different outcome was rejected as irrelevant to the question of what procedural fairness required.

With regard to the relationship between domestic law and the ECHR, *Osborn* contributes to an increasingly prominent line of judicial and extra-judicial argument emphasising the importance of domestic law in ensuring adequate protection of fundamental rights. The case will no doubt prove highly significant in the ongoing debate about the common law's role in human rights protection, serving as a sort of judicial insurance policy and safeguarding the courts' powers to protect human rights in the face of any future repeal of the Human Rights Act 1998 or withdrawal from the ECHR.

PHILIP MURRAY

"PRIOR FAULT"

THE criminal law assumes that defendants possess certain capacities relating to reason and control. Those shown to lack these attributes are exempted from criminal responsibility. Two examples are insane people (whose understanding of the nature and quality of their conduct, or its wrongfulness, is insufficient), and automatons (who lack adequate control over their actions). Denying the criminal responsibility of such people is uncontroversial. Things become more complicated, however, when voluntary intoxication is added into the mix. How should the criminal law respond to those who, in a state of self-induced intoxication, temporarily become detached from reality and/or become unable to control their actions? That is the question that faced the Court of Appeal in *Coley, McGhee and Harris* [2013] EWCA Crim 223.

This note concentrates on *Coley*, the most difficult of the conjoined appeals. Coley was a 17-year-old man of previous good character. One night, dressed in dark clothing and a balaclava, he grabbed one of his knives (he was a collector), entered his neighbour's house, and opened her bedroom door. The neighbour awoke and alerted her partner to Coley's presence. A struggle ensued, in which the partner was stabbed nearly to death. Coley was charged with his attempted murder.

Without more, this case looks simple, but Coley claimed to have "blacked out" after smoking cannabis earlier that evening. He thus could not remember the incident. There was even a suggestion, corroborated somewhat by expert evidence at trial, that Coley may have believed himself to be a character in a violent video game at the time of the stabbing. The trial judge told the jury that this story was relevant only to the question of whether Coley intended to kill his

https://doi.org/10.1017/S0008197314000087 Published online by Cambridge University Press

neighbour's partner. Coley was convicted, but he appealed on the basis that insanity and automatism should also have been before the jury.

From a doctrinal perspective, these arguments were hopeless. First, the law has long distinguished between the state of voluntary intoxication itself (which cannot constitute a "disease of the mind" for the purposes of insanity), and a separate mental condition caused by voluntary intoxication (which can): see *Beard* [1920] A.C. 479. In *Harris*, the defendant's practice of drinking heavily when off work, and then stopping abruptly before returning to his job, had resulted in alcoholic psychosis, which could qualify as a "disease of the mind". There was, however, no suggestion that Coley's long-term cannabis use had resulted in a similarly qualifying "disease of the mind". The insanity defence was thus unavailable.

Coley's automatism point was despatched with similar ease. The Court of Appeal confirmed that automatism requires a "complete destruction of voluntary control" over action. To date, it was arguable that the "complete destruction of voluntary control" requirement applied only to road traffic cases – the context in which it was first recognised (see e.g. *Attorney-General's Reference (No 2 of 1992)* [1994] Q.B. 91). That view now appears unsustainable. Automatism is a very narrow defence indeed. Coley's actions certainly looked as if they were voluntary and controlled, and so the defence was not made out.

It was further noted that, even if Coley had completely lost voluntary control, this condition was self-induced, and hence an inappropriate basis for automatism. This reasserts the position in *Quick* [1973] Q.B. 910 and related cases that alcohol and illegal drugs are considered to be "dangerous", and thus any state of automatism that follows from their voluntary consumption will not exculpate the defendant. The view is taken that, in abusing such substances, the defendant is negligent as to the risk of being rendered an automaton and harming others. He has, in short, exhibited "prior fault".

Although correct in terms of precedent, the decision in *Coley* demonstrates why the law is problematic. Coley's was not simply an argument about being disinhibited by intoxicants, which, as confirmed in *McGhee*, is irrelevant to the question of criminal liability (see, too, *Sheehan and Moore* [1975] 1 W.L.R. 739). Neither does it seem apposite to call defendants such as Coley merely "irrational", as the Court of Appeal does repeatedly. Rather, it is submitted that Coley's argument goes to the core of the institution of criminal law. If, as writers such as Duff and Ashworth argue, the criminal law speaks with a moral voice, we must ask to whom its prohibitions are addressed. A person who genuinely believes he is playing a computer game does not seem like someone who can respond to moral reasons. If so, at the time of acting,

https://doi.org/10.1017/S0008197314000087 Published online by Cambridge University Press

he is not an appropriate target of criminal responsibility, and should thus be exempted from it.

The reply that Coley's altered mental state was brought about voluntarily, through his "prior fault" in taking drugs, is unsatisfactory, at least when stated so baldly. As everybody reacts differently to intoxicants, surely the defendant's experiential foresight of his intoxicated character should be relevant to asking whether he was *at fault* with regard to the possible commission of an intoxicated offence. Some such evidence was adduced at Coley's trial. It appears that he had been paranoid and "blacked out" after smoking cannabis before, but no violent consequences appear to have resulted. If so, then Coley had no reason to suspect violent consequences – particularly of the nature inflicted on the neighbour's partner – would flow from his decision to smoke cannabis on the evening of the stabbing. The defendant in *McGhee*, by contrast, was apparently aware of the dangers of mixing temazepam with alcohol. If that means he had acted violently whilst intoxicated before, then finding fault with McGhee's choice to drink, and denying him an exemption from criminal responsibility, is more defensible. He would have had foresight that drinking alcohol might have violent results, and have chosen to disregard it. Therein lies a relevant "prior fault".

In ignoring experiential foresight in cases such as *Coley*, it is submitted that the law draws too heavily on the correlation between some drugs (particularly alcohol) and violence. A more individualised assessment of the defendant's foresight concerning the risks of intoxication would better establish whether his decision to drink or take drugs demonstrated "prior fault", making a conviction for an intoxicated offence appropriate.

The fear might, of course, be that defendants would raise spurious arguments about their foresight of the consequences of becoming acutely intoxicated. This could be addressed through a reversal of the burden of proof, like in cases of insanity and diminished responsibility. The defendant would have to satisfy the judge or jury on the balance of probabilities that he had no reason to suspect that getting into a state of acute, voluntary intoxication would have the relevant consequences. The prosecution could call any existing admissible evidence (e.g. the victims of the defendant's previous intoxicated attacks!) to rebut the defendant's claim. Even though reversing the burden of proof would raise issues about the presumption of innocence, it would help weed out false "defences", and be an improvement of the law's current, inflexible approach to "prior fault".

There is not space here to consider whether a specific offence (say, "dangerous intoxication") should capture those who cause harm whilst acutely voluntarily intoxicated, but did not foresee the relevant risk

https://doi.org/10.1017/S0008197314000087 Published online by Cambridge University Press

when taking the drink/drugs. Such a proposal might placate those who would not wish defendants such as Coley to escape criminal liability entirely.

Unfortunately, in *Insanity and Automatism: A Discussion Paper* (2013), the Law Commission proposed the retention of the blanket rules about "prior fault". It also downplayed the significance of the defendant's experiential foresight of the risks of drinking or taking drugs in its previous report on *Intoxication and Criminal Liability* (Law Com No 314, 2009). Coley's case would thus be dealt with in the same unsatisfactory manner if the Commission's proposals were enacted.

One separate point concerns the appeal in *Harris*, which was allowed by the court. Harris' case involved aggravated arson under section 1(2) of the Criminal Damage Act 1971. To be liable for that offence, the defendant must be reckless as to starting the fire, and reckless as to the resulting endangerment of others' lives. Recklessness normally requires that the defendant be aware of the relevant risk (following *G and Another* [2003] UKHL 50, [2004] 1 A.C. 1034). Cases of voluntary intoxication are, however, recognised as "exceptional" (see *Stephenson* [1979] Q.B. 695). The recklessness as to the bare act of starting of the fire constitutes a "basic intent", and so proof that the defendant was too intoxicated to foresee the risk of fire, but would have foreseen it if sober, will be sufficient fault (see *DPP v Majewski* [1977] A.C. 443). By contrast, the defendant's recklessness with regard to endangerment of persons stretches beyond the bare act of starting the fire. It thus constitutes a "specific intent", and evidence of voluntary intoxication can be adduced to show that the defendant did not foresee the relevant risk (see *Heard* [2007] EWCA Crim 125, [2008] Q.B. 43). Although somewhat convoluted, this has been the assumed position for some time. It was, however, suggested in *Harris* that it might need to be revisited (at [57]). Clarification on this matter would be desirable, though it is unclear how often it raises problems in practice.

FINDLAY STARK

INTERNATIONAL LAW, PEOPLE TRAFFICKING AND THE POWER TO STAY CRIMINAL PROCEEDINGS FOR ABUSE OF PROCESS

ONE of the first things we teach our students about public law is that the UK operates a "dualist system". This means that public international law and municipal law are seen as separate entities, the rules of the first only operating internally when some legislative step has been taken to incorporate them into the second. Of how this works, criminal

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