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**COMMITTEE ON CRIMINAL CODE REFORM**

**DRUNKENNESS**  
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## DRUNKENNESS

He that killeth a man drunk, sobur schal be hangyd.

From T. Starkey, *England in the Reign of Henry VIII*,  
quoted by Glanville Williams, *Criminal Law, The General Part*, 2nd ed., 1961, p. 560

### 1. INTRODUCTION

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Throughout our history, judges and legislators have been loathe to permit accused persons to evade criminal responsibility on account of voluntarily-induced intoxication.

Two arguments have been advanced to justify this attitude; the accused is morally blameworthy for getting drunk, and there is a danger that any drunkenness defence will be abused.

Sir James Fitzjames Stephen expressed the first proposition pithily in 1883:

The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk.

*A History of the Criminal Law of England*, Vol. 2, p. 165

That view of the law can be traced back to at least the 16th century. In *Reniger v. Fogassa* (1551) 76 ER 1, the Exchequer Court stated:

[I]f a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. And Aristotle says, that such a man deserves double punishment, because he has doubly offended, viz. in being drunk to the evil example of others, and in committing the crime of homicide.

The second proposition was flamboyantly expressed by the English Criminal Law Commissioners in 1843, when they rejected any general plea of drunkenness on the grounds that:

the pretence would be constantly resorted to as a cloak for committing the most horrible outrages with impunity; what is worse, the reality would be incurred not only to ensure safety to the most notorious offenders, but for the enabling them to inflict atrocious injuries with the greater confidence; and the very excessive brutality of an outrage would afford such evidence of the total absence of reason and human feeling as would tend to the acquittal of the most heinous criminals.

Quoted in Glanville Williams, *Criminal Law, The General Part*, 2nd ed., 1961, p. 565

Both these approaches reflect an attitude that public policy considerations must take precedence over basic principles of criminal responsibility. In Canada, that view still prevails, and the challenge facing law reformers is to determine whether a drunkenness regime can be crafted which will, simultaneously, protect the public and uphold our general principles of culpability.

## 2. THE "DEFENCE" OF DRUNKENNESS

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Technically, evidence of drunkenness is not a "defence". A defence, such as necessity, is raised only after the Crown has otherwise proved the *actus reus* and *mens rea* of the offence beyond a reasonable doubt.

With drunkenness, on the other hand, the defence alleges that there is a reasonable doubt as to whether the Crown has proved the essential elements of the offence. In other words, has the *actus reus* been negated by evidence that the accused, on account of drunkenness, did not act voluntarily, or has the *mens rea* been negated by evidence that the accused, on account of drunkenness, did not have the requisite mental element required of the particular offence?

This is an important distinction to keep in mind, not only in assessing the caselaw but also in considering how the issue of drunkenness should be treated in the new *Criminal Code*.

## 3. A CHRONOLOGY OF THE CASELAW

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The modern law of drunkenness has its origins in *Director of Public Prosecutions v. Beard* [1920] AC 479, 14 Cr. App. R. 159 (HL). The accused was alleged to have raped a 13-year old girl and, when she resisted, he put his hand over her mouth. The pressure of his thumb on her windpipe suffocated her. The accused, in a statement to the police, claimed that he was "sodden and mad with drink."

Lord Birkenhead, for the Court, reviewed earlier caselaw and drew the following conclusions:

1. insanity whether produced by drunkenness or otherwise is a defence to the crime charged;
2. 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, and
3. 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 so 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.

In *MacAskill v. The King* [1931] SCR 330 the Supreme Court of Canada adopted *Beard* as the law of Canada.

Lord Birkenhead's second proposition was given a strict, and arguably unintended, interpretation by the Supreme Court of Canada in *R. v. George* (1960) 128 CCC 289. The accused was charged with robbery based on theft coupled with assault, and the Court was required to decide whether drunkenness negated the *mens rea* of the offence.

Fauteux J. stated:

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved by the Crown as one of the constituent elements of the offence, there is no specific intent necessary to constitute the offence of common assault.

His Lordship then cited the 3 propositions in *Beard*, and agreed with the trial judge that there was a doubt, on the evidence, "whether the Crown had proved that George had, owing to drunkenness, the capacity to form the specific intent required in the offence of robbery, ie. the intent to steal". (p. 302) However, Fauteux J. added that the trial judge should have considered the included offence of assault, and

the law as to the validity of a defence of drunkenness has to be related to that particular offence.

Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved. (p. 302)

The House of Lords revisited the specific/general intent issue in *DPP v. Majewski* [1977] AC 443. The accused was charged with various counts of assault stemming from a barroom brawl; he alleged that, on account of his consumption of alcohol and drugs, he did not form the intent required for assault. The trial court convicted, applying *Beard*, and the Court of Appeal upheld the conviction.

Before the House of Lords the accused argued that it offends against the principles of the common law that a person should be convicted of an offence which he did not intend to commit. Any evidence, including evidence of self-induced intoxication tending to show that the accused's faculties were disturbed is relevant to rebut the inferences which can properly be drawn from the fact that the accused did the act alleged to amount to an assault.

The Court rejected that submission. The Lord Chancellor restated the prevailing view that "**self-induced intoxication, however gross and even if it has produced a condition akin to automatism, cannot excuse crimes of basic intent such as the crime of assault**", and then added:

I do not for my part regard that general principle as either unethical or contrary to the principles of natural justice. If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury

he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases. . . . The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness. (pp. 474-5)

Several members of the Court recognized the illogicality of this position. Lord Salmon responded as follows:

I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. . . . Absolute logic in human affairs is an uncertain guide and a very dangerous master. The law is primarily concerned with human affairs. I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence. (pp. 483-4)

One year later the Supreme Court of Canada decided *Leary v. The Queen* (1977) 33 CCC (2d) 473, a case in which the accused was charged with rape. The trial judge directed the jury that evidence of drunkenness was not a defence to a charge of rape, and the British Columbia Court of Appeal agreed, considering itself bound by its earlier decision in *R. v. Boucher* [1963] 2 CCC 241.

In the Supreme Court of Canada, a majority endorsed, with no significant discussion, the law as stated in *R. v. George* and *DPP v. Majewski*, that a distinction is to be drawn between offences of general intent and those which, in addition to general intent, also require a specific intent attending the purpose for the commission of the act. Drunkenness can only be a defence to the latter kind of offences. Further, rape is a crime involving a general intent, and is therefore one to which the defence of drunkenness can have no application.

Paul Weiler has criticized this interpretation of *Beard* as follows:

They have treated Lord Birkenhead as though he were a one-man legislature writing a statute. . . . [The Court] has lifted one abstract passage out of the context of the *Beard* opinion and treated it as an exhaustive statement of Canadian law.

*In The Last Resort*, 1974, p. 105.

Glanville Williams is equally scathing of the way in which the Courts, including the House of Lords in *DPP v. Majewski*, have misconstrued *Beard*:

Lord Birkenhead, delivering in effect the judgment of the House of Lords, stated that evidence of intoxication could be taken into consideration in deciding whether the defendant had a "specific intent essential to constitute the crime." He did not explain what he meant by "specific," but we can say with some confidence that his judgment indicates that he had nothing very much in mind, and it is a great pity that he did not cross the word out of his speech before delivering it. That he attached no significance to the word is shown by the fact that immediately after the sentence in question he repeated it in essence but modified it by omitting the word "specific" and substituting the phrase "the intent necessary to constitute the crime." Moreover, at the end of his speech he stated expressly that his remarks were meant to apply not only to crimes requiring a "specific intent" but also to crimes not requiring a "specific intent," "for," he said, "speaking generally (and apart from certain special offences), a person cannot be convicted of crime unless the mens was rea." He could hardly have made it clearer that, whatever distinction he had in mind between specific intents and other intents, he (and therefore

the House of Lords for whom he was speaking) meant his remarks to apply to all intents. That, indeed, was how his opinion was understood for many years.

But judges then conceived the fear that gullible juries would turn dangerous drunks loose upon the community (there is little or no evidence that they have done so). Since so many crimes were worded to require a mental element, and since nothing was to be expected from the Government and Parliament, which we do not think it an important part of their function to settle legal difficulties, the judges silently came to the conclusion that the only remedy was the accustomed one of do-it-yourself. The technique was to take Lord Birkenhead's phrase "specific intent" and to assert that what he said applied *only* to crimes having that requirement (whatever meaning might be found for it, Lord Birkenhead having assigned none). In *Majewski* the law lords were pressed with the argument that Lord Birkenhead did not mean what he was now supposed to have meant, but they brushed aside the argument with the assertion that he could not have meant what he said.

*Textbook of Criminal Law*, 2nd ed., 1983, p. 471

Returning to *Leary*, Dickson J. (with whom Laskin C.J. and Spence J. concurred) wrote a strong dissent. After a thorough review of the caselaw, he suggested that subsequent Courts had misinterpreted *Beard*, and noted that "the irrational 'specific intent-basic intent' dichotomy has presented difficulty ever since, for there are not, and never have been, any legally adequate criteria for distinguishing the one group of crimes from the other." (p. 490) He went on:

Consider the position of the jury. The members of the jury will have heard all of the evidence as to drunkenness and are then, in effect, told to excise it from their minds. The result is that either: (a) the Crown, because the accused was intoxicated, is relieved of the burden of proving a requisite mental state which would have had to be proven if the accused had been sober (placing the intoxicated offender in a worse position than the sober offender - the antithesis of the policy sought to be implemented by the 19th century jurists); or (b) in the alternative, the jury is required to examine the mental state of the accused, notionally absent the alcohol, an impossible task and, in the case of a general intent crime and a very drunk man, to find a fictional non-existing mental state as an ingredient of guilt. . . .

There seems little reason for retaining in the criminal law - which should be characterized by clarity, simplicity, and certainty - a concept as difficult of comprehension and application as "specific intention." (p. 491)

Dickson J. rejected the proposition espoused in *Majewski* that public policy demands retention of the "specific intent" concept no matter how illogical or difficult of application that concept may be:

I have grave doubt that the rule in *Beard* deters or is capable of deterring the intoxicated offender. Such an offender only has an excuse if he acted in circumstances where he was incapable of forming an intent, or without an intent in fact. Certainly when that state is reached, no prohibitive rule could deter. (pp. 493-4)

If sanctions against drinking to excess are thought necessary, His Lordship recommended that they be introduced by legislation (as in a crime of being drunk and dangerous), and not by adoption of "a legal fiction which cuts across fundamental criminal law precepts and has the effect of making the law both uncertain and inconstant." (p. 495)

Finally, Dickson J. urged that the Court's concern is with the mental state of the accused, in fact, and not merely his capacity to have the necessary mental state:

Intoxication is one factor which, with all the other attendant circumstances, should be taken into account in determining the presence or absence of the requisite mental element. If that element is absent, the fact that it was absent due to intoxication is no more relevant than the fact of intoxication giving rise to a state of insanity. (p. 495)

In 1982 the House of Lords took *Majewski* one step further, in *Commissioner of Police v. Caldwell* [1982] AC 341. The accused was charged with an offence under the *Criminal Damage Act, 1971*, s. 1(2):

1.(2) A person who . . . destroys or damages any property . . .

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged, and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,

shall be guilty of an offence.

The accused testified that, although he intended to damage or destroy the property by setting fire to it (because of a grievance with the proprietor), he was so intoxicated at the time that it did not occur to him that there might be people in the hotel whose lives might be endangered.

Lord Diplock, for the majority in the House of Lords, ruled that the accused was "reckless as to whether the life of another would be . . . endangered", applying the ordinary English meaning to "reckless", as including not only a decision "to ignore a risk of harmful consequences resulting from one's acts that one has recognized as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was." (pp. 353-4)

His Lordship recognized that this understanding of recklessness imputes an element of objectivity into the definition:

If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as "reckless" in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as "reckless" in its ordinary sense if, having considered the risk, he decided to ignore it. (p. 354)

However, Lord Diplock added that in the case of self-induced intoxication, *Majewski* made it clear that "reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime." (p. 355) Thus, classification into offences of "specific" and "basic" intent is irrelevant where being reckless as to whether a particular harmful consequence will result from one's act is a sufficient alternative *mens rea*." (p. 356)

Lord Edmund-Davies (with Lord Wilberforce) dissented, stating in part:

My Lords, it was recently predicted that, 'There can hardly be any doubt that *all* crimes of recklessness except murder will now be held to be crimes of basic intent within *Majewski*': see *Glanville Williams, Textbook of Criminal Law*, p. 431. That prophecy has been promptly fulfilled by the majority of your



Lordships, for, with the progressive displacement of 'maliciously' by 'intentionally' or 'recklessly' in statutory crimes, that will surely be the effect of the majority decision in this appeal. That I regret, for the consequence is that, however grave the crime charged, if recklessness can constitute its *mens rea* the fact that it was committed in drink can afford no defence. It is a very long time since we had so harsh a law in this country. (pp. 361-2)

In 1986 the Ontario Court of Appeal, in *Regina v. Moreau* (1986) 51 CR (3d) 209, dealt with the issue of mistake of fact in a general intent offence, when intoxication was the alleged cause of the mistake of fact. Notwithstanding *Pappajohn v. R.* (1980) 14 CR (3d) 243 (SCC), the Court ruled that:

An honest but mistaken belief that the complainant consents negatives recklessness unless it is precluded by wilful blindness. However, where the mistake is induced by voluntary intoxication, the mistake on policy grounds does not exempt an accused from liability for an offence of general intent. (headnote)

The Supreme Court of Canada was invited to reconsider its decision in *Leary in Bernard v. The Queen* [1988] 2 SCR 833, a case of sexual assault causing bodily harm. The Court's four judgments can be summarized as follows:

*McIntyre and Beetz, JJ.* a general intent offence is one in which the only intent involved relates solely to the performance of the act in question, with no further ulterior intent or purpose. A specific intent offence is one which involves the performance of the *actus reus*, coupled with an intent or purpose going beyond the mere performance of the questioned act. The distinction, which is neither artificial nor based on a legal fiction, is not divorced from logical underpinnings.

Drunkenness does not apply in offences of general intent, but only to specific intent offences where the accused is so intoxicated that he lacks the capacity to form the specific intent required to commit the crime.

The fact that an accused may not rely on intoxication in general intent offences does not relieve the Crown from proving *mens rea*; it may be proved in two ways. First, it may be inferred from the *actus reus*, in that a person is presumed to have intended the natural and probable consequences of his actions. Second, in cases where the accused was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may meet its evidentiary obligation respecting the necessary blameworthy mental state of the accused by proving the fact of voluntary self-induced intoxication. Proof of voluntary drunkenness can be proof of a guilty mind.

Finally, *Leary* does not convert sexual assault into an absolute liability offence (and thereby violate the *Charter*, ss. 7 and 11(d)), by removing the Crown's onus of proving the requisite intention. *Leary* upholds the principle that the morally innocent should not be convicted, for it recognizes that "accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control leading to the commission of a crime, are not morally innocent and are, indeed, criminally blameworthy." (p. 880)

*Wilson and L'Heureux-Dube JJ.* sexual assault causing bodily harm is an offence of general intent, and in this case the accused's blameworthy mental state can be inferred from his conduct. It is accordingly not necessary to resort to self-induced intoxication as a substituted form of *mens rea*; imposing criminal liability on that basis may not survive a *Charter* challenge.

*Leary* is perfectly consistent with the onus resting on the Crown to prove the minimal intent. Evidence of intoxication can go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism.

*Dickson C.J. and Lamer J. (dissenting)*: in principle, intoxication is relevant to the mental element in crime, and should be considered, together with all other evidence, in determining whether the Crown has proved the requisite mental state beyond a reasonable doubt. The categories of specific and general intent have evolved as an artificial device whereby evidence, otherwise relevant, is excluded from the jury's consideration, on the basis that protection of the public should override principle and logic. But surely Parliament, not the Courts, should make such judgments. Also, there is no evidence that the artificiality of the specific intent requirement is actually required for social protection.

*Leary* should be overruled; it imposes a form of absolute liability on intoxicated offenders, which is entirely inconsistent with the basic requirement for a blameworthy state of mind as a prerequisite to the imposition of the penalty of imprisonment, and thereby violates the *Charter*, s. 7. It also runs counter to the s. 11(d) right to be presumed innocent until proven guilty. Finally, it cannot survive the "proportionality" test under s. 1.

*La Forest J.*: while in agreement with the law as stated by Dickson, CJC, he agreed that this was a proper case to apply s. 613(1)(b)(iii).

While *Bernard* has firmly entrenched the "specific intent-general intent" dichotomy in Canadian law, there has been some continuing debate about the issue of "capacity". It will be remembered that Lord Birkenhead's second proposition stated 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," and a line of Supreme Court of Canada decisions has referred to "incapacity to form the necessary intent" as the appropriate test where the defence of drunkenness is in issue: *McAskill v. The King* (1931) 55 CCC 81, *Perrault v. The Queen* [1970] 5 CCC 217, *Alward and Mooney v. The Queen* (1977) 35 CCC (2d) 392, and *Swietlinski v. The Queen* (1980) 55 CCC (2d) 481.

Several recent decisions of the Ontario Court of Appeal have put that test into some doubt. In *Regina v. MacKinlay* (1986) 28 CCC (3d) 306, Martin JA, for the Court, stated:

If the accused by reason of intoxication was incapable of forming the required intent, then obviously he could not have it. If the jury entertain a reasonable doubt whether the accused by reason of intoxication had the capacity to form the necessary intent, then the necessary intent has not been proved. If they are satisfied beyond a reasonable doubt that the accused had the capacity to form the necessary intent, *they must then go on to consider whether, taking into account the consumption of liquor and the other facts, the prosecution has satisfied them beyond a reasonable doubt that the accused in fact had the required intent.* (italics in original judgment) (p. 322)

See also *Regina v. Otis* (1978) 39 CCC (2d) 304, *Regina v. Dees* (1978) 40 CCC (2d) 58 and *Regina v. Seguin* (1979) 45 CCC (2d) 498, all decisions of the Ontario Court of Appeal.

However, in *Regina v. Korzepa* May 24, 1991 (Vancouver Reg. No. CA007275) the British Columbia Court of Appeal rejected the *MacKinlay* formulation. Mr. Justice Wood, speaking for the Court, observed that in real life there are cases where a level of intoxication, insufficient to affect the capacity of the accused to form the specific intent alleged, nonetheless has acted upon that person's mind to such an extent as to raise a reasonable doubt as to whether the required intent was present. In such circumstances,

reality comes squarely up against the legal rule which declares evidence of such intoxication irrelevant to the issue of intent. He went on:

Having said all that, I think it is important to add that I am in complete sympathy with much of what Martin, J.A. had to say in *MacKintay*. The law which restricts the defence of intoxication to the question of the accused's capacity to form a specific intent alleged against him, ignores the reality to which I earlier referred. That reality has long troubled judges and lawyers alike. In a case of murder the present law creates the certainty that many, who through drink did not in fact have either of the intents described in s. 229(a)(i) and (ii), will nevertheless be convicted of murder because their level of intoxication was insufficient to raise a reasonable doubt as to the capacity to form either of those intents.

The rules in *Beard* virtually absolve the Crown from having to prove actual intent in any case where a specific intent is alleged and intoxication is raised as a defence. For in such cases it need only prove the capacity of the accused to form the intent alleged, at which point the "reasonable, commonsense inference", which by then is immune to the reality of the accused's intoxicated condition, discharges the balance of their burden of proof. I am not the first to suggest that by limiting the burden of proof in such cases the law as it presently stands is inconsistent with the presumption of innocence. (pp. 21-22)

This survey of relevant caselaw would not be complete without brief reference to two recent decisions in New Zealand and Australia. In *R. v. Kamipeli* [1975] 2 NZLR 610, the New Zealand Court of Appeal rejected the contention that evidence of drunkenness is admissible only in specific intent offences. Further, the Court ruled that "it is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry." (p. 616)

In *O'Connor* [1980] 4 A Crim R 348 the High Court of Australia (4:3) declined to follow *Majewski*, ruling that no distinction is to be drawn between offences of "basic" and "specific" intent for the purpose of determining whether the mental element of an offence can be established. For all offences requiring proof of a mental element, evidence of intoxication by drugs or alcohol, whether voluntarily self-induced or not, is relevant and admissible in determining whether the requisite mental element was present.

## PROPOSALS FOR REFORM

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### Canada

In 1982 the Law Reform Commission of Canada offered two alternatives:

First, the law could be left as it is, in which case the offences in the Special Part would need to be defined more tightly to make clear when a specific intent is and is not required. Second, the defence could apply to all offences subject to liability for the new included offence of criminal intoxication in the case of voluntary intoxication. (p. 58)

*Criminal Law The General Part: Liability and Defences, Working Paper 29, 1982*

In 1986 the Law Reform Commission recommended abolishing the specific-general intent dichotomy, but at the very high price of instituting negligence as the culpability standard for a wide variety of offences, including homicide, nuisance, vandalism and arson. No alternative dangerous intoxication offence was proposed.

Its most recent proposal is contained in Report 31, *Recodifying Criminal Law*:

#### 3(3) Intoxication

- (a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2) and 3(3)(a), unless the intoxication is due to fraud, duress, compulsion or reasonable mistake,
  - (i) everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of causing death, for committing that crime while intoxicated; and
  - (ii) everyone falling under clause 3(3)(a) who causes the death of another is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.

*[Minority proposal:*

#### 3(3) Intoxication

- (a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) Exception. This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.]

## **b. United States of America**

The 1962 *Model Penal Code* provides that intoxication may negative purpose, knowledge and belief. It may also negative recklessness, but only where the actor would not have been aware of the risk if sober. Clause 2.08 states:

### **Intoxication**

(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial.

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

(5) *Definitions.* In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

## **c. Great Britain**

In 1975 (prior to *Majewski*), the *Butler Committee Report* studied the problem of mentally abnormal offenders. It interpreted s. 8 of the *Criminal Justice Act, 1967* as permitting evidence of intoxication to be raised in general intent, as well as specific intent, cases. It expressed a concern that habitually violent intoxicated offenders might go free, and thus recommended a new statutory offence of "dangerous intoxication." The primary aim of this offence would be to enforce treatment, but at a minimum would provide punishment to and control over those who would not accept such treatment.

A dangerous offence would be one involving bodily harm or death or sexual attack on another or destruction or damage to property that endangered life.

No legislative action was taken on this proposal; the subsequent decisions in *Majewski* and *Caldwell* severely limited the scope of intoxication evidence.

In 1980 the Criminal Law Revision Committee, although critical of the decision in *Majewski*, recommended an intoxication regime which had the effect of introducing an

objective test for recklessness, similar to the U.S. *Model Penal Code*. The Committee proposed that:

1. The common law rules should be replaced by a statutory provision on the following lines:
  - (a) that evidence of voluntary intoxication should be capable of negating the mental element in murder and the intention required for the commission of any other offence; and
  - (b) in offences in which recklessness does constitute an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial. . . .
2. Voluntary intoxication should be defined on the lines recommended by the Butler Committee. . . .
3. In murder or any other offence in which intention is required for the commission of the offence, a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However, in offences in which recklessness constitutes an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial. . . .
4. Our recommendations on voluntary intoxication should be applicable to criminal offences generally. . . .

Professors J.C. Smith and Glanville Williams, a minority on the Committee, proposed that intoxication should be able to negative intention, specific or otherwise. For offences involving recklessness or where mistake was made, evidence of intoxication should be admissible to determine whether the mental element was proved. However, if the accused would have known of a risk if sober or would not have made the mistake if sober, he or she would be convicted of a separate offence of doing the act while in a state of voluntary intoxication. The full text of their proposal is set out in Quigley, "Reform of the Intoxication Defence", 33 McGill LJ 1, at 24-25.

The most recent British proposal is contained in the 1989 English Law Commissioners' Draft Code, clause 22, which states:

22.-(1) Where an offence requires a fault element of recklessness (however described), a person who was voluntarily intoxicated shall be treated-

- (a) as having been aware of any risk of which he would have been aware had he been sober;
- (b) as not having believed in the existence of an exempting circumstance (where the existence of such a belief is in issue) if he would not have so believed had he been sober.

(2) Where an offence requires a fault element of failure to comply with a standard of care, or requires no fault, a person who was voluntarily intoxicated shall be treated as not having believed in the existence of an exempting circumstance (where the existence of such a belief is in issue) if a reasonable sober person would not have so believed.

(3) Where the definition of a fault element or of a defence refers, or requires reference, to the state of mind or conduct to be expected of a reasonable person, such person shall be understood to be one who is not intoxicated.

(4) Subsection (1) does not apply-

- (a) to murder (to which section 55 applies); or
- (b) to the case (to which section 36 applies) where a person's unawareness or belief arises from a combination of mental disorder and voluntary intoxication.

Although the draft does not refer specifically to crimes of intent, the Commentary, paragraph 8.34 makes it clear that:

when the offence charged requires proof of intention, knowledge or belief, evidence of *voluntary* intoxication is to be treated like any other evidence tending to show that the defendant lacked the state of mind in question. This is presently the position in relation to any offence classified as an offence of "specific intent".

Briefly, the proposal precludes intoxication in cases of recklessness or when a defence of mistake of fact is founded on intoxication.

#### **d. New Zealand**

Clause 29 of the New Zealand draft *Crimes Bill* states that:

29. Intoxication. (1) In determining whether any person is criminally responsible for any offence involving intention, knowledge or recklessness in respect of any act done or omitted to be done, evidence that the person was, at the time of the act or omission, intoxicated, whether voluntarily or involuntarily and whether by alcohol or any other substance, may be taken into account in deciding whether or not that person had the necessary intention or knowledge or was reckless.

- (2) Subsection (1) of this section does not apply where-
  - (a) Intoxication is an essential element of the offence charged; or
  - (b) The person charged-
    - (i) Had already resolved before becoming intoxicated to do or omit to do the act; or
    - (ii) Consumed or otherwise used any intoxicant to strengthen his or her resolve to do or omit to do the act.

#### **e. Australia**

In Australia the 3 *Criminal Code* states (Queensland, Western Australia and Tasmania) and the Northern Territory have provisions paralleling the law as stated in *Majewski*.

In the 4 common law jurisdictions (New South Wales, Victoria, South Australia and the Australian Capital Territory), the High Court's decision in *O'Connor* [1980] 4 A Crim R 348 applies. In that case the Court (4:3) declined to follow *Majewski*, ruling that no distinction is to be drawn between offences of "basic" and "specific" intent for the purpose of determining whether the mental element of an offence can be established. For all offences requiring proof of a mental element, evidence of intoxication by drugs or alcohol, whether voluntarily self-induced or not, is relevant and admissible in determining whether the requisite mental element was present.

The 1990 Review Committee saw as its options (i) adoption of the rule in *O'Connor* (along with an alternative offence of committing a dangerous or criminal act while intoxicated), or (ii) legislative entrenchment of the law as stated in *Majewski*. It chose the latter, recommending that:

- (a) the proposed consolidating law should contain provisions (similar to those contained in paragraph 29(2)(b) of the New Zealand Crimes Bill) to the effect that where intention to cause a specific result is an element of an offence, intoxication, voluntary or involuntary, may be considered in determining whether the accused had the requisite specific intention, but where intention to cause a specific result is not an element, intoxication may be considered in determining whether the accused had any relevant fault only if the intoxication was involuntary;
- (b) the provisions of the proposed consolidating law with regard to mental illness should extend to mental disease or defect caused by the use of intoxicants: that is, not to a temporary disturbance of mind caused by present intoxication but to a condition (such as brain damage) caused by the previous abuse of an intoxicant; and
- (c) the proposed consolidating law should further contain a provision that where a definition of an offence refers expressly or by implication to the state of mind of a reasonable person, such a person should be understood to be one who is not intoxicated.

## **f. Academics**

Many academics have sought to find an intoxication regime which will respect our general principles of criminal responsibility, and at the same time address the apparently public perception that permitting evidence of intoxication to rebut *any* level of *mens rea* might free habitually violent intoxicated offenders.

Berner has proposed a "special defence" of intoxication, and a "special verdict" of not guilty on account of intoxication:

As in the case of insanity, it could be open either to the accused or to the prosecution to raise the issue, and an accused who was acquitted on account of intoxication could be provided with treatment, if necessary, on the same basis as the accused who is acquitted by reason of insanity.

"The Defence of Drunkenness - A Reconsideration", (1971) 6 UBCLR 309, at 349

A number of academics have proposed a new statutory offence of "criminal intoxication", "being drunk and dangerous" or "criminal incapacitation". See, for example, Glanville Williams, *Criminal Law, The General Part*, 1961, p. 573, Smith and Hogan, *Criminal Law*, 6th ed., p. 221, Beck and Parker, "The Intoxicated Offender - A Problem of Responsibility", (1966) 44 Can Bar Rev. 563, at 609, and Gold, "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge", (1976-77) 19 Crim LQ 34, at 82.

The most recent, and arguably most carefully thought-through, proposal is by Quigley, "Reform of the Intoxication Defence", (1987) 33 McGill LJ 1, at 37-40, an excerpt of which is attached as an Appendix to this paper.

Reference to academics would not be complete without observing that Colvin has written a spirited defence of the present intoxication rules. In his view "specific intent" and "general intent" represent nothing more than labels identifying the offences for which self-induced intoxication may and may not give rise to a defence, but *Majewski* and *Leary* can be



explained in terms of a coherent set of principles: see "A Theory of the Intoxication Defence", (1981) 59 Can Bar Rev. 750.

## 5. DISCUSSION

### a. Shortcomings of the Present Canadian Law

The law in Canada is, at present, unprincipled and arbitrary. The heart of the problem lies with the Courts' creation of an artificial distinction between crimes of specific intent and general intent. In *Leary*, Dickson J described it as an "irrational" dichotomy, "for there are not, and never have been, any legally adequate criteria for distinguishing the one group of crimes from the other." (p. 490)

The greatest injustice resulting from this artificial dichotomy is that it imposes an objective standard of liability; an accused can be found guilty, not for the state of mind he or she actually had, but for the state of mind which the accused would have had (or might have had), if sober.

This violates the most fundamental principle of criminal responsibility, that an accused is culpable only if the Crown proves beyond a reasonable doubt that the accused committed the *actus reus* with the state of mind requisite for that offence.

The two arguments advanced for attaching criminal liability in such circumstances are equally unconvincing. First, it is argued that the accused was morally blameworthy for getting drunk. Some Courts go so far as to say that this conduct satisfies the *mens rea* of the resulting offence. Others are content to acknowledge the illogicality of the situation, but finding public policy arguments persuasive.

Second, it is argued that to allow evidence of drunkenness to negative the mental element in crimes of general intent would result in dangerous "drunk" criminals being set free. Such empirical evidence as does exist does not support that contention. Quigley ((1987) 33 McGill LJ 1, at 5) refers to an Australian study of 510 cases held in the immediate aftermath of *O'Connor*. The number of cases in which the defence of drunkenness was argued but could not have been relied upon until *O'Connor* was 11 out of 510. Of the 3 resulting acquittals, only one could safely be attributed to acceptance of the drunkenness defence.

This result is not surprising, for several reasons. First, the accused will have to lead persuasive evidence of drunkenness, before the trial judge will put the issue to the jury. Second, in crimes of general intent, the level of *mens rea* which the Crown must prove is so minimal that it will be extremely rare that *mens rea* can be negated. Third, juries are inherently skeptical of such defences. As Dickson J. observed in *Pappajohn* (1980) 14 CR (3d) 243 (SCC) in the context of mistake of fact:

The reasonableness or otherwise of the accused's belief is only evidence for or against the view that the belief was actually held and the intent was therefore lacking. . . . Canadian juries, in my experience, display a high degree of common sense and an uncanny ability to distinguish between the genuine and the specious. (p. 267)

A second shortcoming of the present law is that it obligates the accused to raise a reasonable doubt as to his or her *capacity* to form the specific intent required, regardless of

what was the accused's actual intent, if any. Once again, an accused may be attached with criminal liability even though the Crown has not proved that he or she had the intent necessary to constitute the crime.

Finally, it would be a logical extension of the law as stated in *Leary* and *Bernard*, for Canadian Courts to follow the House of Lords' lead in *Caldwell*, precluding evidence of drunkenness in cases of recklessness.

#### Other "Constructive Mens Rea" Proposals

The 1962 American Penal Code, the 1989 English Law Commissioners' Draft Code and the 1990 Review Committee in Australia all advocate retention of the present restrictive approach to drunkenness, as stated in *Majewski* and *Caldwell*. The criticisms of the present Canadian law, as set out above, apply with equal force to these proposals; the principal complaint being that they impose a form of constructive *mens rea* in cases of general intent, in cases of recklessness and in cases where the accused seeks to lead evidence of drunkenness as the cause of his or her mistake of fact.

#### The Law Reform Commission of Canada Proposal

The Law Reform Commission's most recent proposal is as follows:

##### 3(3) Intoxication

- (a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2) and 3(3)(a), unless the intoxication is due to fraud, duress, compulsion or reasonable mistake,
  - (i) everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of causing death, for committing that crime while intoxicated; and
  - (ii) everyone falling under clause 3(3)(a) who causes the death of another is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.

*[Minority proposal:*

##### 3(3) Intoxication

- (a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) Exception. This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.]

This proposal has several positive qualities. First, it deals comprehensively with the issue of drunkenness. Second, it does away with the specific intent/general intent dichotomy and the "capacity to form the intent" anomaly.

However, it suffers from several important shortcomings. First, it is in one sense more harsh than the present law which, at least in the case of specific intent offences, grants a complete acquittal to an accused who raises a reasonable doubt as to intent based on drunkenness. Under the Law Reform Commission's proposal, drunkenness as a "defence" is eliminated in all cases except murder.

Second, it ascribes liability, even though the Crown has not proven the mental element. For example, an accused who is acquitted of theft because evidence of drunkenness negated the specific intent necessary for conviction would still be convicted of theft, "while intoxicated".

Third, it mandates a conviction for "manslaughter while intoxicated" in the case of an accused charged with murder who negates the *mens rea* required for murder through evidence of drunkenness, notwithstanding that such evidence might also negate the *mens rea* required for manslaughter.

Fourth, by limiting the clause 3(3)(b) proviso to "reasonable mistake", it introduces an objective standard of negligence, regardless of what the accused's actual belief was. So, for example, in a case of sexual assault, evidence of drunkenness actually causing the accused to believe that the complainant was consenting would not suffice, unless the accused could show that he would have held the same belief in consent, absent the drunkenness. In other words, this adopts the position stated by the Ontario Court of Appeal in *Moreau* (1986) 51 CR (3d) 209.

Finally, the proposal is silent as to the penalty to be imposed upon an accused convicted of a crime "while intoxicated".

#### d. A New Offence of Dangerous Intoxication

As noted above, numerous academics and some judges have advocated creation of a new offence of "being drunk and dangerous" or "dangerous intoxication". Most concede that its application in reality would be very limited, and some imply that it is being advocated as much to appease those who fear the wholesale acquittal of dangerous drunks as to respond to a real gap in the law.

Nevertheless, such proposals have several appeals. First, they enable evidence of drunkenness, if substantiated, to negate the culpability requirements of *any* offence.

Second, they impose criminal liability only for the conduct for which the accused is responsible; *ie.* voluntarily becoming intoxicated, and in that state committing a dangerous offence such as one "involving bodily harm or death or sexual assault on another or destruction or damage to property that endangered life" (*Butler Committee Report*, 1975).

Third, they enable the state to deal with the underlying evil, the accused's drunkenness, by way of therapeutic treatment. This is only an extension of the remedial approach already endorsed by Parliament in the case of conditional discharges for curative treatment, applicable to drinking drivers: see *Criminal Code*, s. 255(5).

Without doubt, an acceptable "dangerous intoxication" provision could be drafted. The real question is whether such legislative action is necessary.

## 6. ISSUES FOR CONSIDERATION

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- a. Is the present law respecting drunkenness satisfactory, or is it in need of reform?
- b. If reform is called for, should evidence of drunkenness be admissible:
  - i. to negative general intent;
  - ii. to negative recklessness;
  - iii. to support a claim of mistake of fact?
- c. Should any codification of the law of drunkenness specifically exclude its application in certain circumstances, such as in the New Zealand draft *Crimes Bill*, s. 29(2)?
- d. Do we need a new statutory offence of "being drunk and dangerous" or "dangerous intoxication"?
- e. If so, how should such an offence be defined?

## APPENDIX

### Proposal for a New Offence of Dangerous Incapacitation

Excerpt from

Quigley, "Reform of the Intoxication Defence", (1987) 33 McGill LJ 1, at 37-40

#### *B. My Proposals*

Although presented in the form of legislation, this is not to suggest that the following proposal for codification and reform is necessarily model legislation. Indeed, there are some areas for which further study is required and which are beyond the purview of this article. At the end of the proposal, I will attempt to explain and clarify some of the points made. To ease the presentation of that discussion, my proposals are set out in point form:

1. On a trial for any criminal offence requiring *mens rea* except an offence of dangerous incapacitation, the judge or jury shall determine whether the Crown has proved that the accused acted voluntarily and with the *mens rea* required for the offence. That determination shall be made on all of the evidence presented in the trial, including any evidence of the impairment or incapacitation of the mind of the accused from any cause whatever, with the drawing of such inferences from the evidence as appear proper in the circumstances.
2. In a case where an accused might be liable for the offence of dangerous incapacitation and where there is evidence of impairment or incapacitation of the mind of the accused, if the trial is by judge and jury, the trial judge, in charging the jury, shall inform the jury that acquittal on the offence charged and any included offence(s), if on the basis of a lack of voluntariness or a lack of *mens rea*, shall not necessarily amount to a final determination of the culpability of the accused.
3. Where the accused is charged with an offence of a dangerous nature, the judge or jury, when arriving at a verdict of acquittal for the offence charged and any included offences, shall state whether the acquittal is due to a unanimous reasonable doubt as to the act having been committed voluntarily or with *mens rea* due to the incapacitation of the accused. An offence of a dangerous nature is an offence which has resulted in bodily harm or death or involved [serious] sexual attack on another person or destruction or damage to property that endangered life or bodily health or that consisted of the operation of a motor vehicle in an incapacitated condition.
4. Where a verdict has been rendered pursuant to section 3, if the Crown wishes to proceed, the accused shall immediately be placed on trial before the same judge or jury for the offence of dangerous incapacitation. Any evidence heard on the trial of the offence originally charged shall become evidence on the trial of the offence of dangerous incapacitation.

5. The Crown and the accused shall each be entitled to call any additional evidence necessary to a determination of the issues involved in the offence of dangerous incapacitation. The trial judge may, in her discretion, permit either party an adjournment of the proceedings in order to obtain such further evidence but only to avoid unfairness to such party. Otherwise, the trial shall proceed for the new offence. The accused shall be deemed to have made the same election as for the offence charged. Likewise, where the offence charged was one on which the Crown could proceed by indictment or by summary conviction, the Crown shall be deemed to have made the same election as for the original offence charged. No new indictment or information shall be required. However, if a jury trial, the jury should be informed that the accused is to be tried for having been in an incapacitated condition that resulted in dangerous conduct and not for the particular conduct that resulted.

6. In determining the culpability of the accused for the offence of dangerous incapacitation, the judge or jury, as the case may be, shall only convict if satisfied beyond a reasonable doubt by the Crown that:

(a) in part or in whole, the condition of the accused resulted from her subjective fault, that is, that the accused intentionally or recklessly got into an incapacitated condition by ingesting a substance she knew was capable in sufficient quantity of incapacitating her or got into such a condition by omitting to ingest a substance where she knew that a failure to ingest such substance might result in her incapacitation; provided that such incapacitation is not culpable if it results in part from a fact unknown to the accused that increases her sensitivity to the substance or omission to take the substance; or,

[(b) where, in part or in whole, the incapacitated condition was caused by a mental disorder of a serious and prolonged nature, representing manifest danger to the public.]

7. Upon conviction for an offence of dangerous incapacitation, the accused shall be liable:

(a) where death resulted from the condition of dangerous incapacitation, to imprisonment for five years;

(b) where the original offence charged was a summary conviction offence, to punishment for a summary conviction offence;

(c) for any other situation, to imprisonment for two years.

8. The trial judge shall not, however, impose imprisonment for such an offence unless it has been demonstrated that:

(a) the accused refuses to take remedial treatment for the causes of the incapacitated condition in order to prevent its recurrence; or,

(b) there is evidence that treatment of the accused is highly unlikely to be successful; or,

(c) an accused has failed to comply with the terms and conditions of a previous sentence for a conviction for dangerous incapacitation; or,

[(d) no other appropriate disposition is available].

9. The provisions of Part XX of the *Criminal Code*<sup>65</sup> apply *mutatis mutandis* to an offence of dangerous incapacitation, except that, in addition to

any other powers of disposition, a trial judge may commit an accused directly to an appropriate institution or other treatment facility. Committal to such an institution or treatment facility shall be by warrant of committal in Form 18 but shall specify the name of the institution or treatment facility and the reason for the committal. A warrant of committal may be varied upon application to the trial judge if it is made to appear that there are valid reasons for doing so.

10. Either party may appeal from the verdict or sentence. Where the offence charged was an indictable offence, the provisions of Part XVIII of the *Criminal Code* shall apply and where the offence charged was a summary conviction offence, the provisions of Part XXIV shall apply.

11. A conviction for an offence of dangerous incapacitation shall be treated as any other conviction for the purposes of the *Criminal Records Act*,<sup>166</sup> the *Canadian Evidence Act*,<sup>167</sup> and the *Criminal Code*.

12. The provisions dealing with an offence of dangerous incapacitation shall apply *mutatis mutandis* to proceedings under the *Young Offenders Act*<sup>168</sup> except that where death resulted from the incapacitation of the accused, the maximum penalty would be three years confinement in "close custody" as defined in section 24(1) of the *Act*.