A JURISPRUDENTIAL ANALYSIS OF THE CANADIAN DEFENCE OF VOLUNTARY INTOXICATION

By

Makenna Lutz

[redacted]

Under the supervision of

Professor Doug King

An Honours Project submitted in

partial fulfillment

of the Degree requirements for the degree of

Bachelor of Arts - Criminal Justice Honours

Mount Royal University

April, 2021

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MOUNT ROYAL UNIVERSITY

CALGARY, AB. CANADA

Abstract

The jurisprudence following the defence of voluntary intoxication has remained a controversial topic within the legal system. This thesis evaluates the prominent landmark cases that have shaped the present voluntary intoxication defence and section 33.1 of the Criminal Code. This Criminal Code section bars the use of the intoxication defence while under extreme intoxication in cases involving harm towards the bodily integrity of another. Section 33.1 has yet to be revisited in the past 20 years. Included in this thesis is the analysis of each precedented case and the majority and dissenting decisions presented by the Supreme Court of Canada. Drawing on case law from both the Ontario Court of Appeal and the Supreme Court of Canada, this thesis is a semi-comprehensive historical timeline of the jurisprudence surrounding the defence. While there are compelling arguments for both the constitutionality and unconstitutionality of section 33.1, the Supreme Court of Canada has yet to conclude on the long-standing legislation. The Supreme Court will decide on the controversial topic in the upcoming months in an amalgamated hearing of *R v Sullivan* [2020] and in the case of Thomas Chan. This thesis includes a discussion of possible Supreme Court outcomes for the defence and Criminal Code section 33.1.

Dedication and Acknowledgements

First and foremost, I would like to thank my parents and my sister for continuously supporting me throughout my education, whether emotionally, financially, or physically – I thank you, I love you and I appreciate you. Hats off to you for listening to me rant passionately about not only the topic of my honours but the diverse issues I learn about on a daily - I propose you will miss the "did you know…" spiel?

I would like to express my gratitude for the supportive, genuine friends in my life - you know who you are. Your patience does not go unnoticed. Thank you to my partner for supporting me and my goals as if they were your own– I love you.

Thank you to my professor and honours supervisor Doug King for investing the time and expertise to assist me in completing this project. Your devotion to social justice is truly admirable. Thank you for passing your Charter and legal passion on to those you teach – I am forever thankful. To Professor Ritesh Narayan for igniting my passion for social justice – I can never repay you.

I would like to thank the Criminal Justice professors and faculty for fostering an immersive learning environment that I will never take for granted. Thank you to my Mentor, Cathy, for instilling the confidence and reassurance that I can and will do anything I set my mind to. This is only the beginning of a life of dedication to advocacy and social justice.

No matter how big or small your contribution, thank you.

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Jurisprudential Analysis of the Canadian Defence of Voluntary Intoxication

The interpretation of the Canadian criminal defence of intoxication has been continuously sought out through the Supreme Courts of Canada. Each case that evolved the defence left the public and lower courts with an ambiguous understanding of the defence's nature. The forever changing interpretation of common law legislation has begun to, once again, turn in the minds of scholars and legal professionals. Until the 1994 enactment of section 33.1 of the Criminal Code, the defence of intoxication remained a matter of common law (Verdun-Jones, 2011, p. 282). While the defence has been clearly laid out in terms of requirements and application, the main question that remains is the constitutionality of its statutory limitation , found in s.33.1 of the Criminal Code.

Section 33.1 has stood as a consistent provision of the Criminal Code, shortly following *R v Daviault* [1994] as Parliament's attempt to protect victims of assault, more importantly, sexual assault while their attacker had been intoxicated. Controversy quickly formed around the legislation, questioning the possible violation of section 7 and section 11(d) Charter rights. Yet, for twenty-five years, this Criminal Code legislation remains.

The courts rely on the very principle of intent, also referred to as *mens rea*. In order for a court to find an accused guilty of a criminal act, it must be determine *mens rea* and *actus reus* beyond a reasonable doubt. Intoxication has the ability to inhibit motivation, executive functioning, and the foresight of an individual and, therefore, can affect the mental state of an individual at the time they commit an offence (Dimock, 2010, p.2). Is it mere recklessness? Is it the inability to predict circumstances? Or is it the lack of mental functioning as a whole? The determination of guilt is questioned as to how it can be solely based on *mens rea* if the accused

lacked it as a whole? The Court has yet to make a concrete, clear decision based on mental intent involving intoxication due to its convolution.

That is until the early months of 2020 following *R v Chan* and *R v Sullivan*. The courts began to re-consider the connection between s. 33.1 and the mental intent of an offender. The two cases, decided by the Ontario Court of Appeal, stated that s. 33.1 presumes that an intoxicated offender had the intention to commit the crime at hand without actually determining the intention. December 23, 2020, the Supreme Court of Canada agreed to hear *R v Chan* and *R v Sullivan* as one and to determine the constitutionality of s. 33.1.

The primary aim of this thesis is to demonstrate the jurisprudential evolution of the criminal defence of voluntary intoxication through landmark cases in Canadian history. Through precedent case law, this thesis will define the difference between voluntary and involuntary intoxication, specific and general intent offences, the three levels of intoxication and how s. 33.1 bars individuals from their right to be presumed innocent until proven guilty. This thesis will also discuss the general misconceptions of the defence and three possible ways that the Supreme Court could rule in the near future. It is pertinent to Canadian fundamental freedoms to have policies and legislation that clearly abides by each individual's Charter Rights. The forthcoming ruling will be followed by many.

Figure 1: Intoxication Defence Pathways

Circumstance	**Defence**
Involuntary Intoxication	Full Defence
Voluntary Intoxication / General Intent	No Defence, unless Intoxication is akin to Automatism and did not cause harm to the integrity of another person

Voluntary Intoxication / Specific Intent	Partial Defence if party can provide evidence that the accused lacked the *mens rea*

Methodology

The purpose of this thesis is to demonstrate how the Canadian defence of voluntary intoxication has evolved through case law and to analyze the enactment, interpretation and Ontario's present suspension of s. 33.1 of the Criminal Code. This historical case analysis intends to further understand the purpose of the defence by examining Supreme Court of Canada (SCC) cases and secondary data. Each related SCC case, throughout the previous 25 years, provides provisions to the defence that will aid in analyzing the evolution of the defence within the courts. The importance of using Supreme Court cases is relevant to representing a larger population than just the case itself (Seawright and Gerring, 2008, p. 294).

The research design best suited to develop the history and interpretation of the Canadian defence of voluntary intoxication and s. 33.1 is by using a historical case analysis. Historical analysis is used to explore past issues by collecting, verifying and synthesizing evidence that defends or refutes a hypothesis (Savitt, 1980, p. 53). A historical analysis uses secondary sources and different forms of primary documentation to provide unobtrusive data. Primary documentation in this thesis includes court and legal documents for the respective cases; *R v King* [1964], *DPP v Beard* [1920], *Leary v The Queen* [1978], *R v Bernard* [1988], *R v Daviault* [1994], *R v Daley* [2007], *R v Sullivan* [2020]. Each case is an authentic legal document stored in the CanLII and Lexum databases.

This semi-comprehensive research study aims to determine a trend analysis based on using case law. The primary source of data is case law and supported by secondary sources,

including scholarly articles, books, and news articles. There is no ethical approval needed for this thesis due to the unobtrusive measures for data collection, such as public case documents and scholarly articles. There will be no interaction with other individuals in the collection of this data.

To follow is the historical analysis of the defence of intoxication. Each section provides a brief overview of the requirement that must be met to argue the defence successfully, its application, and the landmark cases that have evolved the defence.

Voluntary and Involuntary Defence of Intoxication

Two forms of the intoxication defence can be successfully argued. One can grant an offender a complete acquittal, and the other can grant a partial defence in reducing charges. Involuntary intoxication, if argued successfully, can grant a full acquittal, and voluntary intoxication can offer a lesser charge or conviction. It is important to note that intoxication under this legislation is not just to the extent of alcohol use but also includes intoxication by way of drug consumption.

The defence of voluntary intoxication is defined whereby the offender, of their own accord, is intoxicated to the extent that they cannot form the necessary mental intent, or *mens rea*, to commit a specific intent offence (Gooch & Williams, 2015). Voluntary intoxication can be argued in cases with charges such as 1st-degree murder, breaking and entering, robbery, and kidnapping which require specific intent. This is based on the notion that while an individual may have committed the criminal act, known as the *actus reus*, intoxication prevents them from having the requisite intention to commit the crime, known as the *mens rea*. It is nearly impossible to gain a full acquittal on a specific intent charge using the defence of voluntary intoxication. In these instances, the defence is more accessible to have charges reduced than a

full acquittal. For example, an offender charged with first-degree murder would have the opportunity to use the intoxication defence to reduce charges to second-degree murder or manslaughter. If the offender successfully raised a reasonable doubt that they lacked the intent to murder while intoxicated, a conviction may be reduced to that of a lesser charge.

Involuntary intoxication is a defence that can negate all criminal culpability. Involuntary intoxication is defined as the consumption of a substance whereby the individual "did not consent, or lacked the knowledge that the substance might cause intoxication" (Hearn et al., 2020, p. 378). This could include ingesting prescription drugs and having an unforeseeable reaction or being under coercion to ingest a substance. *R v King* [1962] added to the element of *mens rea* and the possibility of being involuntarily intoxicated.

R v King [1962]

King was administered an anesthetic from his dentist to have his teeth removed. He was warned not to drive post-operation but, feeling seemingly okay, King decided to drive. He ultimately caused an accident. While he was convicted at trial, the Appellate Court acquitted him based on involuntary intoxication. The Supreme Court upheld the Appellate Court's judgment and determined the dichotomy of involuntary and voluntary intoxication. It was determined that the "concept of free will and meaningful choice is central to the idea of voluntariness" (Blair, 2014, para. 3).

To successfully argue the defence of involuntary intoxication, the individual must prove that he/she had no mental element or intention to commit the crime before or during the act and that the substance's facilitation/use was not of free will or choice (Hearn et al., 2020, p. 378). The defence of involuntary intoxication is a route that negates full criminal responsibility.

The idea of voluntary and involuntary intoxication was introduced throughout the courts before the 1982 enactment of the Canadian Charter of Rights and Freedoms. A full or partial defence can be granted in the wake of voluntary or involuntary intoxication. However, it is much more complex to prove that the accused did not possess the mental element to be successful with the defence. In the Supreme Court's understanding of *mens rea and actus reus*, the dichotomy of specific and general intent offences was created to determine offences that required an ulterior motive or offences solely based on the act.

Specific and General Intent Offences

The defence of intoxication is primarily based on the requirement of *mens rea*. Offences are separated into two categories. Defining the act and the mental intention, this includes specific intent offences and general intent offences. Specific intent offences are defined as committing a wrongful act to bring upon an ulterior motive (Byelikova, 2019, p.14). Stuart (2007) states that in order to satisfy the requirements for the defence of intoxication, the "defendant must hold the premeditated intent for future actions" (as cited in Byelikova, 2019, p.).

The alternative category of *mens rea* is the general or basic intent offences, which can be defined as an intention to commit a crime; therefore, it was not an accident nor an honest mistake (Byelikova, 2019, pg. 15). General intent offences require a very minimal degree of mental knowledge to understand that the conduct is wrong in nature or will lead to consequences. Offences of a general intent can include but are not limited to; assault, sexual assault, and uttering threats. Until the case of *R v Daviault* [1994], the Supreme Court of Canada applied principles found in the English case, *DPP v Beard* [1920], decided by the British House of Lords, and the Canadian SCC cases *R v Bernard* [1988], and *Leary v The Queen* [1977] to makes decisions regarding the intoxication defence.

Figure 2: *Specific and General Intent Offences identified by the Courts*

This table has been removed due to restrictions on copyright. The original table can be found on page 290 of Verdun-Jones, S. N. (2011). Criminal law in Canada (6th ed.). Nelson Education.

DPP v Beard [1920]

The *Beard* Rule and its rigidity was formed with the intent to ameliorate the harshness of the law. Additionally, it was created to protect the public from dangerous and drunk offenders (Quigley, 1987, p. 168). Prior to *Beard*, intoxication was considered more of an aggravating factor than a mitigating factor. The presence of intoxication can now be used in cases to negate criminal culpability, to a degree, instead of making evidence and matters worse. During the time of *Beard*, the intoxication defence was formulated around the development of the element of *mens rea.* Judges found that drunkenness could not negate the mental element compatible with *mens rea* (Quigley, 1987, p. 169).

The British case involved Beard suffocating a girl while raping her. This is the case that allowed the defence of intoxication in particular circumstances. Known as the *Beard* Rule, these three guidelines became a model for the intoxication defence's circumstances and limitations. Verdun-Jones (2011) summarizes the following three rules:

1. Suppose the intoxication induced a mental disorder and rendered the accused "not criminally responsible" due to extreme intoxication. An individual must be acquitted due to "Not Criminally Responsible on Account of Mental Disorder" (pg. 283). This includes the disease of the mind that affects long-term alcoholics called *delirium tremens* (Verdun-Jones, 2011,

pg. 285). Delirium Tremens can cause psychotic episodes due to the sudden cessation of alcohol intake when someone has been reliant on it for years (Schuckit, 2014, p. 2110). This condition is covered under the Not Criminally Responsible on account of Mental Disorder (NCRMD) if proved by the party that raised it.

Throughout the years, the courts have determined that specific drug intake is covered under this stipulation so long as the party can successfully argue, Not Criminally Responsible due to mental disorder automatism. For example, MDMA (more commonly called "Ecstasy" or "Molly") has been shown to cause psychotic episodes and has led individuals to commit violent offences. The SCC determined that an individual with a "disease of the mind" (Criminal Code s. 2) is proved only if an "ordinary" person would not have acted in the dissociated state, in the same circumstances as the accused.

2. In *Beard*, so long as the accused lacked the intent to a specific intent offence, they cannot be convicted of that charge but may have their charge reduced, also known as a partial defence (Haque & Cumming, 2003, pg.146). However, intoxication is not a defence for a general intent offence. For example, an offender's specific intent offence charges may be reduced from murder to manslaughter if found that the accused lacked the intent to kill due to their intoxication.

Under the *Beard* Rule, the courts had to determine the "capacity" in which the individual could have formed the intention for a specific intent offence. It did not consider the actual intent but whether the accused maintained a capacity to form such intent. Meaning, was the individual in a state of mind to make a right or wrong decision based on the foreseeable consequences. This can relate to the idea of self-induced intoxication being sufficient enough to satisfy the intention. However, in *R v Robinson* [1996], after the passage of the 1982

Canadian Charter of Rights and Freedoms, Justice Lamer (as he was then) instructed that judges in the lower courts are to instruct juries that the "issue before the Court is whether the Crown has satisfied beyond a reasonable doubt that the accused had the requisite intent" (Roach, 2015, pg. 257). The question that the courts considered in each case raising the defence was whether the accused had the prerequisite intent to commit the offence and if they could have the foresight on the consequences of their actions.

Chief Justice Dickson (as he was known then) wrote in the dissent of *Leary* [1997] that specific and general intent offences should not be allowed to determine the defence of intoxication because it acts as an exclusion of evidence for the jury. His dissenting opinion was carried through to *R v Daviault* [1994], where the majority still believed in the dichotomous distinction to maintain a clear understanding of the circumstances that arise while intoxicated. In the Court's interpretation, it is entirely different when an enraged individual swings at their friend just to swing than an individual swinging at someone to try and hurt or kill that person. It is a matter of basic actions and specific intent.

3. If the accused cannot fully demonstrate that he or she lacked the specific intent to commit a crime, then the defence is null and will not constitute the mitigating of the accused's criminal culpability. The excuse that intoxication makes decision-making more difficult is invalid. Essentially, if the accused cannot raise a "reasonable doubt as to whether they formed the necessary intent for proof of specific intent, then intoxication is of no defence" (Verdun-Jones, 2011, pg. 293). However, in the decision of the third *Beard* Rule, it was written to convey that the jury must "prove" that the accused had not formed the necessary intent. The third rule in *Beard* takes into consideration the voluntary nature of intoxication as a way to recognize the intent. It looks at the intention, the foresight that the accused could have had,

the consumption of drugs and alcohol and the quantity. A holistic picture of the circumstances gives the Judge and jury an inference into whether the accused intended the offence.

As the courts and legal scholars ridiculed the *Beard* analysis, the standard interpretation was that *mens rea* requirement varies among different offences. Rather than limiting the defence to only specific intent offences, the judges began to see that the mental element must be incorporated into the investigation and the defence administration. It determined that if the crime was committed, then there would have been basic intention to commit that crime- also known as general intent. The case of *Beard* laid the initial foundation for the Courts to begin interpreting the defence of intoxication as common law evolved. The pre-Charter case of *Leary v The Queen* [1977] solidified *Beard* rules.

Considering the dichotomy of specific and general intent and the question of *mens rea*, Justice Fauteux (as he was known then) in *R v George [1960]* explains a "distinction is to be made between (i) intention as applied to acts considered concerning 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" (as cited in Gold, 1978, p. 737). On this basis, the decision of *Leary* concluded.

Leary v The Queen [1977]

The case of Allan Leary in the year 1977 was an additional pre-Charter case that further solidified the *Beard* Rule. The defence of "drunkenness," as it was then referred to, remained a dichotomous category distinguishing between specific and general intent.

Allan Leary was accused and convicted of rape. Leary claimed the defence of "drunkenness" and that there was consent between him and the victim. However, the defence was not available to a general intent offence in concurrence with *Beard*.

The court had to be satisfied that there is "evidence that drunkenness raised a reasonable doubt as to the accused's capacity to form specific intent" (Roach, 2015, p. 258). In *Leary*, it was determined that he was not intoxicated past the point of forming the intent to commit the rape. The Supreme Court was faced with other questions regarding the nature of the specific and general intent and why the classification matters.

The Supreme Court of Canada had four main questions to determine in the *Leary* case;

1. Is the distinction of specific and general intent to be upheld according to the classification and ruling in *Beard*? What is the main distinction?
2. Is rape a general intent offence according to *R v George*?
3. Was there significant evidence to infer that Leary was so intoxicated that he could not form intent?
4. Was there a miscarriage of justice by the trial judge informing the jury that drunkenness was not a defence for rape?

The ruling in *Leary* reiterated the *Beard* Rule and, in earlier cases such as *R v George* [1960]. There is no available intoxication defence to a general intent offence, and the offence of rape (as it was referred to then) is of general intent (Gold, 1978, p. 735). However, the distinction that rape is of general intent had not been operationalized. It is stated as self-evident, and there is no further explanation (Gold, 1978, p. 738). In response to *Leary*, legal scholar Glanville Williams considered the confusion that arises when a jury is given the advice that rape

is of general intent and no defence is arguable (Gold, 1978, p. 738). However, drunkenness can be used in the accused's argument as a mitigating factor. It was determined that there was no miscarriage of justice when the jury was informed; however, it was explained that the application in informing the jury had to be demonstrated accurately.

In *Leary*, the Supreme Court found that " the Crown must prove that the accused intended to do the acts with which he is charged" (1978, p. 32). A decision had to be determined on the distinction of "[the] effect of drunkenness on the capacity to form the requisite intent and the intent in fact. For example, a court had to accurately consider the pre-requisite intent or the intent during the time of the act as the *mens rea* component.

The intent to commit the crime was said to be substituted by the intent to consume alcohol. *Leary* stood for the proposition that if the accused was found to be sufficiently intoxicated during the offence and unable to form the *mens rea* required for the general intent offence, then the act of self-induced intoxication would be sufficient enough to satisfy the mental element, therefore, holding the accused liable. This rule holds the principle that those who voluntarily consume alcohol or other substances are not morally innocent and deprive themselves of self-control, ultimately leading to the commission of a crime (as cited in *Bernard*, 1988)

The majority of the Supreme Court remained in favour of the dichotomy between general and specific intent. However, many criticized the lack of flexibility and subjectivity when dealing with each case's individual circumstances. The flexibility, if used, would allow judges and juries to consider the full circumstances surrounding the case and can include intoxication as a mitigating factor in the determination of intent. A suggestion also made by scholars and the public is that courts should clarify and define the mental elements of each offence in order to prevent further confusion; however, this could allow more rigid parameters and not allow for

flexibility within the Courts. These criticisms stemmed from former Chief Justice Dickson's dissenting decision.

Dissenting Decision

Supreme Court Justice Dickson (appointed Chief Justice in 1984) had determined that because an ordinary and prudent person (or "reasonable" person) may consume alcohol willingly, it does not infer that every individual who voluntarily becomes intoxicated has the intent to commit a crime.

Dickson's rationale analyses the Court's connection between the voluntary consumption of alcohol and the specific intention to commit a crime. In cases prior to *Leary*, voluntary alcohol consumption was used almost interchangeably with voluntariness or intention to commit a crime. For example, if an individual was to consume alcohol and become intoxicated voluntarily, in the Court's rationale, the initial consumption of alcohol was enough for them to believe that that individual voluntarily or intentionally committed the crime. Justice Dickson disputed this claim because the act of consuming alcohol did not directly cause any individual to commit a crime but is instead a mitigating factor in the determination of guilt. It lacks the very notion of *mens rea* that the Court is trying to establish.

To avoid negating the requirement of *mens rea*, the Court then coined the term "recklessness." Justice Dickson (as he was known then) described recklessness as the knowledge that the accused may possess surrounding the conduct that can involve consequences because of the individual's *actus reus* (Colvin, 1982, p. 346). Essentially, the courts determined that although someone may not intend to commit an offence, they must indeed have the requisite knowledge to predict something could occur. This removed the element that the accused had to possess the full mental intention to commit an offence and introduced the possibility of an

individual knowing that alcohol consumption may have adverse effects, also known as subjective liability. Subjective liability is the concept that an accused person cannot be convicted of a crime unless they have (i) deliberately intended to bring about the consequences prohibited by law or (ii) subjectively realized that their conduct might produce prohibited conduct, but proceeds with the action regardless of the risk – also known as recklessness (Verdun-Jones, 2011, p. 78).

Additionally, in his dissent, Justice Dickson touched on his belief that intoxication should not be regarded as a stand-alone defence but rather a contributing factor to a condition that might be inconsistent with criminal responsibility, such as insanity or a disease of the mind. This was one of the first times the Court addressed possible links of intoxication to psychiatry. Justice Dickson concluded his dissent by arguing that it was unfair to assume that an individual would be presumed to have intended an act due to voluntary intoxication. He believed that it was unreasonable to believe that every individual who consumed alcohol would have the foresight to predict consequences, therefore, indulging in reckless behaviour. Justice Dickson believed that the determination of the individual's mental capacity to form intent should be more simple than the specific and general intent dichotomy. Knowing this would be an issue in the public's eye, he concluded by stating that the defence should be handled case by case, addressing all circumstances and evidence.

This was not the first, nor the last time the controversy around specific and general intent was expressed regarding the intoxication defence. Nearly ten years later, *R v Bernard* [1988] , following the precedent set in *Leary*, to once again question if rape is a general intent offence and if the trier of fact (either judge or jury) need be made aware of the self-induced intoxication along with all other evidence to consider the *mens rea* component met. To conclude, *Leary* solidified that the "self-induced intoxication could negate specific intent and it

could constitute proof of general intent" (Healy, 1990, p. 611). *Bernard* was the first case to challenge *Leary* on the basis of an infringement of rights found in the Charter of Rights and Freedoms .

Post-Charter

The Canadian Charter of Rights and Freedoms

In 1982, the Canadian Charter of Rights and Freedoms was enacted to protect individuals from government legislation that violates an individual's fundamental rights and freedoms. The Charter allows for the guarantee of democratic, mobility, legal, and equality rights of individuals to be upheld per the rule of law. The Charter does not aim to intervene in individual to individual interactions.

Bernard's defence argued that the *Leary* precedent was in violation of sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms, which state as followed;

(1) Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(2) Section 11(d). To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

R v Bernard [1988]

Nelson Bernard was charged and convicted of sexual assault causing bodily harm and appealed his conviction to the Supreme Court of Canada. Bernard had admitted to the assault and stated in a police interview that he was "all drunked up". However, that remained the only evidence of intoxication. Intoxication was still no defence to sexual assault (former known as

"rape") based on the *Leary* precedent. The Crown had to prove the *mens rea* intention of the offence apart from the determination of intoxication.

In *Bernard*, there were two ways in which the *mens rea* could have been raised. The first being the mental intention inferred from the act of the crime, meaning Bernard intended to commit sexual assault and therefore fulfill the *mens rea* requirements. The second being that the accused, Bernard, was so intoxicated, raising doubt that he even had the voluntary nature to commit the assault. In concordance with *Beard* and *Leary*, the Court stated that by proving the accused became intoxicated by self-inducing, it satisfied the necessary blameworthiness. Blameworthiness can be described as an individual's level of culpability determined by their mental state (Moore, 2009). The level of moral blameworthiness often increases with the severity of the offence; for example, there will be more moral blameworthiness placed on someone who has murdered as opposed to theft under $5000.

The nature of this case followed the *Leary* Rule closely but would be the first to raise the argument of extreme intoxication in general intent offences. There was an attempted analysis into the meaning behind capacity, intention and voluntariness. The main question was, should they have been interchangeable? Although Canada does not contain a clear, uniform definition of legal capacity, it is an ascription of mental (in)capacity that determines one's rights to make decisions (Law Commission of Ontario, 2017).

In *Bernard*, the Supreme Court majority upheld that the different concepts of *mens rea* could not be substituted as interchangeable. However, it was reiterated that the dichotomy of specific and general intent was not derived from artificial means and shall remain; later disputed by then Chief Justice Dickson. The majority found no infringement of section 7 or 11(d) of the Charter but for differing reasons.

Section 7 and 11(d)- Raised Charter Violation

The majority found that *Leary* and *Bernard* did not infringe sections 7 and 11(d) of the Charter. Justice Wilson and Justice L'Heureux-Dubé concluded that it was not an infringement because sexual assault is of general intent and constitutes the act committed. Both agreed that the *Leary* Rule, in its most "flexible form," still required the Crown to prove minimal intent and that the defence could be raised to the trier of fact in circumstances of extreme intoxication akin to automatism. This was the first time extreme intoxication had been raised in common law as a possible alternative avenue.

As mentioned above, Justice Wilson inferred to the Court that there be flexibility in its application of the *Leary* precedent. The Court stated that the "*mens rea* can still infer from the *actus reus* itself and a person can be presumed to have intended the natural and probable consequences of his actions" (1988, 2 S.C.R. 833). However, Justice Wilson prompted a suggestion on whether the evidentiary burden had been met. Wilson J. raised the notion of a possible negation for general or basic intent, which she classified as extreme intoxication akin to automatism or insanity. Meaning, if the accused committed a general intent offence, such as assault, the defence would have the opportunity to prove that the individual was in a state akin to or of similar nature to insanity, constituting a lack of mental capacity. In *Bernard,* there was insufficient evidence to conclude that the accused was in a state of insanity and therefore reassuring the Courts that there was no reason to consider the defence of voluntary intoxication for a general or basic intent offence.

Justice La Forest, in the *Bernard* majority offered a different rationale. He stated that the mental element and intention of *mens rea* could not be stripped in common law as it is too embedded in the courts. Parliament can remove or revise through legislative policy. La Forest J.

concluded that the Criminal Code s. 613(1)(b)(iii) could have been appropriately applied to this case to prove no substantial wrong or miscarriage of justice. Criminal Code s.613(1)(b)(iii) was a revision that summarized that a Court of Appeal would be the opinion on the grounds of wrongful decisions, miscarriage of justice, or a substantial wrong. The main issue with Justice La Forest's claim that this Criminal Code section could be adequately applied was that nor the Crown or defence raised such section in *Bernard*, and the trier of fact could not have automatically assumed it.

Concurring with Wilson J. and L' Heureux- Dubé J., McIntyre J. and Beetz J.(as they were known then) agreed to dismiss Bernard's appeal. The concepts of general intent and specific intent were said to be logically sound and based solely on the action and, as stated in *Leary*, sexual assault is an offence of general intent. McIntyre J. and Beetz J. viewed the common law as sound, and those who voluntarily become intoxicated, impact their self-control, and commit crime, should not be entitled to an acquittal. They believed that *Leary* and *Bernard* served society well and therefore were not an infringement on section 7 or 11(d) of the Charter of Rights and Freedoms.

Chief Justice Dickson dissented alongside Justice Lamer, once again raising the argument to conclude that the defence "asserts a general proposition that evidence of self-induced intoxication should be considered by the trier of fact, with all other relevant evidence, to determine whether the prosecution has proved the *mens rea* required to constitute the offence" (1988, 2 S.C.R. 833). As stated in the dissent, *Leary's* precedent was an infringement on section 7 and 11(d) of the Charter due to the absolute liability an offender is subjected to. Additionally, Dickson C.J. considered it a violation of the presumption of innocence. Dickson C.J. found that this infringement cannot be saved by section 1 of the Charter because the public protection had

not achieved the proportionality test. The proportionality test under section is described as to where limiting Charter rights measures have significant importance on the general public.

Dickson C.J. stated in the dissent that the appeal should have been overruled and that the circumstances and evidence should be left to the trier of fact because the limits set in *Leary* on juries are beyond "normal limits." Dickson shares the same view as the *Leary* dissent, reiterating the importance of reviewing each case in a holistic matter. Ultimately, precedent set by *Leary* remained, and Chief Justice Dickson's dissenting view would be translated into *R v Daviault.*

R v Daviault [1994]

Daviault followed the enactment of the Charter and paved the way for the Parliament to create legislation found in the Criminal Code s. 33.1. Henri Daviault was an alcoholic man who sexually assaulted a 65-year-old woman partially paralyzed and in a wheelchair. Daviault claimed to have no recollection of his actions and was in a state of "blackout" due to his alcohol consumption. Daviault raised the defence that he had no memory of the assault and was extremely intoxicated, to which expert testimony had concurred. An expert pharmacologist testified that if a Daviault had consumed the amount he claimed, a regular person would have either died or been in an alcohol-induced coma. However, Daviault was an alcoholic and therefore was conditioned to consumption.

Until this case, the courts denied the defence of intoxication for general intent offences, leaning on precedent set in *Beard*, *Leary* and *Bernard*. However, Daviault was acquitted by the trial judge based on reasonable doubt that he did not have the necessary intent to satisfy a guilty verdict. The Quebec Court of Appeal overturned this decision on the grounds that the trial judge made a fundamental error allowing Daviault to access the intoxication defence for a general intent offence, therefore convicting Daviault of sexual assault. Daviault appealed the Quebec

Court of Appeal's ruling to the Supreme Court of Canada in the belief that the rules of *Leary* went against his Charter 7 and 11(d) Charter rights. The Supreme Court of Canada agreed with Daviault's claim and set aside a new trial. The Court ruled in a 6 - 3 majority, reforming the *Beard* and *Leary* decisions.

As a result, Supreme Court Justice Corey stated that there was significant saturation in the legal system to change or strike down the dichotomy between specific and general intent, but believing it is "unprincipled, illogical and arbitrary" (as cited in Baker and Knopff, 2014, p. 40). Justice Corey stated that if an extreme case of intoxication defence was raised in a general intent offence, it is embedded in the Charter that those individuals have a right to the defence. Justice Corey reiterated approximately ten times during his decision that this should be applicable only in rare cases when extreme intoxication is brought forward and holistically assessed by the courts. Concluding that if the defence was raised in a general intent offence, a reverse onus is on the accused to prove that they lacked the *mens rea* in the facilitation of a crime. They must prove on the *balance of probabilities* that they were in a state of extreme intoxication. Essentially, this burden of proof is set higher than producing a reasonable doubt making a successful defence more challenging. Additionally, there must be expert medical testimony to support or dispute whether someone could be in a state of automatism.

Justice Cory indicated that at the point where "extreme intoxication is akin to automatism, it renders the accused to be incapable of either performing a willed act or of forming the minimal intent required for the general intent offence" (*R v Daviault*, 1994, as cited in Roach, 2015, p. 266). Automatism refers to the "complex state of impaired consciousness" (McCaldon, 1964, p. 914). The *Daviault* decision was in parallel with s. 16 of the Criminal Code, the defence of Not Criminally Responsible on Account of Mental Disorder, where the accused shall not be

prosecuted based on insanity. Justice Corey, in the decision of *Daviault*, recognized that being intoxicated is not a legal classification of a “disease of the mind”. However, if intoxication is extreme, akin to automatism, then it is a state of “temporary insanity” and therefore should be included as a defence.

The majority in this decision recognized that *mens rea* is an integral part of the justice system and has been since the beginning. Therefore, to eliminate a substantial aspect of determining guilt, the *mens rea,* and assume that someone is automatically guilty under *Beard* and *Leary,* is against the right to the assumption of innocence. Additionally, Justice Corey addressed *Beard's* motion and concluded that the consumption of a substance alone could not be a substitute for the *mens rea* requirement. Once again, it was said to be an infringement of the Charter s. 11(d) to assume blameworthiness on an individual who practiced self-induced intoxication. Corey J. stated, " [that] voluntary intoxication is not yet a crime and that a person who does intend to drink cannot be said to be intending to commit a sexual assault." Additionally, as Justice Dickson stated in dissent in *Leary*, one cannot assume that an ordinary and prudent person would commit a crime after becoming intoxicated by way of self-inducing; it is unreasonable and cannot be generalized.

Justices L' Heureux-Dubé, Cory, McLachlin and Iacobucci were all in concordance with Justice Cory's decision. The argument coincided with Justice Wilson's "flexible approach" in *Bernard*, where the trier of fact should consider the evidence and circumstances in an extreme intoxication case. The dissenting decisions of Justices Sopinka, Gonthier and Major support the original *Leary* principle that general intent offences do not offer a defence of intoxication, and that sexual assault is of a general intent offence. The dissent stated that these stipulations were of "sound policy considerations." The dissenting view resonated with many citizens, academics and

ultimately, Parliament. Society's protection was at the forefront of the dissent; however, on the other hand, it ridiculed reasonable people who consume alcohol, supposedly negating control and safety over other people. However, the dissenting decision did state that the consumption of a substance cannot substitute the minimal requirement for intent to commit a crime unless it "gives rise to a mental disorder within the terms of s.16 of the Criminal Code" (p.66).

As previously stated, Justice Corey reiterated multiple times that the revision would only be in support of rare extreme intoxication cases. However, many courts were faced with the fact that the public viewed this as “permitting drunken men to rape with impunity” (Baker and Knopff, 2014, p. 40). An increase of cases flowed through the courts using the new defence, and many judges faced confusion. The decisions failed to follow Justice Corey’s recommendation of the defence being applicable in those rare cases of extreme intoxication, not in every case that equated intoxication with general intent. The Supreme Court’s decision was simple; in its view, the conviction of an accused person without proof of minimal *mens rea* for the offence “offends the Charter in a manner so drastic and so contrary to the principles of fundamental justice” (Lawrence, 2017, p. 393). It could not be saved or justified by section 1.

This landmark case split legal scholars and advocates into two. One group believes that the Charter is in place to uphold each individual’s rights, including an accused person. A second group believed that the ruling in *Daviault* was against the Charter protections against vulnerable women and children, allowing their sexual abusers to run free from consequences. Parliament responded to the uproar with a swift legislation enactment nine months post-*Daviault*. The Supreme Court was thorough in their decision to clearly state that the defence was in the event of rare extreme intoxication. However, Parliament, along with some in the public, criticized the recommendations as a defence permitting sexual violence. In 1994, the Government of Canada

amended the Criminal Code by adding s. 33.1 with the intention to place statutory limits on the application of the defence of intoxication underlying the Supreme Court's decision in *Daviault*.

Section 33.1 - Criminal Code of Canada

Section 33.1 of the Criminal Code of Canada reads as follows:

Self-Induced Intoxication

When defence not available

33.1 (1) 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).

Criminal fault by reason of intoxication

(2) 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.

Application

(3) 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.

Section 33.1 prevents an individual from using the defence of intoxication for a general intent offence that harms the bodily integrity of another, even if extremely intoxicated akin to

automatism or temporary insanity. The case of *R v Bouchard-Lebrun* [2011] summarized the conditions in which s. 33.1 applies. If all three conditions were satisfied, there is no basis by which the accused could argue he lacked the "general intent or the voluntariness to commit the offence" (Verdun-Jones, 2011, p. 297). The conditions are as followed;

(1) If 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 with or threatening to interfere with the bodily integrity of another.

This legislation does not apply to cases in which there is no violence. For example, an accused can raise the defence of intoxication without being barred by s.33.1 in cases causing property damage or mischief. Where an accused is self-intoxicated and harms or threatens to harm another individual, s. 33.1 bars the use of the intoxication defence.

Parliament's swift response, s. 33.1, was created without using s. 33(1) of the Charter's - the notwithstanding clause or a "second look" clause. The notwithstanding clause allows Parliament or any provincial/territorial government to declare legislation that may infringe on a Charter right or freedom for up to five years (Russel, 2007, p. 65). Parliament and the other governments also have the authority to extend or renew the legislation under the notwithstanding clause but it is recommended a "second look" be taken by the courts prior to renewal.

Parliament enacted s. 33.1 in 1994 and has yet to reconsider or take a "second look at the constitutionality". Reviving the common law *Leary* Rule for general intent offences, s. 33.1 is a form of guilty-by-proxy legislation that allows the court to substitute the mental element in voluntary intoxication cases for the mental element in general intent offences involving violence

(Lawrence, 2017, p. 391). In the dissent of *Leary* and *Bernard,* the argument that has long been debated that self-induced intoxication cannot substitute *mens rea* is now being included in the Government's legislation as a definitive way to prosecute individuals. The definitive prosecution eliminates the Crown's responsibilities to proving the *mens rea* for cases that are not easily navigated.

Despite the clear denunciation of s. 33.1, the Supreme Court of Canada has yet to consider the legislation for the past 20 years. Critics suggest it is a matter of comfort in the provision. In recent years, the Supreme Court has had the opportunity in *R v Bouchard-Lebrun* to revisit s.33.1's constitutionality. However, no party brought up the argument of temporary insanity, as mentioned in *Daviault.* In place presently, s. 33.1 remains, even in events of extreme intoxication, akin to automatism or temporary insanity. *R v Daley* [2007] clearly outlines the three levels of intoxication and the defence application.

Three Levels of Intoxication

R v Daley [2007]

At trial, a jury convicted Wayne Daley of second-degree murder of his common-law wife. In appeal, the courts reviewed how a jury is to be appropriately directed and how to consider the degree to which the accused can foresee their actions. The legal question was if a jury was directed correctly, should they consider whether intoxication could have "affected the accused's ability to foresee the likely consequences of his actions, sufficient to raise a reasonable doubt as to whether he had the necessary intention for a conviction of murder" (*R v Daley*, 2007).

Failing to adequately describe the relevance to the accused's level of intoxication, the Appeal Court found that the trial judge did not direct the jury to link the evidence and the expert

evidence to the accused's ability to foresee the consequences of his actions. Instead, the judge focused on the capability of forming such intent. The SCC determined that a jury must not be lead in a "perfect way" but rather in a correct way. Justice Bastarache reiterated that "Trial judges need only summarize and present to the jury what was clearly stated by the expert witness, nothing more." This was in response to the expert testimony used by Daley's counsel to prescribe that the amount of alcohol in which he consumed could have caused a "blur in judgement." This led to the interpretation and review of the three levels of intoxication.

Mild Intoxication

Mild intoxication is the relaxation of inhibitions and socially acceptable behaviour (Justice Bastarache in *R v Daley*, 2007). Mild intoxication would be an example of going out with one's friends and having a couple of pints. Although the level of capacity for alcohol consumption may be higher or lower in some individuals, coherence is still present. There are no present defences for mild intoxication.

Advanced Intoxication

Advanced intoxication is where an individual lacks the specific intent to commit an offence (*R v Daley*, 2007). The accused's foresight to recognize any possible consequences is impaired and raises a reasonable doubt on the requisite *mens rea*. Set out in *Daley*, the advanced level of intoxication can only be applied to specific intent offences and must be raised by the accused, but the onus is on the Crown to prove that the accused did have requisite knowledge/foresight to satisfy the *mens rea*. A jury must be aware of the intoxication and be satisfied that the intoxication effect was such that it might have affected the impaired accused's foresight of consequences to sufficiently raise reasonable doubt *(R v Robinson*, 1996).

Extreme Intoxication

Extreme intoxication is the third degree of intoxication and is rarer. This level is akin to automatism or can cause temporary insanity. Accused persons who lack the required *mens rea* due to extreme intoxication are entitled to an acquittal or a charge reduction under the Charter. Section 33.1 only pertains to specific intent offences and bars general intent offences causing bodily harm. Justice Cory laid out the parameters of the defence, including that the "accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication" (Lawrence, 2017, p. 397). The accused must include expert testimony in the defence, but the Courts determined that an individual who lacks the *mens rea* of a general intent offence cannot, in law, be convicted of a crime. The media and the public greatly ridiculed this.

The argument of temporary insanity has followed the extreme intoxication akin to automatism. The conventional argument remains that those who abuse alcohol or substances for copious amounts of time can be subjected to a state of mental insanity caused by chronic intoxication. The Supreme Court has yet to determine the validity of temporary insanity in congruence with s. 33.1. However, the Supreme Court had the opportunity to revisit the intoxication debate in *R v Bouchard-Lebrun* and now in the forthcoming cases of *R v Chan* and *R v Sullivan*.

Temporary Insanity and Non-Mental Disorder Automatism

As stated earlier, automatism is the "complex state of impaired consciousness" (McCaldon, 1964, p. 914) and insanity is a legal term that refers to an individual's lack of criminal culpability for a specific offence (Stankowski, 2013). Temporary insanity is far more complex and problematic in terms of application. It implies a lack of criminal culpability in

response to a "temporary or transient mental illness" (Stankowski, 2013). Many speculate on whether being so extremely intoxicated, akin to automatism, can perhaps transpire into a form of non-mental disorder automatism. Alternatively, others speculate that the chronic use of substances can, over time, accumulate into an episode of temporary insanity.

Under the *Daviault* decision, Justice Corey believed that extreme intoxication ran in accordance with s. 16 of the Criminal Code, which is presented as the Not Criminally Responsible on account of Mental Disorder defence (NCRMD). He believed that because in instances where insanity renders no *mens rea,* an accused cannot be convicted based on having no moral blameworthiness. It parallels to when an individual has been so intoxicated in a state of "temporary insanity," rendering psychosis, that individual lacks the required and minimal mental element to be convicted of a crime. However, there are two categories of automatism that can be argued: mental disorder automatism, which occurs due to a pre-existing mental disorder and, secondly, a non-mental disorder automatism where an external influence triggers an individual's automatism. The central issue is that s. 33.1 bars any individual who's extreme intoxication is akin to temporary insanity from using a defence, including non-mental disorder automatism, unless an internal mental disorder strictly caused it. We see this demonstrated in *R v Bouchard-Lebrun*, *R v Chan* and *R v Sullivan*.

R v Bouchard-Lebrun [2011]

Tommy Bouchard-Lebrun severely assaulted two individuals while in a state of psychosis influenced by drugs. Bouchard-Lebrun was charged and convicted of aggravated assault on the basis that s.33.1 bars the use of the intoxication defence for general intent offences. Bouchard-Lebrun appealed the conviction to the Quebec Court of Appeal with the defence of NCRMD, with the goal that this would be considered apart from s. 33.1. His defence was unsuccessful,

which brought Bouchard-Lebrun to the Supreme Court. The Supreme Court's decision determined whether Bouchard-Lebrun could satisfy a non-mental disorder automatism defence while being voluntarily intoxicated. There were two statutory stages that the Court had to establish in order to render an insanity defence. The first stage was recognizing and categorizing the mental state of the accused. As the Court stated, this had to be classified in legal terms. Regarding s.16 of the Criminal Code, the second stage concerned the effects of the mental disorder and whether it rendered the individual incapable of knowing his or her actions were wrong during the offence.

In this particular case, the Supreme Court found Bouchard-Lebrun to be in a state incapable of distinguishing his actions from right or wrong. However, the latter stage concerns whether the psychosis experienced by Bouchard-Lebrun would have resulted from a mental disorder or just the intoxication. Following a precedented approach from *R v Stone,* the Supreme Court had to determine whether the mental disorder or psychosis was due to internal factors or external factors. The internal factors are considered the main driving factors of a mental disorder compared to a "normal" person. The external factors are considered a danger factor or something outside of the individual's body that triggers a mental disorder. Apart from the intoxication defence, the stipulation of NCRMD hinges on if the external factors were able to explain the non-mental disorder automatism. If the external factors are the driving force for the temporary mental insanity, there are no grounds for the NCRMD defence being used. If a court finds that the mental insanity was consistent with internal factors, then the defence can be applied.

In *Bouchard-Lebrun*, the Supreme Court suggested that drug-ingestion is an external cause, and therefore Bouchard-Lebrun experienced a state of psychosis experienced by most people consuming drugs. It was strongly inferred that Bouchard-Lebrun was not suffering from a

mental disorder when he committed the assaults. He suffered not from a mental disorder at the time, but a state of psychosis, presenting as a symptom of the drugs he had taken. The symptoms dissipated shortly after the consumption of the drugs.

The main argument in this case is that Bouchard-Lebrun's self-ingested drug usage, that altered his brain function, resulting in the commission of a crime, did not constitute a mental illness under s. 16 Criminal code. Additionally, the intoxication defence cannot be applied under s. 33.1, as assault is a general intent offence. However, many suggest that alcoholism and drug addiction can be considered a disease that can render a person incapable of controlling their substance abuse. The law states that being so grossly intoxicated akin to automatism cannot be used as a mitigating factor in the commission of a crime. However, it is the facilitation of a mental state where the accused has no mental blameworthiness and is punished as if they did. The controversy continues in the recent 2020 Ontario Court of Appeal amalgamated rulings involving two trial court decision. Although heard separately, the cases of Thomas Chan and David Sullivan resulted in an amalgamated decision by the Ontario Court of Appeal. For clarity, the decision is cited as *R v Sullivan* [2020].

Following the Ontario appeal court's decision as applied to both Chan and Sullivan, the Crown has appealed to the Supreme Court of Canada. The Court has agreed to hear the appeal in 2021.

R v Sullivan [2020]

In Sullivan [2020], the Ontario Court of Appeal first considered the appeal of Thomas Chan.

The Case of Thomas Chan

Mr. Chan became intoxicated after consuming "magic mushrooms," which contain hallucinogenic properties. Having consumed magic mushrooms before, Chan and his friends conceded that it would be a "pleasant and uneventful experience." Shortly after consuming the mushrooms, Chan felt no high and decided to ingest more magic mushrooms. A short period later, Chan began experiencing hallucinations and became frightened, stating that his mother and sister were "the devil" and "Satan." Chan later ended up at his father's house with the same delusions. Killing his father and his partner, Chan was said to have "superhuman strength."

In Chan's trial, expert testimony concluded that the substance, magic mushrooms, is a relatively "safe" drug in toxicity. However, the trial judge acknowledged Chan's rugby history having caused cognitive damage leading to mild traumatic brain injuries. As mentioned in *Bouchard-Lebrun*, this would be an internal cause, and the consumption of the magic mushrooms is consistent with an external cause. Therefore, the trial judge concluded that s. 33.1 could not be used because Chan voluntarily ingested the drug, was intoxicated at the time of the offence and departed from how a reasonable person would act. The judge also determined that s.16, non-mental disorder automatism, could not be used because the main driving force for his psychosis was the external effect of the magic mushrooms. In trial, the judge stated that s. 33.1 was a clear violation of sections 7 and 11(d) of the Charter and was not demonstrably justifiable under s. 1. However, due to being constrained by precedent, the judge could not accept either of Chan's arguments.

Chan appealed to the Ontario Court of Appeal. The main issues raised in his appeal were whether the trial judge was correct in applying s. 33.1; whether the trial judge was correct in finding a violation of the Charter of Rights and Freedoms' section 7 and 11(d) but not justifiable

under the Charter's section 1; and whether the judge erred in accepting Chan's mental disorder defence (*R v Sullivan,* 2020). These issues are nothing new to the courts and have been the basis for appeals since the 1995 establishment of s. 33.1.

The boundaries surrounding the use of the intoxication defence solidified a guilty verdict for Chan. The trial judge explicitly stated when delivering the conviction; "Mr. Chan is not a danger to the public. He is a good kid who got super high and did horrific things while experiencing a drug-induced psychosis" (*R v Sullivan,* 2020 ONCA 333, 2020). The trial judge must consider the weight of convicting someone that lacks the bare requirement of *mens rea*.

The trial judge declined to accept Chan's Charter challenge against s. 33.1 because he was bound by "declaration of constitutionality" in previous precedent stating that section 33.1 be upheld. However, the judge suggested entering an acquittal should either of Chan's claims be successful in the higher Courts.

The Case of David Sullivan

Mr. Sullivan had been taking prescription medication to help him quit smoking. He reiterated multiple times throughout the use of the prescription that he believed he was seeing aliens in his condominium. In a suicide attempt, Sullivan ingested multiple prescription medications resulting in a state of psychosis. The prescription, Wellbutrin, has known symptoms of psychosis. Sullivan believed he had captured an alien in his living room and targeted his mother, as he believed she was also an alien. Sullivan stabbed his mother multiple times before the arrival of police. She later died of unrelated causes before his trial.

Sullivan's defence was that he suffered an episode of temporary insanity, raising the defence of non-mental disorder automatism, s. 16 of the Criminal Code. Sullivan did not attempt to use nor raise the constitutionality of s. 33.1 because he claimed that his intoxication was not

voluntary due to him using the drugs to commit suicide. The trial judge did not accept that his intoxication was involuntary and stated that because Sullivan would have known that his prescription medication could cause intoxication. Additionally, following the same logic as *Bouchard-Lebrun*, the trial judge found that the state of psychosis, under s. 16, was not caused by a previous mental disorder (internal) but rather by external influences - the prescription drugs. The judge rejected Sullivan's defence under s. 16.

Sullivan and his legal team appealed to the Ontario Court of Appeal arguing s. 33.1 was unconstitutional. The main legal questions were whether the trial judge erred by relying on s. 33.1 and defining voluntary intoxication?

In reference to both Chan and Sullivan, the Crown argued that s. 33.1 is proportional and substantive in its protections for women and children. This position echoed the rationale used by the Government of Canada when it amended the Criminal Code to include s. 33.1.

Ontario Court of Appeal Decision - R v Sullivan [2020]

In a joint decision by the Ontario Court of Appeal, Sullivan's and Chan's facts and court decisions were laid out. In short, it was concluded that s. 33.1 infringed Charter sections 7 and 11(d) and cannot be saved under s. 1. A new trial was ordered for Chan and Sullivan was acquitted of all charges.

The effect of the Ontario Court of Appeal's decision in *R v Sullivan* [2020] effectively means that s.33.1 in the Criminal Code is of no force or effect in the Province of Ontario.

Aftermath of R v Sullivan [2020]

Almost immediately following the ruling of these cases, there was significant backlash from the media, women's activist groups, and many in the general public.

Although *Sullivan* and *Chan* were not cases involving sexual violence, advocates set out

to petition against the removal of s. 33.1. Although the redaction of s. 33.1 means that those who are accused of violent crimes in a state of non-mental disorder automatism have the opportunity to use the intoxication defence, it is challenging to access and will be rarely accepted, as suggested in the previous cases discussed. The media outlets ran with the headings "Extreme intoxication appeal decision is yet another blow to women" (Sheehy & Grant, 2020) and "Ontario Court throws out law barring self-induced intoxication as a defence for sexual assault" (Perkel, 2020), which does not accurately portray the defence.

Appeal to the Supreme Court of Canada

The Crown's appeal of the Ontario decisions related to Chan and Sullivan in *R v Sullivan* [2020] was granted by the Supreme Court in July, 2020. A hearing date is likely to be scheduled for late 2021 or early 2022.

The Supreme Court will be faced with two main arguments. First, many experts are concerned about the misconceptions and the rate at which women are now likely to report (Shea, 2020, para. 10). If a victim of sexual assault or assault is under the impression that their offender can use the defence of intoxication as a "get out of jail free" card, they will be less inclined to report. Non-reporting is already a significant issue in the justice system and should be mitigated in other ways. The removal of this legislation reduces the confidence in the justice system, and therefore, the Supreme Court should implement a nuanced version to protect those most vulnerable pro-actively. Legislation that is constitutional for all and considers each case's circumstance will be most beneficial, as Justice Dickson stated in his dissent in *Leary.*
Second, some justice professionals have deemed s.33.1 to try to "right a wrong with another wrong." To deny an accused of their s. 7 and 11(d) rights is an injustice in itself. As noted in *Sullivan*, "to override principles that deny accountability, for the purpose of imposing

accountability, is not a competing reason for infringing core constitutional values. It is instead a rejection of those values" (Shea, 2020, para 113).

Discussion and Conclusion

Section 33.1 and Sexual Violence

Seeing s. 33.1 through a feminist lens, those in vulnerable demographics have advocated equating sexual assault to other offences in investigations, court proceedings and convictions. The generalizability of lumping sexual assault and common assault into one category undermines the seriousness of sexual assault compared to a level one assault, the least severe degree of assault. S. 33.1 does not prevent or deter individuals from committing sexual assaults but diminishes the seriousness of vulnerable individuals' protection.

According to 2019 Statistics Canada, one in three women and one in eight men experience unwanted sexual behaviour in a public setting, including bars and restaurants (Cotter & Savage, 2019, para. 6). This also includes five aspects of criminal behaviour; unwanted sexual behaviour in public, unwanted sexual behaviour online, unwanted sexual behaviour in the workplace, sexual assault, and physical assault (Cotter & Savage, 2019, para. 1). Gender-based crimes need added protection due to the high rate at which victimization occurs.

Additionally, sexual assault crimes are underreported, at a low of 5% (Johnson, 2020, para. 1), and declared "unfounded" by police. Unfounded refers to police discretion in whether or not there are sufficient grounds to charge a suspect in any case (Johnson, 2020, para. 3). Often in sexual assault cases, women and men experience barriers preventing reporting in fear of shame, embarrassment, and poor treatment. A range of two to 51% of sexual assault complaints were dismissed as unfounded in 2017 (Johnson, 2020, para. 3). The statistics show a meagre chance of having a sexual assault case followed through the Court, resulting in a conviction. If

that is not a lack of deterrent, then the use of s. 33.1 in a generalizable nature is not of a deterrent either.

Section 33.1 does not deter or proactively prevent sexual assault from occurring, which is what many are concerned about in the recent 2020 *Sullivan* ruling. Roughly 12% of sexual assault cases ended in a conviction, and roughly 7% resulted in a custody sentence (Rotenberg, 2017, para. 3). Vulnerable groups need legislative protection; however, the scope of s. 33.1 is against fundamental rights. For transparency in the accuracy and success of the defence, it would be pertinent to have a system tracking the use and nature of the case using the intoxication defence. If effective and the defence is barred from use in sexual assault cases, would the public find comfort in knowing the success rate is little to none?

The forthcoming Supreme Court of Canada's decision on the constitutionality of the extreme intoxication defence has some media and citizens in a position that undermines the confidence in the justice system. The question remains, is s. 33.1 unconstitutional under sections 7 and 11(d) of the Charter of Rights and Freedoms? If so, how do the courts ensure that vulnerable people, women and children, are protected while upholding the rights of every individual?

The passage of s. 33.1 was a hasty and ill-considered reaction to a decision that gave full autonomy to the courts as found in the *Daviault* decision. S. 33.1 remains broad and seems to right a wrong with another wrong. Those who lack the intention with extreme intoxication akin to automatism are found guilty prior to due process. Additionally, those who are most vulnerable reap only a reaction versus pro-action. The legislation does not specify the nature in which the defence cannot be applied but rather generalizes all offences with harm to others.

Three main views could be argued per s. 33.1. One perspective takes form as the view of former Chief Justice Dickson in *Leary* and *Bernard,* where he argued that the general and specific intent dichotomy be eliminated, and the circumstances of each case should determine intention. Dickson, C.J suggests that no legislation prohibits individuals from using the defence of intoxication; however, it should be in rare, extreme intoxication cases with non-mental disorder automatism.

The second perspective relies entirely on the Charter and believes that s. 33.1 benefits individuals and protects against abuse while intoxicated. Those with this agenda suggest this view to punishing every crime committed while intoxicated, intending to prohibit a defence for intoxication altogether.

In the middle of the two, a third perspective is that s. 33.1 is unconstitutional under the Charter of Rights and Freedoms sections 7 and 11(d) but can be saved under s. 1 of the Oakes test with nuanced amended provisions. The latter perspective should be nuanced by a revision to s. 33.1 in further narrowing down the legislation to protect victims of sexual abuse. The legislation should be revised to state explicitly that extreme intoxication is not a defence to any sexual offence. In suggesting that the legislation be revised, Justice Dickson's dissenting decision in *Leary* states that the use of the defence should be per the trier of fact. The broadness of s. 33.1 should be eliminated from all forms of bodily harm to only offences of a sexual nature. This would allow the trier of fact in each case to accurately assess the intention or lack thereof, the circumstances, and possible rule of temporary insanity – as noted in *Sullivan.*

The possibility of a s. 33.1 nuance being saved by s. 1 of the Charter is based heavily on the substantive need for gender-based protection. Sexual assault and harassment have not decreased as crime rates have lowered, cases are grossly underreported, and many cases that are

brought forward are unfounded by police. Additionally, less than 12% of sexual assault cases end in a conviction; therefore, the population of victims severely lacks legislative protection (Rotenberg, 2017, para. 3). Having s. 33.1 revised would remain unconstitutional; however, it is proportional to the nature of the offence.

Breaking down how the Charter's s. 1 can save a hypothetically re-written s. 33.1 depends on the substantive and pressing need for new legislation, the rational connection between the means and the legislation, the imposition of minimal impairment on an individual's Charter rights, and the benefits versus harmful effects; also known as the s. 1 Oakes test (Sharpe & Roach, 2017, pp. 67-80).

1. A substantive and pressing need for social, legal, and policy reform is based on resolving a fundamental and crucial social problem. The issue of sexual assault within Canada has not decreased recently, and there still has yet to be reform in legislation to protect individuals. As noted above, victims fail to receive adequate justice in all aspects of the field; policing and the courts. There is a need to place sexual assault on a higher priority than other levels of assault, and s. 33.1 generalizes all bodily harm into one – this fails to reassure that sexual assault should be handled differently. Major reform in all areas regarding sexual assault is needed. However, a revision of s.33.1 to include only sexual assault would punish the offenders that commit these offences while drunk and send the message to citizens that there will be repercussions for their offenders. By eliminating the broad scope of all bodily harm, it protects the individuals who have committed offences other than sex offences. Simultaneously, protecting those who were extremely intoxicated and lacked foresight or intention in crimes not involving sexual violence, for example, in the case of *Sullivan* [2020] where s. 33.1 barred them from using the defence of extreme intoxication, even in the

lack of intent and evidence pointing to temporary insanity. The justice system focuses significantly on mental intention but bars those who lack intention due to extreme intoxication.

2. A rational connection includes the link between the measures and the means adopted within the policies and legislation. The means and measures cannot be speculative, irrational or arbitrary. Suggesting that s. 33.1 only bars individuals from using the defence of intoxication in sexual violence cases, this would allow a carefully designed process in which victims of sexual violence have the opportunity to seek full justice. The means to get there currently are being thwarted by policing and Court procedures. As noted earlier, s. 33.1 is not a sole deterrent for individuals committing sexual violence offences because of the broad scope. Creating legislation that upholds victim's justice at the forefront while enabling the process to become more accessible in prosecuting intoxicated sexual offenders will restore confidence in the system. Removing s. 33.1, the barrier, all together, as we have seen in the media, will disrupt social harmony.
3. Minimal impairment means that the policy or legislation tries to impair the freedom or right as little as possible. Currently, with the present s. 33.1 legislation, all individuals are barred from using the defence in any general intent offence; this covers a large scale of circumstances and offences in which, as we have seen in previous cases, strips the individual from the basic criminal defence requirement of proving intention. The minimal impairment regulation also includes alternative modes of achieving the objective. In former Chief Justice Dickson's argument, he suggests that the trier of fact consider cases involving intoxication and the defence to eliminate individuals who lack the basic mental intention would create lesser impairment on the system's confidence the individual themselves. In the new

hypothetical, s. 33.1, if the defence were barred only in sexual violence cases, it would establish the least amount of impairment on the accused and for other cases not involving sexual violence. In protecting those in vulnerable demographics, this would also eliminate the impairment that section 33.1 has on those with cases involving non-mental disorder automatism, as seen in *Sullivan.*

4. A balance between the effects and benefits is the last step to ensure that legislation is justified under s.1 of the Charter. Even though there may be minimal impairment towards individuals and groups, the benefits must outweigh the harm. In this case, if s. 33.1 were to include only a nuance for sexual violence, then the benefits would be that fewer individuals will be acquitted from the legal system if they claim intoxication. It will restore confidence in the system by the women and vulnerable demographics. If legislation directly targets those who use sexual violence against women and children, the trickle-down effect from the Supreme Court's rulings and Parliament's legislation will become standard practices in police agencies to hold mandatory investigations. Women and children need legislative help now more than ever.

Conclusion

A significant revision in the justice system must begin to address the inadequacies is how gender-based crimes are understood and prevented. Creating gender-based legislation to protect victims, specifically of sexual violence, is an initial start. Section 33.1, with a more nuanced focus on sexual violence, while intoxicated, creates the message for women that the courts hear and recognize their victimization. Although the current legislation is difficult to comprehend and apply, the intoxication defence has been dramatically argued since the early days of *Beard.* The present s. 33.1 will be determined if unconstitutional or not within the following year. It is

hoping that the *Chan* and *Sullivan* Supreme Court decision will revise and finalize s. 33.1 legislation. The public's protection shall remain at the forefront of every piece of legislation, it is in the duty of the Courts to determine the scope in which that is being infringed.

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