nature of the defence. For instance, the fact it applies only to specific intent offences, which typically have lesser and included general intent offences, means some type of criminal sanctioning would be available upon conviction (at para 44). In other words, there would not be a full acquittal as intoxication does not apply to general intent offences. The accused would still be held criminally responsible for their self-induced actions. Justice Moldaver also noted there were compelling policy considerations for restricting intoxication as a defence considering alcohol "habitually" plays roles in crimes involving violence (at para 43). In *Brown* the evidence suggests violence to others is not regularly connected to use of the psilocybin drug, although it is a well-known behaviour-altering drug.

That is not the end of the intoxication analysis. In *Brown* we are concerned with extreme intoxication akin to automatism. On that issue, the majority of the SCC in the *R v Daviault* decision ([1994] 3 SCR 63) found the common law principle foreclosing the application of extreme intoxication to general intent offences violated s 7 of the *Charter* as it permitted the voluntary consumption of alcohol to substitute for the fault element required by the offence. Despite this finding, Parliament moved quickly to counteract *Daviault* and provide a statutory

prohibition under s 33.1 of the *Code* confining any intoxication defence, extreme or otherwise, to specific intent offences only. It is this section which was found unconstitutional in the pre-trial motion before Justice de Witt in *Brown* and why, therefore, extreme intoxication could be considered as a defence for the offences, both of which require general intent. For further reading on this issue, my previous podcast/article on "Section s 33.1 and How Intoxication Became a Form of *Mens Rea*" that can be accessed here.

I will not discuss or analyze the *Charter* decision other than to comment that there are inconsistent decisions on the issue across the country. In Ontario, the question received differing treatment at the Superior Court level and on October 9 of 2019, the Ontario Court of Appeal considered the issue as raised in *R v Chan*, 2018 ONSC 3849 and 2019 ONSC 783, which is now on reserve. Interestingly, in *Chan* (see the trial decision 2018 ONSC 7158) the accused was also a young person using magic mushrooms with tragic results. Like Brown, Chan had used the drug in the past and "enjoyed" the experience (at para 1). He was well liked and had no previous aggressive tendencies. Although originally charged with murder and attempt murder, the Crown, likely on the basis of extreme intoxication, sought convictions for the general intent offences of manslaughter and aggravated assault. Justice Boswell considered s. 16 as raised by the defence (Chan also had cognition impairment due to previous concussion). The mental disorder defence was based on "the interplay between the drugs ingested by Mr. Chan and his underlying brain vulnerability" (*Chan* at para 104). Justice Bowell found the accused was suffering from a mental disorder at the time of the offence but that he was not rendered incapable of knowing his acts were wrong. Chan was convicted.

Leaving the constitutionality aside, even if extreme intoxication did not foreclose an automatism defence in the *Brown* case, there are still principles underlying the law on intoxication as it connects to automatism and mental disorder that are relevant. For instance, as already mentioned, extreme intoxication akin to automatism should be approached through the *Stone* steps including a real discussion on whether, in light of the objectives of the law on mental disorder, the automatism arises from a disease of the mind per the legal test. But there is a further issue relating to the intersection of intoxication and automatism that is not fully explored in the *Brown* judgment. That further issue relates back to the self-induced or voluntary nature of the intoxication itself – not in terms of the *mens rea* substitution as outlined by Justice Hollins – but in terms of whether an accused is foreclosed from relying on an automatism defence grounded in self-induced intoxication based on voluntariness principles.

At paragraph 21, Justice Hollins acknowledges the voluntary act issue arising from the case when she references the 1983 English Court of Appeal decision in *R v Bailey*, [1983] 2 ALL EWCA Crim 2. In that case, the accused experienced a hypoglycemic episode from a known diabetic condition resulting in a violent attack. Prior to the episode, the accused started feeling unwell and asked for sugar and water in an effort to raise his glucose levels. Ten minutes later the attack occurred. The defence posited that the accused was in a state of impaired consciousness due to a hypoglycemic episode. The evidence was that the accused earlier in the day likely did not have enough food to eat to counterbalance his insulin shot and that is why his glucose level decreased to a dangerous level. The prosecution further contended that the accused was upset and jealous due to the victim's relationship with his girlfriend. At trial, the trial judge charged the jury that if the incapacity was self-induced, automatism did not apply. The Court of

Appeal dismissed the appeal for various reasons but noted the trial judge's charge on the issue was in error by suggesting the accused's failure to eat enough food foreclosed the automatism defence. This factually is a much different situation than the one faced in *Brown*, which involves a clear case of taking an intoxicant knowing that it was a mind-altering substance. Of course, on Brown's evidence he did not know he would have a "bad trip." This knowledge is important. There is ample Canadian authority for the proposition that an involuntary act becomes a "voluntary" one if the accused was aware of a situation that could result in an involuntary prohibited act, yet chooses to do the act despite the knowledge. This is reflected not only in case law but in the model jury instructions for non-mental disorder automatism on the National Judicial website. Recall that this instruction would occur after the trial judge decides which form of automatism would be left with the jury. In this case, the decision would be to leave non-mental disorder automatism.

The model jury instruction starts with the cautionary tone found in *Stone* emphasizing how automatism is "easily feigned" and "all knowledge of its occurrence rests with the accused." After instructing the jury on the non-mental disorder factors pursuant to *Stone* such as the severity of the trigger stimulus, evidence of bystanders, medical history, motive and whether the person who triggered the event is the victim, the model instructions proceed to a second step, not entered into in the *Brown* decision. This second part of the instruction requires the jury to consider whether the accused "did foresee or should have foreseen that he would enter into an automatistic state." If the answer is "yes," then the defence of automatism does not apply.

The footnote in the model instruction indicates "although it is settled that automatism is not available as a defence where it results from the accused's "fault or negligence", the extent of the risk that must be foreseeable or foreseen is not settled." In support, the footnote references three cases. The first, is the SCC decision in *Rabey v R*, [1980] 2 SCR 513, the classic automatism case arising from a psychological blow, decided before *Stone* and its mental disorder preference. In *Rabey*, at page 552, Justice Dickson, in dissent, suggests that "in principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence of his part." The second case is *R v Grant*, 1993 CanLII 2479 (BCCA), where the Appellant was convicted of criminal negligence causing bodily harm resulting from a driving incident when he was experiencing an epileptic episode. Although the Appellant experienced episodes before, they were all nocturnal and therefore the episode at the time of the driving was unanticipated. However, the Appellant was advised by his physician not to drive due to his condition. The trial judge, therefore, correctly found the Appellant could not rely on the defence of automatism. The BCCA in *R v Jiang*, 2007 BCCA 270 at para 22, reiterated the significance of prior knowledge of a vulnerability, such as parasomnia, could preclude the application of the automatism defence.

Applying this line of authority to *Brown*, Mr. Brown's previous experience with the drug was "positive." However, the taking of an illegal mind-altering drug places Mr. Brown in a different position than those cases where the accused experiences an unexpected medical condition or takes all steps required to ensure the condition does not occur. As both medical experts opined in *Brown*, "it was reasonably foreseeable that a person who is disoriented and paranoid could

become aggressive" (at para 72). The circumstances in *Brown* may fulfill the knowledge requirement, foreclosing the availability of the defence.

Finally, it is helpful to review the 2010 Quebec decision of *R c YS*, 2010 QCCQ 2558, involving dangerous driving and criminal negligence charges arising from an epileptic attack while driving. This is a good example of how the Court should apply the *Stone* decision where the defence of automatism is raised. In *YS*, the trial judge considered whether epilepsy was a disease of the mind (at paras 78-81) and then considered whether the accused's automatic reaction would be one expected from a "normal" person in the same situation (at para 82). The court found the trigger was internal and involved the accused's own internal subjective make up making the automatism more likely from a disease of the mind. The court then applied public policy protection of the public concerns pursuant to *Stone* and *Luedecke*, where Justice Doherty found the trial judge erred by not applying the *Stone* approach to an automatism sexsomnia defence (*YS* at para 94). The trial judge in *YS* concluded the accused was not criminally responsible pursuant to s 16 of the *Code* (at para 95). It should also be mentioned that in the SCC decision of *R v Bouchard-Lebrun*, [2011] 3 SCR 575, Justice Lebel, in dismissing the mental disorder automatism argument raised by the Appellants for general intent offences in which they were experiencing drug-induced toxic psychosis, noted that the exclusion of transitory states from a s. 16 consideration is not "absolute" and can be rebutted by evidence that the psychosis did not "exclusively" arise from the self-induced intoxication (see paras 69 and 76). To properly determine this however, the court must look at the whole of the evidence and apply the *Stone* analysis in its entirety.

It may be that in *Brown* the same result might be arrived at even with the application of the legal considerations I have outlined above. Factually, it was a tragic event for everyone involved. The victim's life was changed forever and no doubt the incident will haunt the accused as well. Legally, the case raises issues of criminal responsibility in the context of very complex incapacity issues. Over and above these legal issues, are the public policy concerns involving blameworthiness and voluntary consumption of intoxicants. Finally, the case stands as an example of the inadequacies in the law to deal with complex intersecting issues and the concern we may all share with the incapacity of the criminal law to adequately and fairly deal with the self-induced but extremely intoxicated accused.

This post may be cited as: Lisa Silver, "Does the Criminal Law Have the Capacity to Respond to the Intoxicated Automaton?" (March 13, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/03/Blog_LS_Brown.pdf