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Criminal Law -- Mens Rea -- General Principles -- Intoxication as a Defence

Graham Parker

Osgoode Hall Law School of York University

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COMMENTS

COMMENTAIRES

CRIMINAL LAW—MENS REA—GENERAL PRINCIPLES—INTOXICATION AS A DEFENCE.—The easiest thing to do is to sit back, wait for the *Criminal Reports* to arrive, and to snipe at the latest attempt by the Supreme Court of Canada, or any other Canadian court, to deliver another decision which the academic lawyer can pull apart and re-write at his leisure.

Perhaps we should have sympathy for the judges of our highest court. Criminal lawyers have not been very frequently appointed to that court and yet an appreciable percentage of its workload is in criminal law and related subjects.

Similarly, until quite recent times, criminal law has not been a respectable academic legal subject in Canada. While we have had some worthwhile studies relating to the relationship of law and morals and describing specific offences and some defences, there have been very few studies on the basic principles of *mens rea* and the theory of criminal responsibility.¹

The decision of the Supreme Court of Canada in *Leary*² is a disappointing one. An initial reaction is to regret that court's undue reliance on the authority of the English House of Lords. In particular, the court has followed the example set by the Law Lords in *Director of Public Prosecutions v. Majewski*.³

Some members of the House of Lords were unhappy with the state of the law relating to intoxication as a defence but felt that reform of the law was the job of the legislature. Should Canada's

¹ The best articles are Binavince, *The Doctrine of Mens Rea in Canada*, (1966), 4 *Colloque International de Droit Comparé* 82; Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea* (1971), 49 *Can. Bar Rev.* 280; Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence* (1972), 15 *Crim. L.Q.* 160; Gordon, *Subjective and Objective Mens Rea* (1974), 17 *Crim. L.Q.* 355.

² (1977), 74 D.L.R. (3d) 103 (S.C.C.).

³ [1976] 2 W.L.R. 623 (H.L.).

highest court have felt similarly constrained? In *Morgentaler*,⁴ the Supreme Court decided that the accused should not have any supplemental defence of necessity because the Criminal Code⁵ had incorporated a full legislative scheme. The Code, however, is silent on the defence of intoxication and the Supreme Court could have given free rein to judicial creativity.

Leary provided an invitation to lay down some basic principles about *mens rea* but the court ignored the opportunity, with the exception of the dissenting judgment of Dickson J. which will be discussed below. The legacy of *Beaver*⁶ has been squandered. This is a sad state of affairs when we realise that the English House of Lords in *Morgan*⁷ has taken almost twenty years to arrive at the position which Cartwright J. reached in *Beaver* when he laid down an intelligent subjective rule relating to *mens rea*.

The *Leary* case concerned the defence of intoxication. Yet it is potentially much wider than that. The Supreme Court of Canada was invited to do two things: on the narrow level, to choose between conflicting decisions of provincial courts of appeal which had interpreted the ambiguous and difficult *D.P.P. v. Beard*⁸ rule in different ways. On a broader level, the country's highest court could have taken a fresh approach to the whole question of *mens rea* as the basis of the criminal law and criminal law theory.

Some years ago, I tried, very ineptly, to explain the dilemmas I had in teaching criminal law.⁹ I explained that I had tried to teach criminal law from a blackletter approach, from a cynical functional (or was it realist?) point of view or from a sociological or criminological perspective. I was groping toward the notion that penal theory should play a bigger part in the formulation of criminal law principles.

In the intervening years, there have been some admirable attempts to achieve this broader approach. Perhaps I should call it an integrative approach because one of the best known theorists, Herbert Packer¹⁰ used that term although some might feel that his *Crime Control and Due Process Models* were rather simplistic—or, rather, said too little while implying too much. Other critics have

⁴ (1975), 30 C.R.N.S. 209 (S.C.C.).

⁵ R.S.C., 1970, c. C-34.

⁶ [1957] S.C.R. 531.

⁷ [1975] 2 All E.R. 347 (H.L.).

⁸ [1920] A.C. 479 (H.L.).

⁹ Parker, *The Inhibitions of the Criminal Law Teacher* (1969), 4 U.B.C. L. Rev. 29.

¹⁰ Packer, *The Limits of the Criminal Sanction* (1968). See also Ross, *On Guilt, Responsibility and Punishment* (1975).

been much hastier than that and have suggested that Packer was not really offering two models but one and that a new model,¹¹ akin to that of Barbara Wootton¹² should be adopted. The American criminal law, particularly as it is described in the appeal courts shows a preoccupation with procedure to an extent which a Canadian lawyer or judge finds difficult to interpret, particularly as our Bill of Rights has had so little meaning and application so far.

Maitland has said that the history of the law was secreted in the interstices of procedure. This aphorism may have been true of the private law but it is very difficult to say whether it applies to the criminal law for the simple reason that we know so little about its history. Milsom, in his excellent history of the English law describes the history of criminal law as "miserable" ending a very short chapter on criminal law (amounting to no more than a twentieth of his book) with the wry comment that "crime has never been the business of lawyers".¹³

Without being too cynical about Milsom's last remark, we can say that, in a rather back-handed way, it proves Maitland's point. The history of the criminal law is cloudy because procedurally there has been so little for the legal historian to report and observe. There were few procedural safeguards for accused persons, substantive law was seldom examined at the trial level because counsel were only infrequently provided and there were only appeals in very extraordinary cases. The myth that the presumption of innocence and the need for proof of *mens rea* have been necessary since the time of Magna Carta has died hard.

Until very recently, the history of crime has consisted almost exclusively of the history of rather bizarre modes of trial (such as battle and ordeal) and even more bizarre methods of punishment.

Even if we look at the work of the first true scholar of the criminal law—James Fitzjames Stephen, the step-father of our own Code, we find that the level of sophistication in examining the substantive criminal law and the underlying theory is extremely simplistic. Look at his use of the word "malice" for instance.¹⁴

The "interstices of procedure" of the criminal trial show very little but a barbaric system where proof was always more important than truth or principle. This is not an indictment of the judiciary but of the state of the art. If we examine the few law reports which

¹¹ Griffiths, *Ideology in Criminal Procedure in A Third "Model" of the Criminal Process* (1970), 79 *Yale L.J.* 359.

¹² Wootton, *Crime and Criminal Law* (1963).

¹³ Milsom, *Historical Foundations of the Common Law* (1969), pp. 353, 374.

¹⁴ Stephen, *A General View of the Criminal Law of England* (1863), pp. 81-82.

consider criminal cases in Canada in the nineteenth century, we are looking at courts of first instance in which the judges seem to be operating on some sort of hunch theory.

In this short case comment, it is not possible to write at any length about the bibliography or historiography of the criminal law, particularly as it is practised by the Supreme Court of Canada. Usually, the judges of that court use books such as Williams¹⁵ and Smith and Hogan.¹⁶ These books are carefully researched and written books of technical law. The word "technical" is used pejoratively because these authors seem to be intent on *le vice anglais* of reconciling cases and trying to fit a vast array of fact-situations and cases to a set of rules or doctrines.

These texts seem to have trouble coming to grips with general principles and relating those to penal theory. The reason for this is difficult to understand: perhaps, in Jerome Hall's terms, they confuse principles and doctrines.¹⁷ Yet there have been English exemplars for more helpful commentary ranging from Bentham to H.L.A. Hart¹⁸ and now the excellent contributions of Ashworth.¹⁹ Perhaps we can be more hopeful of the work of the English Criminal Law Revision Committee.

These introductory remarks, which may be considered more appropriate to a journal devoted to legal education or legal history, have been inspired by the judgment of the majority of the Supreme Court of Canada in *Leary*. They have been included here because we need intellectual strength in the Supreme Court on matters relating to criminal law. We need to consider criminal law theory more carefully partly because the criminal law needs some intellectual respectability and partly because the liberty of the subject is at risk.

The majority judgment is, at best, unimaginative. The court was pre-occupied with the question of the specific intent ingredient as a prerequisite to the successful use of the partial defence of intoxication.

Leary had been convicted of rape. The accused had claimed that he was drunk at the time of the sexual intercourse and thought that the complainant was consenting. The trial judge had instructed the jury that intoxication was not a defence to a charge of rape.

¹⁵ Williams, *Criminal Law: The General Part* (2nd ed., 1961).

¹⁶ Smith and Hogan, *Criminal Law* (3rd ed., 1973).

¹⁷ Hall, *General Principles of Criminal Law* (2nd ed., 1960).

¹⁸ *E.g.* Hart, *Punishment and Responsibility* (1968).

¹⁹ *E.g.* Ashworth, *Reason, Logic and Criminal Liability* (1975), 91 L.Q. Rev. 102, and *Self-Defence and the Right to Life* (1975), 34 Camb. L.J. 282.

The three rules in *Beard*, but particularly the "specific intent" one, have been subject to some strange interpretations. What would a law student, coming fresh to *D.P.P. v. Beard*, make of Lord Birkenhead's judgment? Where would he find the *ratio decidendi*? Would he automatically choose those three rules? If he read recent decisions he would certainly be wise to choose them. Yet, he may be hard put to make any sense of the term "specific intent". The House of Lords in *Majewski* has made a similar evaluation of "specific intent"—that it is illogical, and perhaps worse.

Why have the courts, with one or two notable exceptions, ignored the following passage from *Beard*? "I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime. . . . It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences) a person cannot be convicted of a crime unless the *mens* was *rea*".²⁰

Our notional law student might become persuaded that the "specific intent" rule was a concession to the peculiar facts and crime control qualities of the crime which *Beard* had committed and that "specific intent" was referring to the felony-murder situation. So long as the prosecution was able to prove that *Beard* could not have been so drunk that he did not know he was raping the girl—specific intent if you like—then he should be convicted of the felony-murder. The crime of felony-murder could almost be described as one of strict liability and one could argue that the intoxication defence was hardly given a fair trial in that particular case.

I feel some uneasiness too in the *ad hoc* and arbitrary way in which the judge, a non-expert in behavioural science or human physiology, suggests that rape is impossible for a truly drunken man. An appellate court is in effect interpreting evidence, at a third remove from the trial, which is hardly a satisfactory way of judging human behaviour. The Ashworth approach of looking at intoxication is a little more sophisticated. Under his classifications, we could take the view that the criminal is drunk and dangerous²¹ and falls under a separate category of crime. Alternatively, if we decided not to follow the analogue of the status offence, we could decide that fault is still to be taken into account—if the accused has

²⁰ *Supra*, footnote 8, at p. 504.

²¹ Ashworth, *supra*, footnote 19, at p. 122. See a similar suggestion made earlier by Beck and Parker; *The Intoxicated Offender: A Problem of Responsibility* (1966), 44 *Can. Bar Rev.* 563.

become voluntarily drunk, then he is at fault in so behaving. Ashworth says:²²

A system which makes no provision for compulsory measures upon those who cause harm or damage whilst avoidably incapacitated does pay too high a price in terms of social security.

As Ashworth points out, the specific intent rule has had this effect by courts using a subterfuge to refuse a partial defence. The trouble with the specific intent rule is that it is a mere subterfuge and we would be better off with a purer and more direct solution to our problem.

This is what Lord Birkenhead had in mind in the largely ignored remark in *Beard* which was quoted earlier. One is tempted to advise our law student that this is the true *ratio decidendi* of the House of Lords decision in 1920. Lord Birkenhead said that the rule he was formulating was not an exceptional rule applicable only to specific intent but was governed by the general rule that a person cannot be convicted of crime unless the *mens was rea*.

This passage from *Beard* may have two possible meanings:

1) That *mens* is *rea* when the evidence suggests that the accused was not too drunk for legal purposes when it is shown that he actually engaged in the act of rape (or some similar lesser act, such as assault in robbery as in *George*).²³

2) That the House of Lords was deciding that the issue is always one of *mens rea* and that true responsibility must be found. That the accused must be shown to have contemplated the harm despite his intoxication and the intoxication is only one factor in that decision.

This last phrase of Lord Birkenhead may have been meant to signify no more, in the context, than that no one who was physically capable of rape lacked a guilty mind simply because he claimed that he was very drunk at the time. If this is all that the phrase means, then it is not very useful. At best it is merely an evidentiary question, or it is an inept way of applying a moral ingredient to the offence. If this is the correct way to interpret it, then it means that the British Columbia Court of Appeal decision in *Boucher*²⁴ is preferable to the Ontario decision in *Vandervoort*.²⁵

The rule, as interpreted, is a very blunt instrument in an area of law which has too many imprecise definitions. Of course it is

²² *Op. cit.*, footnote 19, at p. 124.

²³ [1960] S.C.R. 871.

²⁴ (1962), 40 W.W.R. (N.S.) 663 (B.C.C.A.).

²⁵ [1961] O. W.N. 141 (C.A.).

also very imprecise because it does not take account of any knowledge or theories from outside the law.

When the specific intent is used as a convenient peg on which to hang liability or a partial defence, the rule seems to make very little sense.

The following might be an explanation of the way in which the *Beard* rule has been interpreted in subsequent cases, including *Leary*:

1. Law is an art, not a science.
2. When the law is dealing with difficult human problems and potential loss of liberty for the subject, as happens in the criminal law, it is to be applauded that the law is an art and not a science.
3. The law, and the criminal law in the present case, is an art-form embodying the accumulated wisdom of the centuries.
4. The accumulated wisdom is exclusively legal wisdom culled from the case-law.
5. There may be other wisdom—such as that found in philosophy or the social and behavioural sciences—but it should not be looked at because the law is a closed, self-sufficient system.
6. What is the basic rule of *mens rea*? It embodies the notions of free will or voluntariness, intention or recklessness and either a subjective or objective interpretation of these concepts.
7. Beyond that, the law has found it very difficult to offer any more precise definitions.
8. More precise definitions are difficult because the law is pre-occupied with attempts to reconcile past and present decisions.
9. If a difficulty occurs, a firm rule is preferable to an ambiguous one, even if it is a narrow rule which is exclusively legal in outlook.
10. If the law cannot be made more accurate, but certainly is deemed essential, a legal fiction is called for. Specific intent is such a fiction and has served very well.

A counter to these notions might be the following:

1. Can we develop rules of criminal responsibility which take into account something more than the conventional wisdom of decisions which as recently as the beginning of this century seemed to find some intellectual solace in a phrase such as "malice"?
2. Is it possible to state a rule of *mens rea* which tries to examine fault in a broader sense and which also takes into account the notions of social defence, community morality and deterrence?
3. If we are looking at criminal legal responsibility, we must

understand responsibility broadly and not take a sectionalized approach to the problem so that we are purely compartmentalizing the notions of liability.

4. If an accused is only to be convicted when his *mens rea*, we should do something more than rely on legal fictions such as specific intent which may solve immediate problems but hardly carries forward a body of knowledge which can assist us in creating a good system of law.

The judicial styles of the majority and the dissenters in *Leary* reflect the two viewpoints outlined above.

When we are dealing with a judgment in the first mould, there is an almost irresistible temptation to follow the example of those who want to reconcile cases and to make distinctions where none really exists. Yet Pigeon J.'s judgment for the majority must be examined in this light to dissipate some of the rules which are allegedly created by it.

The linch-pin of the *Leary* judgment seems to be Fauteux J.'s definition, in *George*, of specific intent; that there is "a distinction 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 . . . is, in some cases, the only intent required . . . while in others, there must be in addition to that general intent, a specific intent attending the purpose for the commission of the act".²⁶

This sounds very useful but does it say anything to aid Pigeon J. in his search for a solution to the disagreement between the Ontario and British Columbia courts of appeal?

This formulation of course may possibly be useful if we are discussing the difference between theft or theft by a servant, theft or robbery, murder or manslaughter. In these instances, we are simply obliged to define a little more exactly because such additional description is legally and factually necessary. This means that Davey C.J.B.C. in *Resener*²⁷ (who approvingly cited Fauteux J. in *George*) is quite wrong when he says that "a specific intent to assault indecently is not an essential ingredient of the crime of indecent assault, as distinguished from *mens rea*, which may be established, among other ways, by a general intent to assault".

The last part of the quotation from Davey C.J.B.C. does not

²⁶ *Supra*, footnote 23, at p. 877.

²⁷ [1968] 4 C.C.C. 129 (B.C.C.A.). See Ferguson, *Mens Rea Evaluated in Terms of the Essential Elements of a Crime, Specific Intent, and Drunkenness* (1971), 4 Ottawa L. Rev. 356.

seem to make much sense because it implies that *mens rea* has nothing to do with intention. If I approach a person menacingly, I have committed an assault. If I add words, not of general threat but which express my intention to touch the genitals of the victim, I have committed an (attempted) indecent assault. If we insist on playing the game of specific-general intent, then Davey C.J.B.C. seems to be wrong even according to Fauteux J.'s formulation.

The problem with this formulation is that the courts in Canada (and in England in *Majewski*) have allowed the doctrines or rules relating to drunkenness to obscure the more fundamental principle of *mens rea*.

Why have the courts resorted to this artifice or fiction of specific intent, particularly in cases of rape and attempted rape? If one were uncharitable, an explanation would be that the specific intent notion has been a substitute for thought—the courts have found another category which had nothing to recommend it but the fact that it was a rationalisation. I am sure the courts are convinced that the specific intent rule was keeping the system pure but the mistake of Davey C.J.B.C. in *Resener* shows the dangers of such an approach.

In the *George* case the first appellate court to examine George's total acquittal on the robbery charge took the same view as the trial judge on the basis that if the accused lacked the intention to rob, then he also lacked the intent to do bodily harm. Both of the judges were of the opinion that they could make no distinction between the two acts and the incapacity, caused by alcohol, under which the accused was labouring at the appropriate time.

This seems a reasonable assumption if intoxication is going to be a defence based on the wider *Beard* rule (that is, the *mens* was not *rea*). Of course this is difficult when we know that there is another rule that voluntary, as opposed to involuntary, intoxication is not excusable behaviour. Why should this be the case? The law has taken the view that a person who voluntarily imbibed alcohol (or any other drug?) knew or ought to have known at that time that he would become drunk and would perhaps do acts which were criminal. This was thoroughly confirmed by the United States Supreme Court in *Powell v. Texas*²⁸ where Marshall J. said that the suggested defence that because Powell was an alcoholic and unable to control his actions, including the facts of the charge—found in a public place in a drunken condition—was not a reason for changing the whole basis of *mens rea*:

²⁸ (1968), 392 U.S. 514. See Parker, Status and Crime (1972), 5 A.N.Z. Jo. of Criminology 83.

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.²⁹

Marshall J. also said that the fact that the state did not know how to treat alcoholism, or did not have sufficient personnel or physical resources to cure alcoholism was an additional factor in arriving at his decision.

Therefore we cannot find the explanation for the partial defence of intoxication in the free will concept. Perhaps there are some further answers in the Supreme Court of Canada decision in *King*.³⁰ Ritchie J., in commenting on the charge of impaired driving where the accused had smashed his car after having had sodium pentothal administered for oral surgery, said:³¹

... he cannot . . . avoid the consequences of the impairment which results by saying that he did not intend to get into such a condition, but if the impairment has been brought about without any act of his own will, then [he is not guilty of impaired driving].

Ritchie J. then referred to the rebuttable presumption that "a man intends the natural consequences of his own conduct" (he omits the "probable" ingredient), and suggested that its application "involves a consideration of what consequence a man might be reasonably expected to foresee in the circumstances".³²

King is closer to automatism than to the partial defence of intoxication, at least in the way in which the Supreme Court of Canada considered it and yet a very good argument could be made that the behaviour of *King* (in having received some days' notice of the likely effects of sodium pentothal and yet still drove his car to the doctor's office) was closer to the concept of a voluntary act than that of *Powell*. Unlike the case of rape and robbery where the defence of intoxication is raised, both *King* and *Powell* involved offences where drinking or ingesting of drugs was an element in the offence itself.

The courts have taken a mechanistic attitude to the question of drink and its effect on the human mind. In *King* the accused could have foreseen the harm which was actually caused and yet he was acquitted on the narrow interpretation of involuntary ingestion. The more difficult concept of involuntariness in *Powell v. Texas* was too revolutionary for the United States Supreme Court.

²⁹ (1968), 392 U.S. 514, at pp. 535-536.

³⁰ [1962] S.C.R. 746.

³¹ *Ibid.*, at p. 763. ³² *Ibid.*

With the exception of *Vandervoort* in Ontario and the Australasian cases, the courts have used the specific intent concept as a hook on which to hang a partial defence and in taking this approach, they have felt able to ignore the deeper and more difficult concepts of intention and voluntariness which were raised most eloquently but unsuccessfully in *Powell*.

The specific intent idea makes no logical sense but it was useful as a legal fiction providing a partial defence when the law has decided that the accused was entitled to some relief from full responsibility but would not be totally acquitted on a pure theory of *mens rea*.

In the rape cases, we are faced with the fact that if the intoxication defence is focussing on the issue of consent, and if it is successful, then it means the court is only dealing with fornication rather than non-consensual or unlawful intercourse. If a person is planning to have intercourse and applies force to the body of the female so as to make his purpose clear, is this only part of the lawful intercourse or can it still be assault? Logically, is the consent issue the same on both potential crimes—rape and assault? The female might well reply that she may have consented to intercourse but not to manhandling. This argument is rather laboured and it is more important to realize that the court is making a moral decision about the behaviour of the accused who would probably be acquitted of everything if the intoxication was allowed to excuse the lack of consent.

The majority, per Pigeon J. decided that the British Columbia Court of Appeal had been correct in deciding that rape was a crime of general intent. The decision in *Boucher* was approved. The *Vandervoort* decision was not followed as it was considered somewhat suspect because the Ontario court had adopted the Australian decision of *Hornbuckle*.³³ Pigeon J. did not approve of this case and others which he mentioned but he thought that there were clear distinctions based on the difference in statutory language and also because of the fact that many of the cases concerned attempted rape (or similar offences) rather than rape itself.

There is a small problem here: the case of *Boucher* was also one of attempted rape. This fact seemed to have escaped Pigeon J. Yet, he does recognize the point raised by two of the judges in *Hornbuckle* that there was something anomalous in granting a defence of intoxication for attempted rape where it may not be available for the full offence of rape. The anomaly has been noticed also in terms of attempted murder which has always required a

³³ [1945] Vict. L.R. 281 (Sup. Ct).

more strictly subjective test than murder which is often rather more objective or constructive.³⁴

This shows the silliness of the specific intent test, and it is regretted that the Supreme Court of Canada did not feel free to be a little more adventurous than the House of Lords although even some members of the English court were more forthright in admitting the absurdity of the specific intent rule.

The dissent, consisting of Laskin C.J. and Spence and Dickson J.J., and written by the last named, is one of the best pieces of writing on criminal law to come from the Supreme Court since *Beaver*.

The most impressive aspect of Dickson J.'s judgment is not the conclusion he reaches on the facts or that he shows that the specific intent rule is meaningless, illogical and of no consequence. Dickson J. goes deeper than that and writes an exposition on criminal law theory which is infrequently seen in the law reports. An inkling of this fine dissenting judgment can be seen in *Mulligan*³⁵ where Dickson J. also dissented and where he criticized the idea of the law treating human events as if they could be compartmentalized and classified according to some pre-ordained legal classification. In that case Dickson J. was inferentially taking on the judgment of Lord Denning in *Gallagher v. Attorney-General for Northern Ireland*³⁶ where that judge managed a bifurcation of an accused's possible insanity and his drinking which tended to trigger his psychopathic or psychotic outbursts.³⁷

In the Dickson J. dissent in *Leary*, we have an essay on criminal law theory. We are off to a good start when Dickson J. describes the terms *mens rea* and "specific intent" as "chameleon-like". He adds two problems which require solution:

1) The impact of the proposition that drunkenness is no excuse for crime upon the fundamental principle that, generally speaking, guilt depends upon the proof by the Crown that the accused intended to do the acts with which he is charged, an intention which may be entirely lacking in a state of advanced drunkenness.

2) Failure to distinguish between (i) the effect of drunkenness on capacity to form the requisite intent and (ii) intent in fact.³⁸

³⁴ *E.g.*, *Grimwood*, [1962] 3 W.L.R. 747 (C.A.); *Menard* (1960), 130 C.C.C. 242 (Que. C.A.); *Tousignant* (1960), 130 C.C.C. 285 (Que. C.A.).

³⁵ [1977] S.C.R. 612. ³⁶ [1963] A.C. 349 (H.L.).

³⁷ There are indications in *Leary* that Dickson J. may have retracted some of that criticism. He cites Lord Denning in *Gallagher* but he may only intend to refer to the "Dutch courage" or third rule in *Beard*, *supra*, footnote 2, at p. 124. Also see *R. v. Joamie* (1977), 35 C.C.C. (2d) 108 (N.W.T. Sup. Ct).

³⁸ *Ibid.*, at p. 114.

Dickson J. answer 1) by saying that intoxication is an evidentiary issue, along with other relevant evidence, which must be considered in deciding whether the prosecution has proved the *mens rea* required to constitute the crime. In other words, Dickson J. is suggesting that we must make up our minds to jettison the legal fiction of specific intent and to allow or refuse intoxication as a negation of *mens rea* or legal responsibility.

He puts it more fully a little later in his judgment:³⁹

... evidence of intoxication should be relevant in determining the presence of the requisite mental element, in as much as intoxication undoubtedly affects a person's ability to appreciate the possible consequences or circumstances. Consumption of alcohol affects mental state. The state of mind of the accused being in issue it would seem reasonable to ask—what was the actual state of mind at the time?

There is very little need to belabour Dickson J.'s demolition of the "specific intent—general intent" myth or fiction. (In addition to calling specific intent meaningless and unintelligible, Dickson J. also calls it "fictional"). He points out that it is not a term recognized by psychology and it is not found in the Code. Those who would find specific intent in such words and phrases as "with intent to", "corruptly" and so on, will find no support in Dickson J.'s words because he thinks these terms lack specificity.

The Dickson approach to the drunkenness defence is to put the issue of intoxication in the same category as mistake of fact as it was explained in *Beaver* and *Morgan*. The person who is very drunk or very mistaken (or perhaps both) can have evidence of the intoxication or mistaken belief put to the jury as an hypothesis as to why he or she lacked *mens rea*. This does not suggest an automatic acquittal because there must be an evidential basis for such belief as was clearly shown by Cartwright J. in *Beaver*. Dickson J. gives a similar explanation about the defence of intoxication:⁴⁰

If the accused was drunk at the time of the alleged offence but it is proved that he did the act intentionally or recklessly, it is irrelevant that but for the drinking he would never have done the act. The intent or recklessness, constituting the necessary mental element, is present and the fact that, by reason of drink, his judgment and control relaxed so that he more readily gave way to his instinctual drives, avails him nothing.

Dickson J. is content to live with the evidential approach to *mens rea* because he quite rightly sees this as the classical way to keep criminal theory unpolled by *ad hominem* arguments or moral judgments which may be fine in the single instance but not for the integrity of the whole criminal law. He answers the question of the *Beard* court about whether it is possible for a very drunk person to

³⁹ *Ibid.*, at p. 117.

⁴⁰ *Ibid.*, at p. 123.

be capable of rape. Once again, Dickson J. sensibly looks upon this as purely an evidential question — that a person having had intercourse without intending to do so must be rare and being mistaken as to the consent of the woman must be rarer. This is a perfectly proper solution to the problem. If we can compare it with the *Beaver* rule, we can say that Louis Beaver would not have been acquitted of possession of heroin if his story had been a cock-and-bull story which no one could possibly believe. If he had a very, very good explanation for that story which removed the cock-and-bull, it would be one of those rare cases where the honest mistake would be accepted because of the evidential reasonableness of the evidence (not the belief). This may be rare but we would hope that a jury would similarly decide that, if the Dickson formulation in *Leary* were the Canadian law, not every person who is a little tipsy and whose libido is resultantly aroused, would have an automatic defence. Dickson J. is not trying to formulate a rapist's charter any more than the House of Lords was trying to undermine the safety and sexual integrity of women in *Morgan*.

Dickson J. suggests the Scandinavian notion of substituting "drunk and dangerous" as a status offence to protect the public from people who become violent under the influence of alcohol. He is not unaware of the dangers of drinking and drinkers, but doubts the deterrent effect of the *Beard* rule. If the legislature failed to pass "drunk and dangerous" laws, then a law could formulate a rule—one which is, once again, based on the principles of *mens rea*:

It may well be that an accused knows, or ought to have known, that drink or drugs makes him prone to certain kinds of conduct. A man who becomes violent when drunk, or a drug-taker who has reason to believe he will obliterate his will and hence become a danger to others may be reckless in the relevant sense. That is a question of fact to be determined in the circumstances of each particular case and not by the application of what is, in effect, an irrebuttable presumption against an accused.⁴¹

Recklessness cannot exist in the air, says Dickson J. and the facts of a particular case must be looked at so that "in the circumstances of a particular case, the ingestion of alcohol may be sufficiently connected to the consequences as to constitute recklessness in a legal sense with respect to the occurrence of the prohibited act".⁴²

To suggest that a person who becomes drunk is automatically reckless is to replace *mens rea* with strict liability. We must look at the mental state of the accused "in fact" and not merely "his capacity to have the necessary mental state". This shows clearly that Dickson J. is interested, unlike so many judges in Canada, in

⁴¹ *Ibid.*, at p. 124.

⁴² *Ibid.*

the integrity of criminal law theory. He combines this with a sensible attitude toward the evidence in the case and the way in which it is presented and the relevance of that evidence to the *mens rea* required in that particular crime (which is *not* the same as specific intent). There should be a consideration by the jury of "all of the evidence including the ages and background of the accused and the woman, the time and place and circumstances of the encounter, the conduct and statements at the time and following the event, and the sobriety of each . . .". The trier of fact should draw "such inferences therefrom as appear proper in the circumstances".⁴³ Where the accused was intoxicated or drugged, "the jury may have little difficulty in drawing an inference of intent or recklessness in the relevant sense, but that remains an issue of fact for the jury to determine in each particular case".⁴⁴

Dickson J. wants us to scrap the specific intent rule which he looks upon as a "legal fiction which cuts across fundamental criminal law precepts and has the effect of making the law both uncertain and inconstant".⁴⁵

So be it!

GRAHAM PARKER*

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⁴³ *Ibid.*, at p. 125.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

* Graham Parker, of Osgoode Hall Law School, York University, Toronto.

¹ (1976), 11 N.R. 386.

² R.S.C., 1970, App. III.