

***Bouchard-Lebrun*: Unduly Limiting Toxic Psychosis and Reigniting the Dangerous Intoxication Debate**

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*Bouchard-Lebrun*¹ confronts the challenging counter-forces at the confluence of mental disorder and extreme intoxication. The courts must consider the essential criminal law function of the protection of the public, but cannot sacrifice, at least too readily, the principle that “it would be unfair in a democratic society to impose the consequences and stigma of criminal responsibility on an accused who did not voluntarily commit an act that constitutes a criminal offence.”² In the case of mental disorder, the verdict of not criminally responsible with its special dispositional regime “gives effect to society’s interest in ensuring that morally innocent offenders are treated rather than punished, while protecting the public.”³ The public’s concern that voluntarily intoxicated accused, particularly those charged with violent crimes, not escape punishment even where their actions may be unintended and involuntary, has produced a complex and, at times, conflicted common law, constitutional and statutory regime.

Bouchard-Lebrun deals with an accused “while he was in a psychotic condition caused by chemical drugs he had taken”⁴ and reviews “the respective scopes of the insanity defence and the defence of self-induced intoxication.”⁵ It concludes, perhaps somewhat artificially in the context of substance-induced psychosis, that the defences “are two distinct legal concepts,” with “different logics,” their “own principles”⁶ and “mutually

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¹*R. c. Bouchard-Lebrun*, 2011 SCC 58 (S.C.C.), reported *ante* at p. xxx, at para. 45 [*Bouchard-Lebrun*].

²*Ibid.*

³*Ibid.*, at para. 52.

⁴*Ibid.*, at para. 2.

⁵*Ibid.*, at para. 1.

⁶*Ibid.*, at para. 36.

exclusive applications.”⁷ The net result of *Bouchard-Lebrun* will be a narrowing of the availability of either defence in many instances. A reconstruction by the courts or Parliament of some of its underlying assumptions on toxic psychosis would suggest a different outcome. A careful evaluation of its conclusion on the intoxication defence would also commend new public policy directions.

Although the reasoning of *Bouchard-Lebrun* will no doubt occasion considerable reflection, this comment will consider just two of its many implications. The Supreme Court’s analysis of toxic psychosis will be scrutinized for the logic of its restrictions on the defence of mental disorder in light of recent research on the diagnostic fluidity and general instability surrounding this condition. Next, given the denial of the extreme intoxication defence to this accused, *Bouchard-Lebrun* will be portrayed as an authority which should spark a renewed interest in considering the creation of novel intoxication offences, despite the pessimistic verdict of some commentators that “[t]he time may have passed for general reforms”⁸ in the area.

Toxic Psychosis in *Bouchard-Lebrun*: The Wrong Cause for This Accused

The two psychiatrists who testified in *Bouchard-Lebrun* differed in their analyses of the accused’s severe psychosis. The defence expert stated that his drug taking and state of mind were artifacts of a friend’s controlling influence, while the Crown’s witness disagreed, attributing everything to a “psychosis caused by a consumption of toxic substances.”⁹ Having accepted the latter opinion, the trial judge rejected the mental disorder defence, leaving the accused only with self-induced intoxication, which, owing to the operation of s. 33.1 of the *Criminal Code*, cannot be used to excuse “an offence against the bodily integrity of another person.”¹⁰ The Supreme Court ratified these conclusions, concentrating on the “identification of the source of the psychosis [playing] a key

⁷*Ibid.*, at para. 37.

⁸Kent Roach, *Criminal Law*, 4th ed (Toronto: Irwin Law, 2009) at 255.

⁹*Bouchard-Lebrun*, *supra*, note 1, at para. 13.

¹⁰*Ibid.*, at para. 14.

role”¹¹ in determining criminal responsibility. In its view, “*Cooper*’s ‘exclusion of self-induced states caused by alcohol or drugs’ from the ambit of s. 16”¹² of the *Criminal Code* meant that “a toxic psychosis caused exclusively by a single episode of intoxication”¹³ precluded the application of the mental disorder provision, which was “not intended to apply to accused persons whose temporary madness was induced artificially by a state of intoxication.”¹⁴ The accused’s argument that “toxic psychosis must always be considered a ‘mental disorder’”¹⁵ was comprehensively rejected as too broad and “unwise,” “[b]ecause of the heterogeneous nature of the circumstances” in which this condition “may be medically diagnosed.”¹⁶ However, *Bouchard-Lebrun* heavily depends upon the diagnosis of substance-induced psychosis being both initially and longitudinally reliable. The Court did acknowledge that other cases might be decided differently depending on the weight of several variables which actually *could* have been present here in a manner which would have supported the invocation of the mental disorder defence.

First, the decision refers to the internal cause factor in *Stone*¹⁷ and points to matters which were interpreted adversely for this accused: “variations in psychological makeup and psychological histories”; “quantity and toxicity of drugs”¹⁸; the state of a normal person “after consuming the same substances in the same quantities”; and “the circumstances in which the accused consumed the drugs.”¹⁹ Similarly, on *Stone*’s continuing danger factor, the Supreme Court decided that the mental disorder defence would apply only if the danger arose “again independently of the exercise of the will of the accused”²⁰ and not merely due to a threat “volunta-

¹¹*Ibid.*, at para. 38.

¹²*Ibid.*, at para. 42. *Cooper v. R.* (1979), 13 C.R. (3d) 97 (S.C.C.).

¹³*Ibid.*, at para. 64.

¹⁴*Ibid.*, at para. 84.

¹⁵*Ibid.*, at para. 65.

¹⁶*Ibid.*, at para. 68.

¹⁷*R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.) [*Stone*].

¹⁸*Bouchard-Lebrun, supra*, note 1.

¹⁹*Ibid.*, at para. 72.

²⁰*Ibid.*, at para. 74.

rily *created* by the accused in the future by consuming drugs.”²¹ Finally, in *Bouchard-Lebrun* the expansive “other policy concerns” of *Stone* did not sustain the mental disorder defence where there was no pre-existing condition of the accused requiring treatment.²² Mr. Bouchard-Lebrun was thought to have failed on all measures, as his psychosis resulted “*exclusively* from self-induced intoxication,” rather than his “inherent psychological makeup.”²³

At least the Court accepted that their “legal characterization” of an accused’s mental condition could be different (and “much more difficult”²⁴) in cases where the facts pointed to other inferences regarding their policy template and especially where the mental condition of the accused indicated “an underlying mental disorder,”²⁵ a situation which will be shown to be relatively common.

Toxic Psychosis Re-examined

All levels of court in *Bouchard-Lebrun* rested their judgments on the assumed precision and dependability of the toxic psychosis diagnosis. These premises are mistaken. Substance-induced psychosis is an area of psychiatry where it is notoriously difficult to make authoritative general pronouncements and to apply any criteria firmly in individual cases over time. While resisting the tendency to attribute dangerousness to every person with mental health problems, it will be shown that a recurrence of psychotic symptomatology in parallel circumstances is not infrequent, even if the initial diagnosis appears to suggest a single occurrence due to drug taking. It will also become evident that many individuals, with no apparent morbidity at the time of the substance ingestion, nonetheless subsequently require treatment after experiencing toxic psychosis.

The overall problem with the analysis of the Supreme Court is that quite often the diagnosis of toxic psychosis and its long-term sustainability are simply not buttressed by contemporary studies. In more cases than *Bouchard-Lebrun* admits, many accused showing signs of a substance-

²¹*Ibid.*

²²*Ibid.*, at para. 75.

²³*Ibid.*, at para. 85.

²⁴*Ibid.*, at para. 86.

²⁵*Ibid.*

induced disorder will actually be responding to internal forces, will possibly be a continuing danger as psychotic episodes may recur later and will thus actually comport with the reasons for permitting the mental disorder defence under “other policy factors.”

Bouchard-Lebrun properly reiterates resistance to the medicalization of legal concepts such as “disease of the mind,” which have “a medical dimension,”²⁶ especially since “medical experts generally take no account of the policy component”²⁷ of the s. 16 analysis. Notwithstanding this caveat, a closer look at some recent research suggests that the Supreme Court may have been unduly restrictive in its study of the policy dimensions of *Stone* as they apply to toxic psychosis. The eagerness to exclude claimants of the mental disorder defence who experience a substance-induced psychosis is more significant given the very widespread consumption of substances: “substance use disorders constitute a tremendous medical and social challenge.”²⁸

Bouchard-Lebrun, like most appellate cases, was decided on its specific facts, although it also aspires to illuminate the breadth of two perennially controversial defences. The parsimonious assumptions about diagnostic certainty and stability make its policy pronouncements less reliable. Criminal cases are not boards of inquiry or Royal Commissions and they are mainly left to rely upon the experts who testify before them. However, particularly where the courts have to confront such complex issues as the toxic psychosis diagnosis, their conclusions should be revisited extra-judicially by stakeholders committed to law reform.

The basic symptoms of “substance-induced psychotic disorder” [SIPD], established in 1992, demand “prominent hallucinations or delusions”; evidence of the foregoing symptoms developing “during, or within a month of, Substance Intoxication or Withdrawal”; “[t]he disturbance is not better accounted for by a Psychotic Disorder that is not substance induced” and “does not occur exclusively during the course of a delirium.”²⁹ The

²⁶*Ibid.*, at para. 61.

²⁷*Ibid.*

²⁸Avram Mack & Richard J. Frances, “Substance-Related Disorders” (2003) 1(2) FOCUS 125.

²⁹American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, text revision (Washington, DC: A.P.A., 2000) at 342 [DSM-IV-TR].

certainty of the application of this diagnosis has been debated because of a number of complicated factors, such as the “link between adolescent cannabis use and the development of psychosis in early adulthood,” “the escalating use of methamphetamine worldwide” and the “high rates of co-occurring substance use disorders (SUDs) among individuals with a psychotic illness.”³⁰ Some researchers have concluded that the DSM-IV-TR criteria above are too narrow and exclude “a significant number of potential SIPD cases,”³¹ suggesting that the toxic psychosis diagnosis is not wholly satisfactory from a clinical, or presumably public policy, perspective in the first place.

Other data has established that a substance-induced disorder diagnosis is neither certain nor stable, with a significant proportion (25%) changing “from a substance-induced psychosis at baseline to primary psychotic disorder at the 1-year follow-up.”³² Indeed, further undermining the use of the *Stone* criteria of internal cause and of continuing danger in *Bouchard-Lebrun*, these authors observed that “surprisingly little is known about longitudinal stability and change in psychotic disorders with alcohol or drug use.”³³ Even more problematically, they show that some toxic psychosis cases “might have actually been primary psychotic disorders that were misdiagnosed.”³⁴

Additional studies echo this skepticism, concluding “that many young people who present with what appears to be a drug-induced psychosis may develop a schizophrenia-like disorder.”³⁵ More recent research confirms this lability in diagnosis and hence causes additional doubt about the *Bouchard-Lebrun* assumptions which have limited toxic psychosis

³⁰Steve Mathias, Dan I. Lubman & Leanne Hides, “Substance-Induced Psychosis: A Diagnostic Conundrum” (2008) 69:3 J. Clin. Psychiatry 358.

³¹*Ibid.*, at 362.

³²Carol Caton, D.S. Hasin, P.E. Shrout, R.E. Drake, B. Dominguez, M.B. First, S. Samet & B. Schanzer, “Stability of early-phase primary psychotic disorder with concurrent substance use and substance-induced psychosis” (2007) 190 British Journal of Psychiatry 105 at 110.

³³*Ibid.*, at 105.

³⁴*Ibid.*, at 110.

³⁵Kathleen Crebbin, Emma Mitford, Roger Paxton & Douglas Turkington, “First episode drug-induced psychosis: a medium term follow up study reveals a high risk group” (2009) 44 Soc Psychiatry Psychiatric Epidemiology 710 at 714.

being seen as a mental disorder: “many individuals diagnosed with drug-induced psychosis are further diagnosed as having a functional psychosis, usually schizophreniform in nature.”³⁶ These researchers concluded that “a significant proportion of patients presenting with apparent drug-induced psychosis experience long-term mental health problems,” suggesting that “psychosis should be attributed to drug misuse with caution and that *the expectation that further episodes can necessarily be prevented solely through avoidance of drug misuse is unrealistic in a high proportion of cases.*”³⁷ Another 2011 study reports consistent findings: “People who experience a substance-induced psychosis have high rates of substance dependence and are vulnerable to subsequent psychotic episodes and more chronic psychotic states.”³⁸ Moreover, the same research corroborates the fragility of SIPD: “one fifth of the patients who were initially diagnosed as having substance-induced psychosis” “subsequently were re-diagnosed as having primary psychosis,” “while abstinent from substances of abuse.”³⁹

Psychiatry is an inexact science. The opportunities for either diagnostic error or incomplete development of diagnostic frameworks are amplified when dealing with the influence of substances and particularly modern trends of polysubstance abuse, as in this case. As the DSM-IV-TR itself says, “the term *mental disorder* unfortunately implies a distinction between ‘mental’ disorders and ‘physical disorders’ that is a reductionistic anachronism of mind/body dualism,”⁴⁰ *a fortiori* when a case involves psychosis caused by or associated with substances.

Reviving the Dangerous Intoxication Debate

In *Bouchard-Lebrun*, having rejected the accused’s contention that his toxic psychosis amounted to a qualifying mental disorder, the decision

³⁶Aravind Komuravelli, Rob Poole & Robert Higgo, “Stability of the diagnosis of first-episode drug induced psychosis” (2011) 35 *The Psychiatrist* 224 (Abstract).

³⁷*Ibid.*, at 227 [Emphasis added].

³⁸Robert Drake et al., “A Prospective 2-Year Study of Emergency Department Patients with Early Phase Primary Psychosis or Substance-Induced Psychosis” (2011) 168:7 *Am. J. Psychiatry* 742 at 743.

³⁹*Ibid.*, at 747.

⁴⁰DSM-IV-TR, *supra*, note 29, at xxx.

then excludes him from the extreme intoxication defence, owing to s. 33.1 of the *Criminal Code*, which determines that his substance-derived condition cannot avail such violent offenders. Don Stuart is no doubt right in chiding the Court⁴¹ for refusing to consider any *Charter* dimension of this provision. Indeed, this is the second occasion that the Supreme Court has had to consider the broader implications of the section. Previously, *Daley*⁴² made short shrift of it, curtly determining that extreme alcohol-induced intoxication would be “extremely rare, and by operation of s. 33.1 of the *Criminal Code*, limited to non-violent types of offences.⁴³ It appears that a form of osmotic constitutionalization has occurred, which provides no firm guidance on the status of s. 33.1, other than to indicate that *Charter* arguments are probably non-starters. However, constitutionality aside, surely the conviction of this accused “in a serious psychotic condition,”⁴⁴ a “severe psychosis that made him incapable of distinguishing right from wrong,”⁴⁵ should cause some reconsideration in the Bar and Parliament of the otherwise dormant debate about the intoxication defence.

Notwithstanding the accused’s florid psychosis, the Supreme Court readily determined that “there is no threshold of intoxication beyond which s. 33.1 does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision.”⁴⁶ Given that the decision simultaneously confirms that “the principles of *Daviault*⁴⁷ still represent the state of the law in Canada,”⁴⁸ subject to s. 33.1, it seems an appropriate time to consider other ways of responding to the doctrinal dissonance inherent in convicting someone of a substantive offence simpliciter, when the accused was so profoundly detached from reality.

⁴¹Annotation of *Bouchard-Lebrun*, reported *ante* at p. xxx.

⁴²*R. v. Daley*, 2007 SCC 53, 52 C.R. (6th) 221 (S.C.C.) [*Daley*].

⁴³*Ibid.*, at para. 43.

⁴⁴*Bouchard-Lebrun*, *supra*, note 1, at para. 10.

⁴⁵*Ibid.*, at para. 13.

⁴⁶*Ibid.*, at para. 91.

⁴⁷*R. c. Daviault* (1994), 33 C.R. (4th) 165, [1994] 3 S.C.R. 63 (S.C.C.) [*Daviault*].

⁴⁸*Bouchard-Lebrun*, *supra*, note 1, at para. 35.

It is fair to concede from a *realpolitik* perspective that it would be publicly unacceptable for a violent accused to be completely exonerated. Moreover, it should be acknowledged that 2012 is not a propitious time to engage in any law reform process in Canada that does not accord with the retributive mood that currently infuses government criminal justice policy. Nonetheless, alternatives to the acceptance of the *Daviault* extreme intoxication defence have been mooted for more than two decades and a revisitation of that national conversation should be in order after *Bouchard-Lebrun*. Perhaps the most realistic option which remains may be some variation of the alternative identified in *Daviault*: “it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk.”⁴⁹

As Kent Roach summarizes the choices, “Parliament could have provided a new offence of being ‘drunk and dangerous’, committing harm while extremely intoxicated, or committing a specific wrongful act while extremely intoxicated.”⁵⁰ These types of legislative response contemplate both the harm caused by the substance-abusing offender and his or her moral culpability in reducing him/herself to that state and enable some level of punishment to be imposed. Morris Manning and Peter Sankoff have admitted that “it is unclear that this would be a panacea, and it might possess constitutional weaknesses of its own.”⁵¹ As Eric Colvin and Sanjeev Anand have reminded us, the argument for the exclusion of the current intoxication rules “has often been coupled with the advocacy of the legislative creation of new offences which would cover the commission of criminal acts while in a state of self-induced intoxication.”⁵²

There are doubters about the viability of this option. For example, Don Stuart observes, “[a]s a matter of policy there is still room for concern,”⁵³ pointing to the possible greater willingness “to settle for the lesser offence,” the unacceptability of failing to apply a label to the of-

⁴⁹*Daviault, supra*, note 47, at para. 68.

⁵⁰Roach, *supra*, note 8, at 240.

⁵¹Morris Manning & Peter Sankoff, *Criminal Law*, 4th ed (Markham: Lexis-Nexis, 2009) at 396.

⁵²Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed (Toronto: Carswell, 2007) at 469.

⁵³Don Stuart, *Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2007) at 462.

fender that highlights the actual nature of his/her criminality, the pretense that “criminal responsibility here is anything other than absolute responsibility” and the problem with the penalty being “considerably less” as a result.⁵⁴

Stuart and others tender serious objections to any such offence, but there are some plausible rejoinders. Tim Quigley was an early Canadian proponent⁵⁵ and recently he has provided a variant in which he posits at least partial answers to these concerns.⁵⁶ For instance, he contends that such an offence should “operate as a lesser included offence but not one for which a plea bargain could be made”⁵⁷ and that the substantive offence could be listed “parenthetically in the conviction of dangerous intoxication.”⁵⁸ Quigley also suggests a focus on treatment, as supplementing any available imprisonment, given the likelihood that “someone reaching a severe state of intoxication does require treatment” for a range of issues.⁵⁹

None of the foregoing is meant to suggest that there would not still be a lively debate if Canada began moving towards some variation of a dangerous intoxication offence. What is lamentable about the status quo exemplified by *Bouchard-Lebrun* is that the country seems willing to countenance the conviction and punishment of offenders who are admittedly entirely unaware of the moral and legal significance of their actions, owing to a level of intoxication which is so extreme that everyone agreed that his condition truly amounted to a form of insanity.

Conclusion: A Case Study . . . For Further Study

The horrific violence of Mr. Bouchard-Lebrun took place in October 2005, now more than six years ago. His trial, in 2008, had two experts

⁵⁴*Ibid.*, at 464.

⁵⁵Tim Quigley, “Reform of the Intoxication Offence” (1987) 33 (1) McGill L.J. 1.

⁵⁶Tim Quigley, “The Persistence of Prior Fault: The Defence of Intoxication in Canada”, online: University of Pennsylvania Law School <www.law.upenn.edu/academics/institutes/ilp/actiolibera/papers/secure/QuigleyPersistenceofPriorFault.pdf>.

⁵⁷*Ibid.*, at 45.

⁵⁸*Ibid.*, at 46.

⁵⁹*Ibid.*

testify who were in agreement that the accused was suffering a severe psychosis rendering him “incapable of distinguishing right from wrong.”⁶⁰ At the Supreme Court, there were two provincial interveners and no one from professional associations or non-governmental organizations. In contrast, *Parks*,⁶¹ the 1992 case wherein the boundaries of the involuntariness and mental disorder were explored, heard from five physicians, all there for the accused: “A large part of the defence evidence in this case was medical evidence.”⁶² In *Swain*,⁶³ the 1991 decision that resulted in the wholesale renovation of the dispositional provisions in mental disorder cases, the five interveners included the Canadian Disability Rights Council, the Canadian Mental Health Association and the Canadian Association of Community Living. The point here is that Mr. Bouchard-Lebrun did not benefit from a more extensive participation of experts at trial nor of interveners on appeal. The public policy issues eventually canvassed at the Supreme Court may have been better elucidated with such a broader range of evidence and argument.

As it stands, *Bouchard-Lebrun* may have a negative impact on the trajectory of development of both the mental disorder and the intoxication defences, particularly at the fraught nexus of toxic psychosis and extreme intoxication. There will be some tendency for otherwise valid claims of substance-induced psychosis to be discouraged. The indirect ratification of the s. 33.1 limits on the *Daviault* principles could suppress further debate on the proper public policy response to the extremely intoxicated offender.

The antidote to the reification of an unsatisfactory status quo is not likely to come, at least immediately, from government. Organizations such as the Canadian Bar Association, the Canadian Psychiatric Association, the Canadian Mental Health Association, the Schizophrenia Society of Canada and the Mental Health Commission of Canada, might assist in promoting a contemporary and cautious revisitation of the potential rigidity, unreceptiveness and even inaccuracy of *Bouchard-Lebrun*. Otherwise, both toxic psychosis and extreme intoxication may be petrified in amber and the stage will have been set for further imposition of unqualified

⁶⁰*Bouchard-Lebrun*, *supra*, note 1, at para. 13.

⁶¹*R. v. Parks*, [1992] 2 S.C.R. 871, 15 C.R. (4th) 289 (S.C.C.).

⁶²*Ibid.*, at page 20.

⁶³*R. v. Swain*, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253 (S.C.C.).

punishment for crimes where, as noted before, “it would be unfair in a democratic society to impose the consequences and stigma of criminal responsibility on an accused who did not voluntarily commit an act.”⁶⁴ Psychosis involves “a distorted or nonexistent sense of objective reality,”⁶⁵ a profound thought disturbance “that prevents people from understanding the difference between the real world and the imaginary world.”⁶⁶ Surely it is time for Canadian criminal law to fairly respond to the fundamentally altered reality of people who commit offences while experiencing substance-induced psychosis.

⁶⁴*Bouchard-Lebrun, supra*, note 1, at para. 45.

⁶⁵Farlex, “Psychosis” online: The Free Dictionary <<http://medical-dictionary.thefreedictionary.com/psychosis>>.

⁶⁶The Canadian Psychiatric Association and the Schizophrenia Society of Canada, “Schizophrenia: The Journey to Recovery: A Consumer and Family Guide to Assessment and Treatment” online: <<http://publications.cpa-apc.org/browse/documents/67>>, at p. 41.