

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Bouchard-Lebrun, 2011 SCC 58, [2011] 3 S.C.R. 575 | **Date:** 20111130**Docket:** 33687 |

**Between:**

**Tommy Bouchard-Lebrun**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Canada and Attorney General of Ontario**

Interveners

**Official English Translation**

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**(paras. 1 to 92) | LeBel J. (McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring) |

R. *v.* Bouchard‑Lebrun, 2011 SCC 58, [2011] 3 S.C.R. 575

Tommy Bouchard‑Lebrun *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada and Attorney General

of Ontario *Interveners*

**Indexed as: R. *v.* Bouchard‑Lebrun**

2011 SCC 58

File No.:  33687.

2011:  May 16; 2011:  November 30.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for quebec

 *Criminal law — Defences — Mental disorder — Accused assaulting two individuals while in state of toxic psychosis resulting from voluntary consumption of drugs — Whether toxic psychosis whose symptoms are caused by state of self‑induced intoxication can be “mental disorder”* *— Whether s. 33.1 of Criminal Code limits scope of defence of not criminally responsible on account of mental disorder — Criminal Code, R.S.C. 1985, c. C‑46, ss. 16, 33.1.*

B brutally assaulted two individuals while he was in a psychotic condition caused by drugs he had taken a few hours earlier. As a result of these incidents, B was charged with aggravated assault. The trial judge convicted B on the basis that all the elements of s. 33.1 of the *Criminal Code* (“*Cr. C.*”), which provides that self‑induced intoxication cannot be a defence to an offence against the bodily integrity of another person, had been proven beyond a reasonable doubt. B then tried unsuccessfully on appeal to obtain a verdict of not criminally responsible on account of mental disorder under s. 16 *Cr. C.* The Court of Appeal held that s. 33.1 *Cr. C.* applied in this case.

 *Held*: The appeal should be dismissed.

 A court must consider the specific principles that govern the insanity defence in order to determine whether s. 16 *Cr. C.* is applicable. If that defence does not apply, the court can then consider whether the defence of self‑induced intoxication under s. 33.1 *Cr. C.* is applicable if it is appropriate to do so on the facts of the case*.* Intoxication and insanity are two distinct legal concepts.

 An accused who wishes to successfully raise the insanity defence must meet the requirements of a two‑stage statutory test. The first stage involves characterizing the mental state of the accused. The key issue to be decided at trial at this stage is whether the accused was suffering from a mental disorder in the legal sense at the time of the alleged events. The second stage of the defence provided for in s. 16 *Cr. C.* concerns the effects of the mental disorder. At this stage, it must be determined whether, owing to his or her mental condition, the accused was incapable of knowing that the act or omission was wrong. In the instant case, it is not in dispute that B was incapable of distinguishing right from wrong at the material time. Therefore, the only issue in this appeal is whether the psychosis resulted from a “mental disorder” within the meaning of s. 16 *Cr. C.*

 Toxic psychosis does not always result from a “mental disorder”. In *Stone*, Bastarache J. proposed an approach for distinguishing toxic psychoses that result from mental disorders from those that do not. This approach is structured around two analytical tools, namely the internal cause factor and the continuing danger factor, and certain policy considerations.

 The internal cause factor, the first of the analytical tools, involves comparing the accused with a normal person. The comparison between the accused and a normal person will be objective and may be based on the psychiatric evidence. The more the psychiatric evidence suggests that a normal person, that is, a person suffering from no disease of the mind, is susceptible to such a state, the more justified the courts will be in finding that the trigger is external. Such a finding would exclude the condition of the accused from the scope of s. 16 *Cr. C.* The reverse also holds true.

 In this case, the application of the first factor suggests that the drug-taking is an external cause. It seems likely that the reaction of a normal person to taking drugs would indeed be to develop toxic psychosis. This strongly suggests that B was not suffering from a mental disorder at the time he committed the impugned acts. And the rapid appearance of psychotic symptoms generally indicates that B’s delusions can be attributed to an external factor. In addition, the psychotic symptoms B experienced began to diminish shortly after he took the drugs and continued to do so until disappearing completely. The Court of Appeal held that the disappearance of the symptoms showed that the symptoms of toxic psychosis coincided with the duration of B’s intoxication. It could thus say that B suffered from no disease of the mind before committing the crimes and once the effects of his drug-taking had passed. There is no valid reason to depart from this conclusion.

 The second analytical tool, the continuing danger factor, is directly related to the need to ensure public safety. In this case, there is no evidence indicating that B’s mental condition is inherently dangerous in any way. Provided that B abstains from such drugs in the future, which he is capable of doing voluntarily, it would seem that his mental condition poses no threat to public safety.

 In this context, B was not suffering from a “mental disorder” for the purposes of s. 16 *Cr. C.* at the time he committed the assault. A malfunctioning of the mind that results exclusively from self‑induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual’s inherent psychological makeup. This is true even though medical science may tend to consider such conditions to be diseases of the mind.

 The foregoing conclusion leads to the question whether s. 33.1 *Cr. C.* is applicable. This provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self‑induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person. Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence. Section 33.1 *Cr. C.* therefore applies to any mental condition that is a direct extension of a state of intoxication. There is no threshold of intoxication beyond which s. 33.1 *Cr. C.* does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision. It is so covered in the case at bar. The Court of Appeal therefore did not err in law in holding that s. 33.1 *Cr. C.* was applicable rather than s. 16 *Cr. C.*

**Cases Cited**

 **Applied:** *R. v. Stone*, [1999] 2 S.C.R. 290; **discussed:***R. v. Daviault*, [1994] 3 S.C.R. 63; *Cooper v. The Queen*, [1980] 1 S.C.R. 1149; *Leary v. The Queen*, [1978] 1 S.C.R. 29; **referred to:**  *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Huppie*, 2008 ABQB 539 (CanLII); *R. v. King*, [1962] S.C.R. 746; *Rabey v. The Queen*, [1980] 2 S.C.R. 513, aff’g (1977), 17 O.R. (2d) 1; *R. v. Parks*, [1992] 2 S.C.R. 871; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Swain*, [1991] 1 S.C.R. 933; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *R. v. Simpson* (1977), 35 C.C.C. (2d) 337; *R. v. Luedecke*, 2008 ONCA 716, 269 O.A.C. 1; *R. v. Oakley* (1986), 24 C.C.C. (3d) 351; *R. v. Mailloux* (1985), 25 C.C.C. (3d) 171, aff’d [1988] 2 S.C.R. 1029; *R. v. Moroz*, 2003 ABPC 5, 333 A.R. 109; *R. v. Snelgrove*, 2004 BCSC 102 (CanLII); *R. v. Lauv*, 2004 BCSC 1093 (CanLII); *R. v. Fortin*, 2005 CanLII 6933; *R. v. Paul*, 2011 BCCA 46, 299 B.C.A.C. 85; *R. v. Malcolm* (1989), 50 C.C.C. (3d) 172; *R. v. D.P.*, 2009 QCCQ 644 (CanLII); *R. v. Vickberg* (1998), 16 C.R. (5th) 164; *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 11(*d*).

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 2, 16, 33.1, 266(*a*), 268, 348(1)(*a*), 463, Part XX.1.

**Authors Cited**

Alexander, Larry, and Kimberly Kessler Ferzan with contributions by Stephen J. Morse. *Crime and Culpability: A Theory of Criminal Law*. New York: Cambridge University Press, 2009.

Barrett, Joan, and Riun Shandler. *Mental Disorder in Canadian Criminal Law*. Toronto: Thomson/Carswell, 2006 (loose‑leaf updated 2011, release 2).

Canada. House of Commons. *House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., June 22, 1995, p. 14470.

Parent, Hugues. “Les *Troubles psychotiques induits par une substance* en droit pénal canadien: analyse médicale et juridique d’un concept en pleine évolution” (2010), 69 *R. du B.* 103.

Parent, Hugues. *Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien*. Cowansville, Qué.: Yvon Blais, 1999.

 APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Rochette and Gagnon JJ.A.), 2010 QCCA 402, 260 C.C.C. (3d) 548, 76 C.R. (6th) 59, [2010] Q.J. No. 1672 (QL), 2010 CarswellQue 9208, affirming the convictions for aggravated assault and assault entered by Decoste J.C.Q., 2008 QCCQ 5844 (CanLII), [2008] J.Q. no 6218 (QL), 2008 CarswellQue 6362 (*sub nom. R. v. Lebrun*). Appeal dismissed.

 *Véronique Robert* and *Roland Roy*, for the appellant.

 *Guy Loisel* and *Pierre DesRosiers*, for the respondent.

 *Ginette Gobeil* and *François Joyal*, for the intervener the Attorney General of Canada.

 *Robert E. Gattrell* and *Joan Barrett*, for the intervener the Attorney General of Ontario.

 English version of the judgment of the Court delivered by

 LeBel J. —

I. Introduction

1. In this appeal, the Court must decide whether a toxic psychosis that results from a state of self‑induced intoxication caused by an accused person’s use of chemical drugs constitutes a “mental disorder” within the meaning of s. 16 of the *Criminal Code*, R.S.C. 1985, c. C‑46 (“*Cr. C.*”), and thus exempts the appellant from criminal responsibility for an offence involving interference with the bodily integrity of another person. In general, this case also gives the Court an opportunity to review the respective scopes of the insanity defence and the defence of self‑induced intoxication.
2. The appellant brutally assaulted two individuals while he was in a psychotic condition caused by chemical drugs he had taken a few hours earlier. He seriously injured one of the individuals by stomping on his head. The victim suffered serious and permanent harm. After being convicted by the Court of Québec on two counts of aggravated assault and assault (2008 QCCQ 5844 (CanLII)), the appellant tried unsuccessfully on appeal to obtain a verdict of not criminally responsible on account of mental disorder (2010 QCCA 402, 260 C.C.C. (3d) 548). With leave of this Court, the appellant is now appealing the judgment of the Quebec Court of Appeal, which rejected the argument that a toxic psychosis resulting from the voluntary consumption of drugs is a “mental disorder” within the meaning of s. 16 *Cr. C.*
3. For the reasons that follow, I find that the judgment of the Court of Appeal is correct in law. I would therefore dismiss the appeal.

II. Main Facts

1. The relevant facts of this case are not in dispute. For the purposes of this appeal, it will suffice to mention that the appellant, Tommy Bouchard‑Lebrun, and a long‑time acquaintance of his, Yohann Schmouth, had smoked marijuana and taken amphetamines during the day on October 23, 2005. In the evening, they decided to go to Amqui so the appellant could visit his parents. They took the bus from Rivière‑du‑Loup, where the appellant lived, to the last stop in Mont‑Joli. They were still intoxicated when they got on the bus.
2. When they arrived in Mont‑Joli during the night on October 24, the appellant and his friend decided to hitchhike to Amqui. At about 1:30 a.m., Gilles Tremblay, an old acquaintance of the appellant’s family, picked them up in his car. At that time, no signs of intoxication were apparent from the appellant’s behaviour. At trial, Mr. Tremblay stated that he had not noticed anything unusual about the appellant at any time during the car trip. His statements confirmed Mr. Schmouth’s testimony that the appellant was [translation] “OK” again when they were around Val‑Brillant, a municipality about 15 kilometres from Amqui. Therefore, it seems that the drugs taken by the appellant during the day on October 23 had ceased to have effect before he arrived in Amqui with Mr. Schmouth.
3. In Amqui, the two young men purchased ecstasy pills of a type known as “*poire bleue*”, which they took during the night on October 24. During the hours that followed, the appellant and Mr. Schmouth decided to go and beat up Dany Lévesque, who was known as “Pee‑Wee”, for the real or imagined reason that he wore an [translation] “upside‑down cross” around his neck. Around 5:00 a.m., the appellant and Mr. Schmouth illegally entered the building where Mr. Lévesque lived. Roger Dumas, who lived on the second floor of the building, was woken up by noise coming from the ground floor and went down to Mr. Lévesque’s apartment to find out what was going on. The two occupants of the building met in the stairs and realized that the appellant and Mr. Schmouth were there, and the latter two then brutally attacked Mr. Lévesque by punching and kicking him many times.
4. Mr. Dumas saw that Mr. Lévesque could not defend himself against his two attackers and tried to intervene. The appellant grabbed him and threw him violently down the stairs. Mr. Dumas lay on the floor at the bottom of the stairs. The appellant went down to where he was and stomped on his head. The assault left Mr. Dumas disabled, and he will have to spend the rest of his life in a hospital.
5. At the time of the assault, the appellant was highly intoxicated because of the effects of the “*poire bleue*” pill he had taken a few hours earlier. In addition to the “normal” symptoms of intoxication resulting from the use of that drug, the highly toxic pill had produced a striking and, according to the appellant, unanticipated effect on him, as it caused a complete dissociation between the appellant’s subjective perceptions and the objective reality. To put it bluntly, he was [translation] “on another planet”. Two witnesses at the trial stated that he [translation] “started acting weird” and was “completely out of it” after taking the “*poire bleue*” pill.
6. In actual fact, the appellant experienced an episode that might be described as religious delirium in light of its symptoms. It was after taking the drug that he became obsessed with the “upside‑down cross” supposedly worn by Mr. Lévesque. During the attack, he made statements of a religious nature that, although coherent, were basically absurd. For example, he said that the Apocalypse was coming. At one point, he raised his arms in the air and asked the victims and the helpless witnesses to the attack whether they believed in him. After referring a few times to God and the Devil once the attack was over, he blessed Mr. Dumas’s spouse by making the sign of the cross on her forehead. Mr. Dumas was still lying on the floor when the appellant then left the scene very calmly as if nothing had just happened.
7. It has never been in dispute, in any of the courts, that the appellant was in a serious psychotic condition at the time of the offences and that the effects of that condition diminished gradually until they disappeared on October 28, 2005. The essential issue in this appeal is instead how that psychosis affects the appellant’s criminal responsibility. I will consider this issue later in these reasons. For now, it will suffice to note that, according to the evidence, the appellant had never experienced a psychotic episode such as this prior to the incidents in question. He had no underlying disease of the mind, nor was he addicted to a particular substance. Although he described himself at trial as an [translation] “occasional user” of drugs, the evidence does not establish that he “abused” drugs — if it can be said that occasional drug use does not constitute abuse, that is.
8. As a result of these incidents, the appellant was charged with committing aggravated assault on Mr. Dumas and Mr. Lévesque contrary to ss. 266(*a*) and 268 *Cr. C.*, and with breaking and entering a dwelling‑house with intent to commit an indictable offence and attempting to break and enter a place other than a dwelling-house contrary to ss. 348(1)(*a*) and 463 *Cr. C.* He pleaded not guilty to all the charges against him.

III. Judicial History

1. *Court of Québec, 2008 QCCQ 5844 (CanLII) (Judge Decoste)*
2. At a trial before a judge alone, the appellant raised one defence. Although he admitted that he had committed the acts on which the charges were based, he claimed that, at the time, he had been under the effects of a psychotic condition induced by Mr. Schmouth’s spiritual influence. The defence’s position was that this psychotic condition had prevented the appellant from exercising judgment to assess what impact his drug‑taking on October 23 and 24, 2005 might have (para. 31). As a result, he was exempt from criminal liability for the commission of the acts for which he had been charged.
3. Two psychiatrists were heard at trial, one for the Crown and the other for the defence. They were in agreement that the appellant had been suffering from [translation] “a severe psychosis that made him incapable of distinguishing right from wrong” (para. 33) at the time he committed the acts in question. However, the experts disagreed about the origin of the psychosis. Dr. Roger Turmel, the defence’s expert, stated that the appellant’s psychosis had resulted mainly from [translation] “the mystical atmosphere” into which he had been plunged by Mr. Schmouth. In Dr. Turmel’s opinion, “even Mr. [Bouchard‑]Lebrun’s decision to take drugs was not made freely but was influenced in a way by the control his friend exerted over him” (para. 31). The Crown’s expert disagreed with this. According to Dr. Sylvain Faucher, the circumstances required for psychosis resulting from a third party’s influence were not present in this case. He concluded instead that, at the material time, the appellant had been suffering from toxic psychosis, that is, psychosis caused by the consumption of toxic substances (para. 37).
4. Judge Decoste accepted Dr. Faucher’s opinion and found that the appellant had been suffering from toxic psychosis at the time he committed the offences (para. 41). In Judge Decoste’s view, because of that state of extreme intoxication, the appellant had to be acquitted on the counts of breaking and entering with intent to commit a criminal offence and attempting to break and enter. He then convicted the appellant on the counts of aggravated assault on Mr. Dumas and assault on Mr. Lévesque, referring for that purpose to s. 33.1 *Cr. C.*, which provides that self‑induced intoxication cannot be a defence to an offence against the bodily integrity of another person (para. 51).
5. In a separate judgment (2008 QCCQ 8927 (CanLII)), Judge Decoste sentenced the appellant to imprisonment for five years for the offence of aggravated assault and three months concurrent for that of common assault.
6. *Quebec Court of Appeal, 2010 QCCA 402, 260 C.C.C. (3d) 548 (Thibault, Rochette and Gagnon JJ.A.)*
7. The appellant appealed the guilty verdict and the related sentence to the Quebec Court of Appeal.  In the appeal against the verdict, his defence and arguments changed. He no longer claimed that his psychotic condition had resulted from Mr. Schmouth’s spiritual influence. After conceding that he had acted under the influence of a toxic psychosis, he instead argued that the defence of mental disorder should have been applicable as a result of this condition, since the evidence at trial showed that he had been incapable of distinguishing right from wrong at the material time (para. 18).
8. In general terms, the appellant argued that the trial judge had confused the insanity defence under s. 16 *Cr. C.* with the defence of self‑induced intoxication under s. 33.1 *Cr. C.* He therefore asked the Court of Appeal to disregard s. 33.1 and find that he was not criminally responsible on the basis that his toxic psychosis on the night of October 24, 2005 was a “mental disorder” within the meaning of s. 16 *Cr. C.*
9. The Court of Appeal rejected the appellant’s arguments. Thibault J.A., writing for the court, began by expressing disagreement with the premise on which they were based, namely that the development of a psychotic condition was [translation] “unforeseeable” in this case (para. 32). She noted that, on the contrary, Dr. Faucher’s testimony had proved that 50 percent of PCP users and 13 percent of amphetamine users were likely to develop such a condition (*ibid.*). She added that the appellant seemed to be one of those people, since the effects of his psychosis had lasted as long as he had remained intoxicated (para. 34).
10. Thibault J.A. then pointed out that according to the line of authority based on *R. v. Daviault*, [1994] 3 S.C.R. 63, the defence of self‑induced intoxication was available in extreme cases to accused persons charged with general intent offences. She added that the enactment by Parliament of s. 33.1 *Cr. C.* had limited this defence to non‑violent offences.
11. To conclude her analysis, Thibault J.A. considered the scope of s. 16 *Cr. C.*, which concerns the insanity defence. She acknowledged that the courts had held that the defence was available to an accused person suffering from an underlying mental disorder whose mental condition had [translation] “deteriorated even more” as a result of drug use (para. 77). However, she pointed out that this Court had clearly held in *Cooper v. The Queen*, [1980] 1 S.C.R. 1149, that transitory psychosis induced by drug use cannot be considered a “disease of the mind” within the meaning of ss. 2 and 16 *Cr. C.* She accordingly held that because of the appellant’s psychotic condition at the time he assaulted his victims, his insanity defence under s. 16 of the *Criminal Code* could not succeed.
12. In this regard, Thibault J.A. added that the appellant had no underlying disease of the mind and had become perfectly sane again once the effects of the “*poire bleue*” had passed. Finally, in her opinion, the appellant’s argument was an attempt to circumvent Parliament’s intent by making it possible for an accused person to plead self‑induced intoxication to avoid criminal liability for an offence against the bodily integrity of another person (para. 79), whereas the explicit purpose of the enactment of s. 33.1 *Cr. C.* had been to preclude such an outcome.
13. The Court of Appeal also dismissed the appeal against sentence on the basis that the sentences imposed by the trial judge, though harsh, were not unreasonable (para. 85).

IV. Analysis

A. *Issues*

1. This appeal raises the following issues:

1. Does s. 33.1 *Cr. C.* limit the scope of the defence of not criminally responsible on account of mental disorder provided for in s. 16 *Cr. C.*?

2. Can a toxic psychosis whose symptoms are caused by a state of self‑induced intoxication be a “mental disorder” within the meaning of s. 16 *Cr. C.*?

B. *Understanding the Nature of the Issue in This Appeal: Response to Daviault* *and Interplay Between Sections 16 and 33.1 Cr. C.*

1. The appellant concedes that the evidence in the record shows that his toxic psychosis *resulted exclusively* from his state of self‑induced intoxication the night of October 24, 2005. Although he disagrees with the failure of the courts below to take his predisposition to such a psychiatric disorder into account, he is not specifically submitting that they erred in rejecting the argument that his intoxication had triggered a latent disease of the mind. Indeed, his counsel stated at the hearing in this Court that she was not raising this as a ground of appeal (transcript, at p. 4).
2. Nevertheless, the appellant’s position leads to the same result. It amounts in substance to arguing that a single episode of intoxication can be a “mental disorder” within the meaning of s. 16 *Cr. C.* if it produces abnormal effects on the accused, such as psychotic symptoms. The syllogism proposed by the appellant comes down to this: since toxic psychosis is an abnormal effect of intoxication, it necessarily affects only those whose psyches are particularly fragile or vulnerable. As a result, this toxic psychosis must be considered a mental disorder from a legal standpoint.
3. Thus, the appellant is arguing indirectly that the toxic psychosis he developed after taking a “*poire bleue*” pill resulted from an underlying disease of the mind that became apparent as a result of his intoxication. But because of the obstacles presented by the evidence in the record and the trial judge’s findings of fact in relation to this argument, the appellant does not focus on his personal situation. Instead, he relies on an argument of general application. According to him, *any* toxic psychosis, even one that results, as the trial judge found in this case, from a single episode of intoxication, must be considered a “mental disorder” within the meaning of s. 16 *Cr. C.* (A.F., at para. 48). The appellant’s reasoning therefore rests on the premise that intoxication can never be the real or underlying cause of toxic psychosis and that toxic psychosis must originate in a pre‑existing mental condition.
4. The corollary to this argument is that a person in a psychotic condition should never, from a legal standpoint, be considered merely to be intoxicated (transcript, at p. 11). The appellant thus contends that the Court of Appeal confused the defence of self‑induced intoxication with that of mental disorder under s. 16 *Cr. C.* in holding that s. 33.1 *Cr. C.* applied in this case (A.F., at para. 34). More specifically, the appellant argues that Thibault J.A. erred in writing that [translation] “[h]is submission would have the effect of rendering s. 33.1 *Cr. C.* meaningless and [disregarding] the clearly expressed legislative intent of preventing individuals who reach a state of extreme intoxication by voluntarily consuming drugs or alcohol from avoiding criminal liability” (para. 79). In his opinion, this passage wrongly suggests that s. 33.1 *Cr. C.* limits the scope of the defence of not criminally responsible on account of mental disorder.
5. The appellant adds that the passage in question is incorrect in law because Parliament, in enacting s. 33.1 *Cr. C.*, endorsed the position taken by the dissenting judges in *Daviault* that, owing to policy considerations, the defence of self‑induced intoxication should not be available in the case of a general intent offence. He points out that those dissenting judges had acknowledged that [translation] “toxic psychosis remained a defence under s. 16” (A.F., at para. 74). The appellant therefore submits that the dissent in *Daviault* struck a judicious balance and gave effect to society’s wish to punish reprehensible acts committed by persons who decide voluntarily to become intoxicated, but not to punish those who lack the mental capacity to form any culpable intent. In his view, Sopinka J.’s reasons support his position that [translation] “those who become mentally ill as a result of drug use are fragile and vulnerable individuals who are predisposed to mental disorders” (A.F., at para. 84). But the appellant raises no arguments regarding the constitutionality of s. 33.1 *Cr. C.*, which means that only the interpretation and application of that provision are in issue.
6. Before I respond to the appellant’s argument that s. 33.1 *Cr. C.* must not be interpreted as changing the scope of the defence of mental disorder, it will be helpful to briefly summarize the case law that led to the enactment of that provision. There are three seminal cases in this regard. The first is the decision of the House of Lords in *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, in which Lord Birkenhead set out the following three rules (as summarized by Bastarache J. in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 34):

(1) That intoxication could be a ground for an insanity defence if it produced a disease of the mind.

(2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

(3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

1. In *Beard*, therefore, the House of Lords stated the principle that intoxication can be raised as a defence in respect of a specific intent offence in certain circumstances. This principle still represents the state of the law in Canada on this question, although it is subject to the qualification of Lord Birkenhead’s third rule in *R. v. Robinson*, [1996] 1 S.C.R. 683 (*Daley*, at para. 40). In *Robinson*, this Court held that the third of the rules from *Beard*, which was based on the *capacity* of the accused to form a specific intent, violated ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, because it required a jury to convict even if there was a reasonable doubt that the accused possessed *actual intent*. The Court therefore replaced this rule with one to the effect that intoxication can be a defence if it prevented the accused from forming the actual specific intent to commit the offence.
2. Since *Beard*, it has thus been possible to apply the intoxication defence to acquit an accused charged with a specific intent offence or, where the nature of the offence so permits, to convict the accused of a lesser included offence requiring only general intent. Another question that subsequently arose was whether an accused could also use the defence of self‑induced intoxication to raise a reasonable doubt about *mens rea* where the offence required only general intent. In *Leary v. The Queen*, [1978] 1 S.C.R. 29, this Court answered this question in the negative. In that case, the Court established the principle that the recklessness shown by an accused in becoming voluntarily intoxicated can constitute the fault element needed to find that a general intent offence has been committed (*Daley*, at para. 36; see also the reasons of McIntyre J. in *R. v. Bernard*, [1988] 2 S.C.R. 833).
3. In *Daviault*, however, a majority of the Court held that the “substituted *mens rea*” rule from *Leary* was contrary to ss. 7 and 11(*d*) of the *Charter*. Cory J. stated that “[a] person intending to drink cannot be said to be intending to commit a sexual assault” (p. 92). He added that “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*” (*ibid.*). The Court thus cast aside the *Leary* rule in *Daviault* and established the principle that accused persons who were in a “state akin to automatism or insanity” at the time they committed an act constituting a general intent offence would be legally entitled to raise a reasonable doubt concerning the required mental element (pp. 99‑100).
4. Sopinka J. wrote a strong dissent in *Daviault*. In his view, there was no reason to abandon the *Leary* rule, since the application of that rule did not relieve the Crown of the responsibility of proving “the existence of a *mens rea* or any of the other elements of the offence of sexual assault which are required by the principles of fundamental justice” (p. 115). He felt that the validity of the *Leary* rule was also reinforced by sound policy considerations, including society’s right “to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community” (p. 114).
5. Less than a year after *Daviault*, Parliament enacted s. 33.1 *Cr. C.* to ensure that “intoxication may never be used as a defence against general intent violent crimes such as sexual assault and assault” (*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., June 22, 1995, at p. 14470). The section reads as follows:

**33.1**(1) [When defence not available] It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self‑induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2)  [Criminal fault by reason of intoxication] For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self‑induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

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

1. In a general sense, the appellant can reasonably argue that Parliament implicitly endorsed Sopinka J.’s dissent in *Daviault* by enacting s. 33.1 *Cr. C.* However, the enactment of that provision did not revive the *Leary* rule. It did not actually codify the position taken by the dissenting judges in *Daviault*; rather, it limited the scope of the rule stated by the majority. This means that the principles set out in *Daviault* still represent the state of the law in Canada, subject, of course, to the significant restriction set out in s. 33.1 *Cr. C.* *Daviault* would still apply today, for example, to enable an accused charged with a property offence to plead extreme intoxication. Indeed, the fact that the appellant was acquitted at trial on the charges against him under ss. 348(1)(*a*) and 463 *Cr. C.* affords an eloquent example of this*.*
2. This being said, the appellant is right to say that s. 33.1 *Cr. C.* should not be interpreted so as to limit the scope of s. 16 *Cr. C.* Intoxication and insanity are two distinct legal concepts. As defences to criminal charges, they have different logics and each of them is governed by its own principles.
3. First of all, it is important to understand that the application of s. 16 *Cr. C.* and that of s. 33.1 *Cr. C.* are mutually exclusive. For s. 33.1 *Cr. C.* to apply, the court must reach a conclusion in law that the accused lacked the general intent or the voluntariness required to commit the offence *by reason of self‑induced intoxication*. The absence of this intent or voluntariness would then preclude a finding that the incapacity of the accused was caused by a disease of the mind (*R. v. Huppie*, 2008 ABQB 539 (CanLII), at para. 21). Conversely, the fact that an accused was intoxicated at the material time cannot support a finding that s. 33.1 *Cr. C.* applies if the accused establishes that he or she was incapable of appreciating the nature and quality of his or her acts *by reason of a mental disorder*.
4. This general principle does not seem particularly contentious. If the accused was intoxicated and in a psychotic condition at the material time, the problem the court faces is to identify a specific source for his or her mental condition, namely self‑induced intoxication or a disease of the mind, and determine whether it falls within the scope of s. 33.1 or s. 16 *Cr. C.* This appears to be all the more difficult to do in cases in which the mental health of the accused was already precarious prior to the incident in question, even if his or her problems had not yet been diagnosed at the time, and in which the psychosis emerged while the accused was highly intoxicated. Yet this identification of the source of the psychosis plays a key role, since it will ultimately determine whether the accused will be held criminally responsible for his or her actions.
5. The law, as it now stands, includes a fairly general framework for resolving this difficult question. The starting point must be the legal concept of “disease of the mind” as defined by Dickson J. in *Cooper*, the leading case:

 In summary, one might say that in a legal sense “disease of the mind” embraces 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. [Emphasis added; p. 1159.]

1. There is of course some correlation between “self‑induced states caused by alcohol or drugs”, which the Court, in *Cooper*, excluded from the definition of the legal concept of “disease of the mind” for the purposes of s. 16 *Cr. C.*, and the states of intoxication now covered by s. 33.1 *Cr. C.* However, where an accused raises a defence of mental disorder, it important that the legal analysis of the situation follow a logical order. The court must not begin its analysis by considering whether the mental condition of the accused at the material time is covered by s. 33.1 *Cr. C.* Such an approach would reverse the steps of the appropriate analytical process and disregard the nature of the defence raised by the accused. And as a result of it, the legal characterization exercise required by s. 16 *Cr. C.* would depend on the interpretation of the concept of causation in issue in s. 33.1 *Cr. C.* The court must instead consider the specific principles that govern the insanity defence in order to determine whether s. 16 *Cr. C.* is applicable. If that defence does not apply, the court can then consider whether s. 33.1 *Cr. C.* is applicable if it is appropriate to do so on the facts of the case.
2. These observations, which are necessary to broadly delineate the respective scopes of ss. 16 and 33.1 *Cr. C.*, do not dispose of the appellant’s main argument regarding the actual content of the insanity defence. The appellant submits that *Cooper*’s exclusion of “self‑induced states caused by alcohol or drugs” applies only to the normal effects of intoxication (transcript, at p. 20). In this context, what remains to be determined is whether a toxic psychosis that results exclusively from a state of intoxication, which the appellant views as an “abnormal effect” of intoxication, constitutes a “mental disorder” for the purposes of s. 16 *Cr. C.* or is excluded by *Cooper*.
3. It is therefore necessary to take a closer look at the scope of *Cooper*’s exclusion of “self‑induced states caused by alcohol or drugs” from the ambit of s. 16 *Cr. C.* I will come back to this later. For now, I wish to point out that the appellant’s criticism of the Court of Appeal’s position on the interplay between ss. 16 and 33.1 *Cr. C.* is unfounded. Contrary to the appellant’s assertion, Thibault J.A. did not infer that s. 33.1 *Cr. C.* limits the scope of the defence of mental disorder provided for in s. 16 *Cr. C.* She stated clearly that no overlap is possible in the application of these provisions and simply concluded that, as the law stands in Canada, [translation] “an accused suffering from a psychosis caused by the consumption of drugs in circumstances analogous to the ones in the case before us” cannot be found to have a disease of the mind for the purposes of s. 16 *Cr. C.* (para. 77). After noting that the appellant had to be considered from a legal standpoint to have been *intoxicated* at the material time, Thibault J.A. added that the appellant’s argument was an indirect way to avoid the application of s. 33.1 *Cr. C.*
4. Thus, the fundamental issue at this point is whether the Court of Appeal erred in law in holding that s. 33.1 *Cr. C.* was applicable in this case rather than s. 16 *Cr. C.* To resolve it, I must consider the legal principles and judicial policy considerations that underlie the interpretation and application of the defence provided for in s. 16 *Cr.  C.*

C. *Defence Provided for in Section 16 Cr. C.: An Exception to the General Principle of Criminal Responsibility*

1. The defence of not criminally responsible on account of mental disorder, which Parliament codified in s. 16 *Cr. C.*, addresses concerns that are very legitimate in a democratic society. Insofar as the principles governing this defence are properly applied, a verdict of not criminally responsible on account of mental disorder protects the integrity of our country’s criminal justice system and the collective interest in ensuring respect for its fundamental principles. A review of the fundamental principles of criminal law that underlie the defence of mental disorder confirms the importance of this defence in Canadian criminal law.
2. According to a traditional fundamental principle of the common law, criminal responsibility can result only from the commission of a voluntary act. This important principle is based on a recognition 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.
3. For an act to be considered voluntary in the criminal law, it must be the product of the accused person’s free will. As Taschereau J. stated in *R. v. King*, [1962] S.C.R. 746, “there can be no *actus reus* unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a willpower to do an act whether the accused knew or not that it was prohibited by law” (p. 749). This means that no one can be found criminally responsible for an involuntary act (see Dickson J.’s dissenting reasons in *Rabey v. The Queen*, [1980] 2 S.C.R. 513, which were endorsed on this point in *R. v. Parks*, [1992] 2 S.C.R. 871).
4. An individual’s will is expressed through conscious control exerted by the individual over his or her body (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 249). The control may be physical, in which case voluntariness relates to the muscle movements of a person exerting physical control over his or her body. The exercise of a person’s will may also involve moral control over actions the person wants to take, in which case a voluntary act is a carefully thought out act that is performed freely by an individual with at least a minimum level of intelligence (see H. Parent, *Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien* (1999), at pp. 266‑71). Will is also a product of reason.
5. The moral dimension of the voluntary act, which this Court recognized in *Perka*, thus reflects the idea that the criminal law views individuals as autonomous and rational beings. Indeed, this idea can be seen as the cornerstone of the principles governing the attribution of criminal responsibility (L. Alexander and K. K. Ferzan with contributions by S. J. Morse, *Crime and Culpability: A Theory of Criminal Law* (2009), at p. 155). When considered from this perspective, human behaviour will trigger criminal responsibility only if it results from a “true choice” or from the person’s “free will”. This principle signals the importance of autonomy and reason in the system of criminal responsibility. As the Court noted in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687:

 The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction. . . . Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society . . . . Criminal liability also depends on the capacity to choose — the ability to reason right from wrong. [Emphasis added; citation omitted; para. 45.]

1. This essential basis for attributing criminal responsibility thus gives rise to a presumption that each individual can distinguish right from wrong. The criminal law relies on a presumption that every person is an autonomous and rational being whose acts and omissions can attract liability. This presumption is not absolute, however: it can be rebutted by proving that the accused did not at the material time have the level of autonomy or rationality required to attract criminal liability. Thus, criminal responsibility will not be imposed if the accused gives an excuse for his or her act that is accepted in our society, in which there is “a fundamental conviction that criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong” (*R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1397). In *Ruzic*, the Court recognized the existence of a principle of fundamental justice that “only voluntary conduct — behaviour that is the product of a free will and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability” (para. 47).
2. Insanity is an exception to the general criminal law principle that an accused is deemed to be autonomous and rational. A person suffering from a mental disorder within the meaning of s. 16 *Cr. C.* is not considered to be capable of appreciating the nature of his or her acts or understanding that they are inherently wrong. This is why Lamer C.J. stated in *Chaulk* that the insanity provisions of the *Criminal Code* “operate, at the most fundamental level, as an exemption from criminal liability which is predicated on an incapacity for criminal intent” (p. 1321 (emphasis deleted)).
3. The logic of *Ruzic* is that it can also be said that an insane person is incapable of morally voluntary conduct. The person’s actions are not actually the product of his or her free will. It is therefore consistent with the principles of fundamental justice for a person whose mental condition at the relevant time is covered by s. 16 *Cr. C.* not to be criminally responsible under Canadian law. Convicting a person who acted involuntarily would undermine the foundations of the criminal law and the integrity of the judicial system.
4. However, the defence of mental disorder remains unique. It does not result in acquittal of the accused, but instead leads to a verdict of not criminally responsible. That verdict triggers an administrative process whose purpose is to determine whether the accused is a significant threat to the safety of the public, to take any necessary action to control that threat and, if necessary, to provide the accused with appropriate care. A verdict of not criminally responsible on account of mental disorder thus gives effect to society’s interest in ensuring that morally innocent offenders are treated rather than punished, while protecting the public as fully as possible.
5. An accused who is found not criminally responsible becomes subject to the scheme established in Part XX.1 of the *Criminal Code*. Parliament adopted the current scheme after this Court had held in *R. v. Swain*, [1991] 1 S.C.R. 933, that a *Criminal Code* provision requiring the automatic and indeterminate detention of an accused found not criminally responsible violated the right to liberty guaranteed by s. 7 of the *Charter*. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, McLachlin J. (as she then was) explained the principles underlying the application of Part XX.1 of the *Criminal Code* as follows:

 In summary, the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. Under Part XX.1, the NCR accused is neither convicted nor acquitted. Instead, he or she is found not criminally responsible by reason of illness at the time of the offence. This is not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender’s possible dangerousness and of what treatment‑associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1’s goals of public protection and fairness to the NCR accused. [Emphasis added; para. 43.]

1. With these general considerations in mind, I will now review the conditions that must be met for s. 16 *Cr. C.* to apply in order to determine, in particular, whether those conditions are met in this case. After this review, I will consider issues related specifically to toxic psychoses that result from a state of self‑induced intoxication.

D. *Requirements of the Defence of Not Criminally Responsible on Account of Mental Disorder*

1. Section 16(2) *Cr. C.* provides that “[e]very person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility”. An accused who seeks to avoid criminal responsibility on this ground must prove on a balance of probabilities that, at the material time, he or she was suffering from “a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong” (s. 16(1) *Cr. C.*). In *Chaulk*, this Court held that imposing this burden of proof on the accused infringed the presumption of innocence guaranteed by s. 11(*d*) of the *Charter* but that this was nonetheless a reasonable limit on that presumption in a free and democratic society.
2. An accused who wishes to successfully raise the defence of mental disorder must therefore meet the requirements of a two‑stage statutory test. The first stage involves *characterizing* the mental state of the accused. The key issue to be decided at trial at this stage is whether the accused was suffering from a mental disorder in the legal sense at the time of the alleged events. The second stage of the defence provided for in s. 16 *Cr. C.* concerns the *effects of the mental disorder*. At this stage, it must be determined whether, owing to his or her mental condition, the accused was incapable of “knowing that [the act or omission] was wrong” (s. 16(1) *Cr. C.*).
3. In the instant case, it is not in dispute that the appellant was incapable of distinguishing right from wrong at the material time. The trial judge wrote that [translation] “[a]t the time the criminal acts were committed, the accused did not realize what he was doing and was in a serious psychotic condition; there is no real dispute about this” (para. 2). Therefore, the only issue in this appeal is whether the psychosis resulted from a “mental disorder” within the meaning of s. 16 *Cr. C.*
4. Incapacity Must Result From a Disease of the Mind
5. The *Criminal Code* does not contain a precise definition of the “mental disorder” concept for the purposes of s. 16 *Cr. C.* Section 2 *Cr. C.* simply provides that the term “mental disorder” means “a disease of the mind” (“*toute maladie mentale*” in French). Because of the circular nature of this definition, the courts have had to gradually delineate this legal concept over time.
6. The line of authority based on *Cooper* clearly confirms that the scope of the legal concept of “mental disorder” is very broad. In *Cooper*, Dickson J. stated that the “disease of the mind” concept includes “any illness, disorder or abnormal condition which impairs the human mind and its functioning” (p. 1159). In *Rabey*, Dickson J. explained that “the concept is broad, embracing mental disorders of organic and functional origin, whether curable or incurable, temporary or not, recurring or non‑recurring” (p. 533). While it must be borne in mind that a verdict of not criminally responsible triggers a special mechanism for the management of the accused, the inclusive nature of the definition of “mental disorder” can be explained in particular by Parliament’s wish to give the public a high level of protection from persons who could be a threat to others (J. Barrett and R. Shandler, *Mental Disorder in Canadian Criminal Law* (loose‑leaf), at p. 4‑12).
7. The “mental disorder” concept continues to evolve, which means that it can be adapted continually to advances in medical science (*R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.)). As a result, it will undoubtedly never be possible to define and draw up an exhaustive list of the mental conditions that constitute “disease[s] of the mind” within the meaning of s. 2 *Cr. C.* As Martin J.A., writing for the Ontario Court of Appeal, stated in *R. v. Rabey* (1977), 17 O.R. (2d) 1, this concept “is not capable of precise definition” (p. 12). It is thus flexible enough to apply to any mental condition that, according to medical science in its current or future state, is indicative of a disorder that impairs the human mind or its functioning, and the recognition of which is compatible with the policy considerations that underlie the defence provided for in s. 16 *Cr. C.*
8. Characterizing a Mental Condition as a “Mental Disorder” Is a Legal Exercise With a Medical and Scientific Substratum
9. For the purposes of the *Criminal Code*, “disease of the mind” is a legal concept with a medical dimension. Although medical expertise plays an essential part in the legal characterization exercise, it has long been established in positive law that whether a particular mental condition can be characterized as a “mental disorder” is a question of law to be decided by the trial judge. In a jury trial, the judge decides this question, not the jury. As Martin J.A. stated in an oft‑quoted passage from *Simpson*, “[i]t is the function of the psychiatrist to describe the accused’s mental condition and how it is considered from the medical point of view. It is for the Judge to decide whether the condition described is comprehended by the term ‘disease of the mind’” (p. 350). If the judge finds as a matter of law that the mental condition of the accused is a “mental disorder”, it will ultimately be up to the jury to decide whether, on the facts, the accused was suffering from such a mental disorder at the time of the offence.
10. Thus, the trial judge is not bound by the medical evidence, since medical experts generally take no account of the policy component of the analysis required by s. 16 *Cr. C.* (*Parks*, at pp. 899‑900). Moreover, an expert’s opinion on the legal issue of whether the mental condition of the accused constitutes a “mental disorder” within the meaning of the *Criminal Code* has “little or no evidentiary value” (*R. v. Luedecke*, 2008 ONCA 716, 269 O.A.C. 1, at para. 113).
11. The respective roles of the expert, the judge and the jury were summarized in *R. v. Stone*, [1999] 2 S.C.R. 290. Writing for the majority, Bastarache J. stated the following:

 Taken alone, the question of what mental conditions are included in the term “disease of the mind” is a question of law. However, the trial judge must also determine whether the condition the accused claims to have suffered from satisfies the legal test for disease of the mind. This involves an assessment of the particular evidence in the case rather than a general principle of law and is thus a question of mixed law and fact. . . . The question of whether the accused actually suffered from a disease of the mind is a question of fact to be determined by the trier of fact. [Citation omitted; para. 197.]

1. The central issue in this appeal is a question of law within the meaning of *Stone*. It is common ground that the appellant was in a psychotic condition that prevented him from distinguishing right from wrong. The main issue is whether a toxic psychosis caused exclusively by a single episode of intoxication constitutes a “mental disorder” within the meaning of s. 16 *Cr. C.*
2. It can be seen at this point that the appellant’s position poses a serious problem. To argue that toxic psychosis must always be considered a “mental disorder” is to say that the legal characterization exercise under s. 16 *Cr. C.* depends exclusively on a medical diagnosis. If the appellant’s position were accepted, psychiatric experts would thus be responsible for determining the scope of the defence of not criminally responsible on account of mental disorder. This argument conflicts directly with this Court’s consistent case law over the past three decades and cannot succeed. It would shift the responsibility for deciding whether the accused is guilty from the judge or jury to the expert.

E. *Specific Problem of a Toxic Psychosis That Results From the Voluntary Consumption of Alcohol or Drugs*

1. An additional reason for rejecting the appellant’s central argument has to do with the very diverse reality encompassed by the term “toxic psychosis”. In the case law, this term usually refers to the symptoms of the accused as diagnosed by psychiatrists. However, medical science does not always identify the causes of toxic psychosis as precisely as is required in law. Although toxic psychosis is always related to exposure to a toxic substance, the circumstances in which it may arise can vary a great deal. This is readily apparent from a review of the case law on this point (see *R. v. Oakley* (1986), 24 C.C.C. (3d) 351 (Ont. C.A.); *R. v. Mailloux* (1985), 25 C.C.C. (3d) 171 (Ont. C.A.), aff’d [1988] 2 S.C.R. 1029; *R. v. Moroz*, 2003 ABPC 5, 333 A.R. 109; *R. v. Snelgrove*, 2004 BCSC 102 (CanLII); *R. v. Lauv*, 2004 BCSC 1093 (CanLII); *R. v. Fortin*, 2005 CanLII 6933 (C.Q.); *R. v. Paul*, 2011 BCCA 46, 299 B.C.A.C. 85).
2. Many factors might contribute to a state of substance‑induced psychosis, including the fact that symptoms of a paranoid personality disorder are active at the time drugs are taken (*Mailloux*), the combined effect of exposure to toxic vapours and a period of intense stress (*Oakley*), dependence on certain drugs, such as cocaine (*Moroz* and *Snelgrove*), heavy drug use during the days and hours leading up to the commission of the crime (*Lauv* and *Paul*), and withdrawal following a period of excessive drinking (*R. v. Malcolm* (1989), 50 C.C.C. (3d) 172 (Man. C.A.)). It seems that this diversity of circumstances can be attributed to variations in psychological makeup and psychological histories from one accused to another, as well as in the nature of the drug use that contributed to their psychoses. The quantity and toxicity of the drugs taken also seem to have a significant effect in this regard. As a result, in each new situation, the case turns on its own facts and cannot always be fitted easily into the existing case law.
3. Because of the heterogeneous nature of the circumstances in which a toxic psychosis at the material time may be medically diagnosed, I consider it unwise to adopt an approach as broad as the one proposed by the appellant. In *Cooper*, this Court instead urged the courts to exercise particular caution where an accused person’s mental condition was closely related to an episode of intoxication contemporaneous with the offence. In my opinion, the Court, in its decision in *Cooper*,recommended a contextual approach that was intended to strike a fair balance between the need to protect the public from persons whose mental state is inherently dangerous and the desire to impose criminal liability solely on persons who are responsible for the state they were in at the time of the offence. Since this contextual approach means that a court must base its analysis on the particular circumstances of the case before it, I cannot accept the recent decisions or opinions that seem to suggest that toxic psychosis is always a disease of the mind within the meaning of the *Criminal Code* (see, *inter alia*, *Snelgrove*, at para. 234; *Lauv*, at para. 18; *Fortin*, at para. 57; *R. v. D.P.*, 2009 QCCQ 644 (CanLII), at para. 25; and H. Parent, “Les *Troubles psychotiques induits par une substance* en droit pénal canadien: analyse médicale et juridique d’un concept en pleine évolution” (2010), 69 *R. du B.* 103, at p. 119).
4. When confronted with a difficult fact situation involving a state of toxic psychosis that emerged while the accused was intoxicated, a court should start from the general principle that temporary psychosis is covered by the exclusion from *Cooper*. This principle is not absolute, however: the accused can rebut the presumption provided for in s. 16(2) *Cr. C.* by showing that, at the material time, he or she was suffering from a disease of the mind that was unrelated to the intoxication‑related symptoms. To determine whether an accused has discharged the burden of proof in this respect, the court should adopt the “more holistic approach” described by Bastarache J. in *Stone* (para. 203). As the Attorney General of Ontario suggested in this Court, it is ultimately this “more holistic approach” that will enable a court to determine whether the mental condition of an accused at the material time constitutes a “mental disorder” for the purposes of s. 16 *Cr. C.* (Factum, at paras. 22‑23).
5. In *Stone*, Bastarache J. proposed a flexible approach structured around two analytical tools and certain policy considerations. The purpose of the approach is to help the courts distinguish mental conditions that fall within the scope of s. 16 *Cr. C.* from those covered by *Cooper*’s exclusion of “self‑induced states caused by alcohol or drugs” (p. 1159). In other words, a court should use this approach to determine whether a medically diagnosed disease of the mind constitutes a mental disorder in the legal sense.
6. The *internal cause factor*, the first of the analytical tools described in *Stone*, involves comparing the accused with a normal person. In that case, Bastarache J. noted that “the trial judge must consider the nature of the trigger and determine whether a normal person in the same circumstances might have reacted to it by entering an automatistic state as the accused claims to have done” (para. 206). The comparison between the circumstances of the accused and those of a normal person will be objective and may be based on the psychiatric evidence. The more the psychiatric evidence suggests that a normal person, that is, a person suffering from no disease of the mind, is susceptible to such a state, the more justified the courts will be in finding that the trigger is external. Such a finding would exclude the condition of the accused from the scope of s. 16 *Cr. C.* The reverse also holds true.
7. Although the trigger associated with the internal cause factor often involves a “psychological blow”, there is no reason why it cannot consist of alcohol or drug use contemporaneous with the offence. What must therefore be determined is what state a normal person might have entered after consuming the same substances in the same quantities as the accused. Since certain factors such as fatigue and the pace of consumption may influence the effects of drugs, this comparison must take account of all the circumstances in which the accused consumed the drugs that triggered the psychotic condition. If a normal person might also have reacted to similar drug use by developing toxic psychosis, it will be easier for the court to find that the mental disorder of the accused was purely external in origin (*Rabey* (S.C.C.), at pp. 519 and 533; see also *Moroz*, at para. 46) and was not a disease of the mind within the meaning of the *Criminal Code*.
8. The second analytical tool, the *continuing danger factor*, is directly related to the need to ensure public safety. The purpose of this factor is to assess the likelihood of recurring danger to others. Where a condition is likely to present a recurring danger, there is a greater chance that it will be regarded as a disease of the mind. To assess this danger, the court must consider, among other factors, “the psychiatric history of the accused and the likelihood that the trigger alleged to have caused the automatistic episode will recur” (*Stone*, at para. 214).
9. Although Bastarache J.’s reasons were not explicit in this regard, it stands to reason that danger will be recurring only if it is likely to arise again independently of the exercise of the will of the accused. The recurrence of danger is not a factor linked to voluntary behaviour by the accused. This conclusion is consistent with the idea that the effect of the defence provided for in s. 16 *Cr. C.* is to exempt from criminal responsibility an accused whose actions are morally involuntary. The purpose of the defence of mental disorder is to ascertain whether the mental condition of the accused poses an *inherent* danger, that is, a danger that persists despite the will of the accused. As a corollary to this principle, a danger to public safety that might be voluntarily *created* by the accused in the future by consuming drugs would not be the result of a “mental disorder” for the purposes of s. 16 *Cr. C.*
10. In *Stone*, Bastarache J. also stated that “a holistic approach to disease of the mind must also permit trial judges to consider other policy concerns which underlie this inquiry” (para. 218). The main policy consideration continues to be the need to protect society from the accused through the special procedure set out in Part XX.1 of the *Criminal Code*. Thus, if the circumstances of a case suggest that a pre‑existing condition of the accused does not require any particular treatment and is not a threat to others, the court should more easily hold that the accused was not suffering from a disease of the mind at the time of the alleged events.
11. The contextual approach required by *Stone* makes it possible to define the scope of this appeal. The purpose of the appeal is not to identify a rule to be applied to every case of toxic psychosis. And because every case has distinctive characteristics, it would be counterproductive to try to formulate an exhaustive definition of the mental conditions covered by *Cooper*’s exclusion of “self‑induced states caused by alcohol or drugs”. The instant case concerns just one type of toxic psychosis, namely one that resulted *exclusively* from a single episode of self‑induced intoxication.
12. Although the courts can seek assistance from the existing case law, it would be preferable for them to engage in an individualized analysis that takes account of the specific circumstances of each case. This means that the courts should determine on a case‑by‑case basis, applying the “more holistic approach” from *Stone*, whether the mental condition of each accused is included in or excluded from the definition of “disease of the mind” proposed by Dickson J. in *Cooper*. This approach is consistent with the line of authority based on *Rabey*, in which this Court endorsed Martin J.A.’s opinion that “[p]articular transient mental disturbances may not . . . be capable of being properly categorized in relation to whether they constitute ‘disease of the mind’ on the basis of a generalized statement and must be decided on a case‑by‑case basis” (pp. 519‑20).

F. *Application of the Principles to This Appeal*

1. In accordance with the approach set out above, I must now determine whether the appellant was suffering from a “mental disorder” within the meaning of s. 16 *Cr. C.* at the material time. To do this, it will be helpful to begin by referring to the trial judge’s main findings of fact. Judge Decoste found that the appellant, who was highly intoxicated at the material time, was in a psychotic condition caused by the voluntary consumption of drugs. He wrote that [translation] “the psychotic condition the accused was in when he committed these criminal acts originated in his drug use during the moments leading up to them” (para. 41). I would also note that the appellant’s central argument is based on the contention that toxic psychosis is necessarily a “mental disorder” within the meaning of s. 16 *Cr. C.* because it is an “abnormal effect” of intoxication that affects only those who have a psychological predisposition or whose psyches are particularly fragile.
2. The evidence in the record does not support the distinction drawn by the appellant between “normal effects” and “abnormal effects” of intoxication. Nor is it compatible with the argument that only persons who are predisposed to a mental disorder are likely to develop toxic psychosis as a result of drug use. For example, Dr. Faucher testified at trial that he saw cases of toxic psychosis [translation] “every week” (A.R., at p. 967). As Thibault J.A. noted, the same witness also stated that half (50 percent) of subjects who take drugs containing PCP are likely to develop a psychotic condition when intoxicated. It thus appears that toxic psychosis is unfortunately a fairly frequent phenomenon that seems to result from the high toxicity of chemical drugs.
3. The application of the first factor from *Stone* thus suggests that the taking of one “*poire bleue*” pill is a specific external factor that contradicts the appellant’s argument, since it seems likely that the reaction of a normal person to such a pill would indeed be to develop toxic psychosis. This strongly suggests that the appellant was not suffering from a mental disorder at the time he committed the impugned acts.
4. The rapid appearance of psychotic symptoms generally indicates that the delusions of the accused can be attributed to a specific external factor. Dr. Faucher’s expert assessment, which the trial judge preferred to that of Dr. Turmel, an expert called by the defence, revealed that the rapid reversal of symptoms is characteristic of a toxic psychosis caused by an episode of self‑induced intoxication (A.R., at pp. 954‑59). Moreover, Professor Parent has written on this topic that [translation] “delusions that subside at the same rate as the drug are usually signs of *Substance Intoxication*” (“Les *Troubles psychotiques induits par une substance* en droit pénal canadien: analyse médicale et juridique d’un concept en pleine évolution”, at p. 123 (emphasis in original)). Such delusions therefore do not result from a disease of the mind within the meaning of the *Criminal Code*.
5. In the instant case, the psychotic symptoms experienced by the appellant began to diminish shortly after he took the “*poire bleue*” pill and continued to do so until they disappeared completely on October 28, 2005. The Court of Appeal held that the disappearance of the symptoms showed that the symptoms of toxic psychosis coincided with the duration of the appellant’s intoxication. Thibault J.A. could thus say that [translation] “[t]he appellant suffered from no [disease of the mind] before committing the crimes, and once the effects of the drug consumption had passed, he was entirely sane” (para. 77). I see no valid reason to depart from this conclusion.
6. As for the second factor from *Stone*, there is no evidence indicating that the mental condition of the accused is inherently dangerous in any way. Provided that the appellant abstains from such drugs in the future, which he is capable of doing voluntarily, it would seem that his mental condition poses no threat to public safety. Although I will not adopt a definitive position on this question, I might have concluded otherwise if the appellant had a dependency on drugs that affected his ability to stop using them voluntarily. The likelihood of recurring danger might then be greater.
7. Finally, after considering all the circumstances of this case, I am satisfied that there is no valid reason to initiate the special procedure provided for in Part XX.1 of the *Criminal Code*. An accused whose mental condition at the material time can be attributed exclusively to a state of temporary self‑induced intoxication and who poses no threat to others is not suffering from a “mental disorder” for the purposes of s. 16 *Cr. C.* The scheme of Part XX.1 applies only if the accused actually suffered from a disease of the mind at the material time. It is not intended to apply to accused persons whose temporary madness was induced artificially by a state of intoxication.
8. In this context, I conclude that the appellant was not suffering from a “mental disorder” for the purposes of s. 16 *Cr. C.* at the time he committed the assault. He has failed to rebut the presumption that his toxic psychosis was a “self‑induced stat[e] caused by alcohol or drugs” in accordance with the definition in *Cooper*. A malfunctioning of the mind that results *exclusively* from self‑induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual’s inherent psychological makeup. This is true even though medical science may tend to consider such conditions to be diseases of the mind. In circumstances like those of the case at bar, toxic psychosis seems to be nothing more than a symptom, albeit an extreme one, of the accused person’s state of self‑induced intoxication. Such a state cannot justify exempting an accused from criminal responsibility under s. 16 *Cr. C.*
9. This conclusion takes account of the policy considerations referred to by Dickson J. in *Cooper*. In light of Dr. Faucher’s expert assessment of the frequency of toxic psychosis in circumstances analogous to the ones in the instant case, the appellant’s position, if adopted, would affect the integrity of the criminal justice system in ways that would be difficult to accept. If everyone who committed a violent offence while suffering from toxic psychosis were to be found not criminally responsible on account of mental disorder regardless of the origin or cause of the psychosis, the scope of the defence provided for in s. 16 *Cr. C.* would become much broader than Parliament intended. These considerations reinforce the conclusion that the toxic psychosis of the appellant in this case is covered by *Cooper*’s exclusion of “self‑induced states caused by alcohol or drugs”.
10. The lack of evidence that the appellant was suffering from an underlying mental disorder certainly simplifies the legal characterization exercise under s. 16 *Cr. C.* From a factual standpoint, this case seems quite clear: as in *Paul*, the only reasonable conclusion is that the appellant’s mental condition is covered by the exclusion from *Cooper*. Contrary to the conclusion the appellant is asking this Court to draw, it would be unreasonable to assume, absent any evidence to back up such a claim, that the real cause of his toxic psychosis was an underlying mental disorder. In addition, no Canadian court has applied the defence provided for in s. 16 *Cr. C.* in the context of toxic psychosis without evidence showing that the accused suffered from an underlying disease of the mind.
11. In light of the case law, it is plausible to expect that the courts will have to perform this legal characterization exercise in circumstances much more difficult than the ones in the case at bar. One example would be a case in which the mental condition of the accused indicates an underlying mental disorder but the evidence also shows that the toxic psychosis was triggered by the consumption of drugs of a nature and in a quantity that could have produced the same condition in a normal person. In such circumstances, the courts should be especially meticulous in applying the “more holistic approach” from *Stone*.

G. *Section 33.1 Cr. C. Applies in This Case*

1. The foregoing conclusion leads to the question whether s. 33.1 *Cr. C.* is applicable. This provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self‑induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person (see, generally, *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.); *R. v. Chaulk*, 2007 NSCA 84, 257 N.S.R. (2d) 99). Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence.
2. The self‑induced intoxication to which s. 33.1 *Cr. C.* refers is limited in time. It corresponds to the period during which the substance consumed by the accused produced its effects. Section 33.1(2) *Cr. C.* leaves no doubt about this. It provides that a person “is . . . criminally at fault where the person, while in a state of self‑induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person”. Section 33.1 *Cr. C.* is intended to prevent an accused from avoiding criminal liability on the ground that his or her state of intoxication at the material time *rendered the accused incapable* of forming the mental element or having the voluntariness required to commit the offence.
3. Section 33.1 *Cr. C.* therefore applies to any mental condition that is a direct extension of a state of intoxication. It is also important to understand that no distinction based on the seriousness of the effects of self‑induced intoxication is drawn in this provision. The appellant’s suggestion that it applies only to the “normal effects” of intoxication is wrong. There is no threshold of intoxication beyond which s. 33.1 *Cr. C.* does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision. It is so covered in the case at bar. The Court of Appeal therefore did not err in law in holding that s. 33.1 *Cr. C.* was applicable rather than s. 16 *Cr. C.*

V. Conclusion

1. For all these reasons, the appeal must be dismissed.

 *Appeal dismissed.*

 Solicitors for the appellant:  Roy & Robert, Montréal.

 Solicitor for the respondent:  Criminal and Penal Prosecutions of Quebec, Matane.

 Solicitor for the intervener the Attorney General of Canada:  Attorney General of Canada, Montréal.

 Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.