

CANADA / JUDGMENT

R. v. Daviault

[1994] 3 SCR 63

COURT

Supreme Court of Canada

DECIDED

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R. v. Daviault

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Date

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Report

[1994] 3 SCR 63

Case number

23435

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Major, John C.

On appeal from

Quebec

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 23435

Decision Content

R. v. Daviault, [1994] 3 S.C.R. 63

Henri Daviault Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Daviault

File No.: 23435.

1994: February 4; 1994: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for quebec

Criminal law -- Sexual assault -- Mens rea -- Intoxication -- Accused acquitted of sexual assault on account of his extreme intoxication at time of incident -- Acquittal overturned on appeal -- Whether evidence of extreme intoxication tantamount to state of automatism can negative intent required for general intent offence.

Constitutional law -- Charter of Rights -- Fundamental justice -- Accused acquitted of sexual assault on account of his extreme intoxication at time of incident -- Acquittal overturned on appeal -- Whether rule that mental element of general intent offence cannot be negated by drunkenness violates principles of fundamental justice -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 7 .

Constitutional law -- Charter of Rights -- Presumption of innocence -- Accused acquitted of sexual assault on account of his extreme intoxication at time of incident -- Acquittal overturned on appeal -- Whether rule that mental element of general intent offence cannot be negated by drunkenness violates presumption of innocence -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 11 (d).

The complainant, a 65-year-old woman who is partially paralysed and thus confined to a wheelchair, knew the accused through his wife. At about 6:00 p.m. one evening, at her request, the accused arrived at her home carrying a 40-ounce bottle of brandy. The complainant drank part of a glass of brandy and then fell asleep in her wheelchair. When she awoke during the night to go to the bathroom, the accused appeared, grabbed her chair, wheeled her into the bedroom, threw her on the bed and sexually assaulted her. He left the apartment at about 4:00 a.m. The complainant subsequently discovered that the bottle of brandy was empty. The trial judge found as a fact that the accused had drunk the rest of the bottle between 6:00 p.m. and 3:00 a.m. The accused was a chronic alcoholic. He testified that he had spent the day at a bar where he had consumed seven or eight bottles of beer. He recalled having a glass of brandy upon his arrival at the complainant's residence but had no recollection of what occurred between then and when he awoke nude in the complainant's bed. He denied sexually assaulting her. The pharmacologist

called by the defence as an expert witness testified that an individual with the blood-alcohol ratio he hypothesized the accused would have had after consuming that amount of alcohol might suffer a blackout. In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his actions when he is in such a state and will likely have no memory of them the next day. The trial judge found as a fact that the accused had committed the offence as described by the complainant, but acquitted him because he had a reasonable doubt about whether the accused, by virtue of his extreme intoxication, had possessed the minimal intent necessary to commit the offence of sexual assault. The Court of Appeal allowed the Crown's appeal and ordered that a verdict of guilty be entered. It held that the defence of self-induced intoxication resulting in a state equal to or akin to automatism or insanity is not available as a defence to a general intent offence.

Held (Sopinka, Gonthier and Major JJ. dissenting): The appeal should be allowed and a new trial ordered.

Per L'Heureux-Dubé, Cory, McLachlin and Iacobucci JJ.: The strict application of the rule established in this Court's decision in *Leary* that the mens rea of a general intent offence cannot be negated by drunkenness offends both ss. 7 and 11 (d) of the Canadian Charter of Rights and Freedoms . The mental aspect of an offence has long been recognized as an integral part of crime, and to eliminate it would be to deprive an accused of fundamental justice. The mental element in general intent offences may be minimal; in this case it is simply an intention to commit the sexual assault or recklessness as to whether the actions will constitute an assault. The necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused, but the substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault. Moreover, the presumption of innocence requires that the Crown bear the burden of establishing all elements of a crime, including the mental element of voluntariness. Assuming that voluntary intoxication is reprehensible, it does not follow that its consequences in any given situation are either voluntary or predictable. Further, self-induced intoxication cannot supply the necessary link between the minimal mens rea required for the offence and the actus reus. To deny that even a very minimal mental element is required for sexual assault offends the Charter in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the Charter . The experience of other jurisdictions which have completely abandoned the *Leary* rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which need to be addressed. Studies on the relationship between intoxication and crime do not establish any rational link. Finally, as the *Leary* rule applies to all crimes of general intent, it cannot be said to be well tailored to address a particular objective and it would not meet either the proportionality or the minimum impairment requirements.

The flexible approach suggested by Wilson J. in *Bernard*, whereby evidence of intoxication could properly go before a jury in general intent offences if it demonstrated such extreme intoxication that there was an absence of awareness which was akin to a state of insanity or automatism,

should be adopted. Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite mens rea and will be found to have acted voluntarily. Extreme intoxication akin to automatism or insanity should, like insanity, be established by the accused on a balance of probabilities. It will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced. While such a burden constitutes a violation of the accused's rights under s. 11 (d) of the Charter , it can be justified under s. 1 . It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking.

Should it be thought that the mental element involved relates to the actus reus rather than the mens rea, the result must be the same. The actus reus requires that the prohibited criminal act be performed voluntarily as a willed act. A person in a state of automatism cannot perform a voluntary willed act, and someone in an extreme state of intoxication akin to automatism must also be deprived of that ability. It would equally infringe s. 7 of the Charter if an accused who was not acting voluntarily could be convicted of a criminal offence. Here again the voluntary act of becoming intoxicated cannot be substituted for the voluntary action involved in sexual assault. To convict in the face of such a fundamental denial of natural justice could not be justified under s. 1 of the Charter .

Per Lamer C.J.: Cory J.'s position on the law was agreed with, and the carving out of an exception to the rule laid down in Leary was supported.

Per La Forest J.: Dickson C.J.'s view in Bernard and Quin which strongly challenged the rule in Leary having been rejected by a majority of the Court, Wilson J.'s approach in that case as developed in Cory J.'s reasons was preferred.

Per Sopinka, Gonthier and Major JJ. (dissenting): This Court's decision in Leary still stands for the proposition that evidence of intoxication can provide a defence for offences of specific intent but not for offences of general intent. Since sexual assault is a crime of general intent, intoxication is no defence. This rule is supported by sound policy considerations. One of the main purposes of the criminal law is to protect the public. Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community. The fact that an accused has voluntarily consumed intoxicating amounts of drugs or alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental disorder within the terms of s. 16 of the Criminal Code .

Since the Leary rule does not relieve the Crown of the responsibility of proving the existence of a mens rea or any of the other elements of the offence of sexual assault which are required by the principles of fundamental justice, it does not violate s. 7 or s. 11 (d) of the Charter . While this is one of the rare cases in which the accused was sufficiently intoxicated to raise a reasonable doubt as to whether he intended to commit the offence of sexual assault, none of the relevant principles of fundamental justice require that the intent to perform the actus reus of an offence of general intent be an element of the offence. The requirements of the principles of fundamental justice

are satisfied by proof that the accused became voluntarily intoxicated. The general rule that the mental fault element of a crime must extend to the actus reus, including consequences forming part thereof, is subject to exceptions. The principles of fundamental justice can exceptionally be satisfied provided the definition of the offence requires that a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence. These requirements are satisfied in this case. Individuals who render themselves incapable of knowing what they are doing through the voluntary consumption of alcohol or drugs possess a sufficiently blameworthy state of mind that their imprisonment does not offend the principle of fundamental justice which prohibits imprisonment of the innocent. Those found guilty of committing sexual assault are rightfully submitted to a significant degree of moral opprobrium, and that opprobrium is not misplaced in the case of the intoxicated offender. While as a general rule an act must be the voluntary act of an accused in order for the actus reus to exist, the rules of fundamental justice are satisfied by a showing that the drunken state was attained through the accused's own blameworthy conduct. Finally, although distinguishing between offences of specific and general intent may lead to some illogical results, the underlying policy of the Leary rule is sound. Rather than jettisoning the rule, the Court should clarify the distinction by clearly identifying and defining the mental element of offences. It can then be determined whether applying the criteria for the identification of offences of specific and general intent in a particular case serves the public interest in punishing the offender notwithstanding the absence of the mens rea associated with the offence.

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By Cory J.

Considered: *Leary v. The Queen*, [1978] 1 S.C.R. 29; *R. v. Bernard*, [1988] 2 S.C.R. 833; not followed: *R. v. O'Connor* (1980), 4 A. Crim. R. 348; *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610; *S. v. Chretien*, [1981] S.A. 1097; referred to: *R. v. Th  roux*, [1993] 2 S.C.R. 5; *R. v. Parks*, [1992] 2 S.C.R. 871; *Rabey v. The Queen*, [1980] 2 S.C.R. 513; *R. v. George*, [1960] S.C.R. 871; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Quin*, [1988] 2 S.C.R. 825; *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Revelle v. The Queen*, [1981] 1 S.C.R. 576; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Swain*, [1991] 1 S.C.R. 933; *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

By Lamer C.J.

Referred to: *R. v. Bernard*, [1988] 2 S.C.R. 833; *Leary v. The Queen*, [1978] 1 S.C.R. 29.

By La Forest J.

Referred to: *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Quin*, [1988] 2 S.C.R. 825; *Leary v. The Queen*, [1978] 1 S.C.R. 29.

By Sopinka J. (dissenting)

Leary v. The Queen, [1978] 1 S.C.R. 29; R. v. Bernard, [1988] 2 S.C.R. 833; R. v. Charest (1990), 57 C.C.C. (3d) 312; R. v. Ciciola, J.E. 90-629; R. v. Penno, [1990] 2 S.C.R. 865; R. v. George, [1960] S.C.R. 871; Director of Public Prosecutions v. Beard, [1920] A.C. 479; Attorney-General for Northern Ireland v. Gallagher, [1963] A.C. 349; Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386; Director of Public Prosecutions v. Majewski, [1977] A.C. 443; R. v. Chase, [1987] 2 S.C.R. 293; Swietlinski v. The Queen, [1980] 2 S.C.R. 956; R. v. Creighton, [1993] 3 S.C.R. 3; R. v. Martineau, [1990] 2 S.C.R. 633; R. v. Parks, [1992] 2 S.C.R. 871; R. v. Théroux, [1993] 2 S.C.R. 5; R. v. Doherty (1887), 16 Cox C.C. 306; R. v. Tolson (1889), 23 Q.B.D. 168; People v. Hood, 462 P.2d 370 (1969); Pappajohn v. The Queen, [1980] 2 S.C.R. 120; Sansregret v. The Queen, [1985] 1 S.C.R. 570; R. v. Bulmer, [1987] 1 S.C.R. 782; R. v. Robertson, [1987] 1 S.C.R. 918; R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Moreau (1986), 26 C.C.C. (3d) 359; R. v. Murray (1986), 31 C.C.C. (3d) 323; R. v. Revelle (1979), 48 C.C.C. (2d) 267, aff'd [1981] 1 S.C.R. 576; R. v. Hartridge, [1967] 1 C.C.C. 346; Rabey v. The Queen, [1980] 2 S.C.R. 513, aff'g (1977), 37 C.C.C. (2d) 461; R. v. Malcolm (1989), 50 C.C.C. (3d) 172; R. v. Mailloux (1985), 25 C.C.C. (3d) 171, aff'd [1988] 2 S.C.R. 1029; R. v. Hilton (1977), 34 C.C.C. (2d) 206; Cooper v. The Queen, [1980] 1 S.C.R. 1149.

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APPEAL from a judgment of the Quebec Court of Appeal, [1993] *R.J.Q.* 692, 80 *C.C.C.* (3d) 175, 19 *C.R.* (4th) 291, 54 *Q.A.C.* 27, setting aside the accused's acquittal by Grenier *Q.C.J.*, [1991] *R.J.Q.* 1794, on a charge of sexual assault. Appeal allowed, Sopinka, Gonthier and Major *JJ.* dissenting.

Giuseppe Battista, for the appellant.

Claude Provost, for the respondent.

The following are the reasons delivered by

Lamer C.J. -- I have read the reasons of my colleagues, Justice Sopinka and Justice Cory. My views of the matter were enunciated through my concurrence in the reasons of Dickson C.J. in *R. v. Bernard*, [1988] 2 *S.C.R.* 833. While I now prefer characterizing the mental element involved as relating more to the *actus reus* than the *mens rea*, so that the defence clearly be available in strict liability offences, my views have not changed. I agree with my colleague Cory J.'s position on the law and, given my position in *Bernard*, which goes much further, I would of course support carving out, as he does, an exception to the rule laid down in *Leary v. The Queen*, [1978] 1 *S.C.R.* 29. I would accordingly allow the appeal and direct a new trial.

The following are the reasons delivered by

La Forest J. -- In *R. v. Bernard*, [1988] 2 *S.C.R.* 833, as well as in *R. v. Quin*, [1988] 2 *S.C.R.* 825, I, along with the Chief Justice, shared the view of then Chief Justice Dickson which strongly challenged the rule in *Leary v. The Queen*, [1978] 1 *S.C.R.* 29. While the majority of the Court differed as to the specific interpretation of *Leary*, what is clear is that they rejected the view espoused by Dickson C.J. I am, therefore, left to choose between the approach set forth in McIntyre J.'s reasons in that case, developed here by Justice Sopinka, and those of Justice Wilson, developed here by Justice Cory. Of the two, I prefer the latter and accordingly (though I would be inclined to attribute the mental element he describes as going to the *actus reus*) I concur in the reasons of Cory J. and would dispose of this appeal in the manner proposed by him.

The judgment of L'Heureux-Dubé, Cory, McLachlin and Iacobucci *JJ.* was delivered by

Cory J. --

Issue

Can a state of drunkenness which is so extreme that an accused is in a condition that closely resembles automatism or a disease of the mind as defined in s. 16 of the Criminal Code, R.S.C., 1985, c. C-46, constitute a basis for defending a crime which requires not a specific but only a general intent? That is the troubling question that is raised on this appeal.

The facts of this case and the judgments below are set out in the reasons of Justice Sopinka. Although I agree with my colleague on a number of issues, I cannot agree with his conclusion that it is consistent with the principles of fundamental justice and the presumption of innocence for the courts to eliminate the mental element in crimes of general intent. Nor do I agree that self-induced intoxication is a sufficiently blameworthy state of mind to justify culpability, and to substitute it for the mental element that is an essential requirement of those crimes. In my opinion, the principles embodied in our Canadian Charter of Rights and Freedoms, and more specifically in ss. 7 and 11 (d), mandate a limited exception to, or some flexibility in, the application of the Leary rule. This would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element required for crimes of general intent.

Analysis

As this case involves the reconsideration of a common law principle in light of more recent developments in the principles of criminal law and particularly the enactment of the Charter, it may be useful to begin with a brief review of the historical development of the relevant criminal law concepts. As well, it will be helpful to outline the various options adopted and suggested with respect to intoxication as a factor in determining whether an accused possessed the mental element required by the crime.

The Physical and Mental Aspects of Criminal Acts

Originally a crime was considered to be the commission of a physical act which was specifically prohibited by law. It was the act itself which was the sole element of the crime. If it was established that the act was committed by the accused then a finding of guilt would ensue. However, as early as the twelfth century, in large part through the influence of the canon law, it was established that there must also be a mental element combined with the prohibited act to constitute a crime. That is to say that the accused must have meant or intended to commit the prohibited act. The physical act and the mental element which together constitute a crime came to be known as the *actus reus* denoting the act, and the *mens rea* for the mental element. Like so many maxims they are imprecise and in many instances misleading.

For my purposes it is sufficient to say that for a great many years it has been understood that, unless the legislator provides otherwise, a crime must consist of the following elements. First, a physical element which consists of committing a prohibited act, creating a prohibited state of affairs, or omitting to do that which is required by the law. Second, the conduct in question must

be willed; this is usually referred to as voluntariness. Some writers classify this element as part of the actus reus, others prefer to associate it with mens rea; however, all seem to agree that it is required. (See, generally, J. C. Smith and B. Hogan, *Criminal Law* (7th ed. 1992), at pp. 37 ff.) If persons other than lawyers were asked what constituted willed or voluntary conduct they would respond that such an act or conduct must involve a mental element. It is the mental element, that is the act of will, which makes the act or conduct willed or voluntary. In *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 17, McLachlin J. had this to say concerning the actus reus:

The term mens rea, properly understood, does not encompass all of the mental elements of a crime. The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist. Mens rea, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent -- those who do not understand or intend the consequences of their acts. Typically, mens rea is concerned with the consequences of the prohibited actus reus.

Similarly, in *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 896, La Forest J. quoted the following passage from the dissenting reasons of Dickson J. (as he then was) in *Rabey v. The Queen*, [1980] 2 S.C.R. 513, at p. 522:

Although the word "automatism" made its way but lately to the legal stage, it is basic principle that absence of volition in respect of the act involved is always a defence to a crime. A defence that the act is involuntary entitles the accused to a complete and unqualified acquittal. That the defence of automatism exists as a middle ground between criminal responsibility and legal insanity is beyond question. Although spoken as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act.

The definition of actus reus is thus established. Yet I should add that, as will be seen later, the mental aspect involved in willed or voluntary conduct may overlap to some extent in both the concept of mens rea and actus reus. Finally, then there must be a contemporaneous mental element comprising an intention to carry out the prohibited physical act or omission to act; that is to say a particular state of mind such as the intent to cause, or some foresight of, the results of the act or the state of affairs.

With this concept of a crime established it soon came to be accepted that in certain situations a person who committed a prohibited physical act still could not be found guilty. A number of examples come to mind. For instance, if a person in a state of automatism as a result of a blow on the head committed a prohibited act that he was not consciously aware of committing, he could not be found guilty since the mental element involved in committing a willed voluntary act and the mental element of intending to commit the act were absent. Thus neither the requisite actus reus or mens rea for the offence was present. The result would be the same in the case of a person who had an unexpected reaction to medication which rendered him totally unaware of his actions. Similarly, if an accused, during an epileptic seizure, with no knowledge of what he was doing, shot and killed a victim, he could not be found guilty of murder since both the ability to act voluntarily and the mental element of the intention to kill were absent. In all these

instances the accused simply could not have formed the requisite intention to commit the prohibited act. Further, it was long ago recognized that a person suffering from a mental illness coming within the scope of what is now s. 16 of the Criminal Code could not be found guilty. That result may have arisen either from the recognition of the inability of a mentally ill accused to form the requisite intention, or from the realization that the nature and quality of the prohibited act was not appreciated by the accused.

A review of the history of the defence of intoxication shows that, originally, intoxication was never a defence to any crime. However, with the evolution of criminal law, this rule came to be progressively relaxed and the defence of intoxication was admitted for crimes of specific intent. Although one of the justifications for this was the courts' preoccupation with the harshness of criminal liability and criminal sanctions, clearly this development was also influenced by the development of the requirements for mental elements in crimes. The defence of intoxication was based on the recognition and belief that alcohol affected mental processes and the formulation of intention (see, for example, D. McCord, "The English and American History of Voluntary Intoxication to Negate Mens Rea" (1990), 11 J. Legal Hist. 372, at p. 378). I would agree with the authors who feel that the progressive expansion of the intoxication defence has paralleled the progressive expansion of theories of the mental elements of crimes. (See, for example, T. Quigley, "A Shorn Beard" (1987), 10:3 Dalhousie L.J. 167.) In my view, the need for this historical expansion is justified and emphasized by the increased concern for the protection of fundamental rights enshrined in the Charter .

It can thus be seen that with the development of principles recognizing constituent elements of crimes, particularly the need for a mental element, there came the realization that persons who lack the requisite mental element for a crime should not be found guilty of committing that crime. For centuries it has been recognized that both the physical and the mental elements are an integral part of a criminal act. It has long been a fundamental concept of our criminal law.

This appeal is concerned with situations of intoxication that are so extreme that they are akin to automatism. Such a state would render an accused incapable of either performing a willed act or of forming the minimal intent required for a general intent offence. I will approach the issue primarily on the basis that the extreme intoxication renders an accused incapable of forming the requisite minimum intent. I have taken the reasons of Sopinka J. to have dealt with the issue on the basis of mens rea.

Categorization of Crimes as Requiring Either a Specific Intent or a General Intent

The distinction between crimes of specific and general intent has been acknowledged and approved by this Court on numerous occasions. (See *R. v. George*, [1960] S.C.R. 871, at p. 877 (Fauteux J.); and subsequent cases such as *Leary v. The Queen*, [1978] 1 S.C.R. 29; *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Bernard*, [1988] 2 S.C.R. 833; and *R. v. Quin*, [1988] 2 S.C.R. 825.) On this issue, I am in general agreement with Sopinka J.'s presentation. The categorization of crimes as being either specific or general intent offences and the consequences that flow from that categorization are now well established in this Court.

However, as he observes, we are not dealing here with ordinary cases of intoxication but with the limited situation of very extreme intoxication and the need, under the Charter, to create an exception in situations where intoxication is such that the mental element is negated. Sopinka J. sees no need for such an exception. This is where I must disagree with my colleague.

It may now be convenient to review the approach that courts have taken with regard to drunkenness as a factor in considering the mental element in crimes of general intent.

Drunkenness as a Factor in the Consideration of Criminal Liability

This issue has been the subject of many judicial decisions in Commonwealth countries. It is useful here to contrast the two opposite positions which have emerged in the absence of Charter considerations. The first position is illustrated by the decision of this Court in *Leary*, supra, and also corresponds to the English position. The second position is that which prevails in Australia and New Zealand. It is best illustrated by the *O'Connor* decision, (1980), 4 A. Crim. R. 348.

Leary v. The Queen

Leary was charged with rape. In the course of his instructions, the trial judge advised the jury that "drunkenness is no defence to a charge of this sort". This position was taken on the grounds that rape was a crime of general intent and that in such a crime, the mental element could not be negated by drunkenness. The majority in this Court confirmed that rape was indeed a crime of general intent and that the mens rea could not be affected by drunkenness. They relied upon *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443. There, the House of Lords held that, unless the offence was one which required proof of a specific intent, it was no defence to a criminal charge that, by reason of self-induced intoxication, the accused did not intend to do the act which constituted the offence. A charge to the jury to that effect was approved.

The minority (Dickson J., with Laskin C.J. and Spence J. concurring) would have required that the jury be satisfied that the accused knew the victim was not consenting or was reckless as to whether she was or not. On that issue it was said that drunkenness was an element that the jury could properly take into account in resolving the question. It was their position that drunkenness should be left to the jury, along with all the other relevant evidence, in deciding whether the accused knew the victim was not consenting.

The supporters of the *Leary* decision are of the view that self-induced intoxication should not be used as a means of avoiding criminal liability for offences requiring only a general intent. They contend that society simply cannot afford to take a different position since intoxication would always be the basis for a defence despite the fact that the accused had consumed alcohol with the knowledge of its possible aggravating effects. Supporters of the *Leary* decision argue that to permit such a defence would "open the floodgates" for the presentation of frivolous and unmeritorious defences.

Those who oppose the decision contend that it punishes an accused for being drunk by illogically imputing to him liability for a crime committed when he was drunk. Further, it is said that the effect of that decision is to deny an accused person the ability to negate his very awareness of committing the prohibited physical acts. That is to say the accused might, as a result of his drinking, be in a state similar to automatism and thus completely unaware of his actions, yet he would be unable to put this forward as a factor for the jury to consider because his condition arose from his drinking. In such cases, the accused's intention to drink is substituted for the intention to commit the prohibited act. This result is said to be fundamentally unfair. Further, it is argued that the floodgates argument should not have been accepted because juries would not acquit unless there was clear evidence that the drunkenness was of such a severity that they had a reasonable doubt as to whether the accused was even aware that he had committed the prohibited act. (See, for example, Mewett and Manning, *Criminal Law* (2nd ed. 1985), at pp. 214-15.)

The O'Connor Case - A Position Taken Contrary to Leary

O'Connor, *supra*, is a decision of the High Court of Australia. O'Connor was seen removing a map holder and a knife from a car. A police officer saw him, identified himself and asked O'Connor why he had taken the articles. O'Connor ran away with the officer in pursuit. When he was arrested, O'Connor stabbed the officer with the knife. He was charged with theft of the map holder and knife and wounding with intent to inflict grievous bodily harm. O'Connor testified that he had consumed alcohol and car sickness tablets before these events and stated that he had no memory either of taking anything from the car or of his subsequent arrest. Medical evidence was given that the combined effect of the tablets and alcohol could have produced such a state of intoxication that O'Connor would have been incapable of reasoning or forming an intent to steal or wound. The trial judge directed the jury, in accordance with Majewski, *supra*, that evidence of self-induced intoxication, although relevant in determining whether the accused had acted with intent to steal or to inflict grievous bodily harm, was not relevant with respect to the included alternative offence of unlawful and malicious wounding. O'Connor was acquitted on the charges of theft and wounding with intent and convicted of the included offence of unlawful wounding.

O'Connor appealed the conviction to a court of criminal appeal which declined to follow Majewski, *supra*, and quashed the conviction. The Attorney General for Victoria then appealed to the High Court.

There, the majority upheld the decision of the Court of Appeal. They concluded that for all offences requiring proof of a mental element, evidence of intoxication, whether self-induced or not, was relevant and admissible in determining whether the requisite mental element was present. The majority went on to observe that evidence of intoxication which merely tends to establish loss of inhibition or weakening of the capacity for self-control would not provide a basis for denying that the mental element of an offence was present. However, where there was evidence that the accused was unconscious or that his mind was a blank through drunkenness at the time of the offence, this should be left to the jury in resolving the question as to whether there

had been a voluntary act on the part of the accused.

Earlier, the Court of Appeal of New Zealand in *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610, came to a similar conclusion. Thus, the courts of Australia and New Zealand have come to a conclusion that is diametrically opposed to that reached in *Majewski and Leary*. This also appears to be the case in South Africa. See *S. v. Chretien*, [1981] S.A. 1097 (A).

Following the decision of this Court in *Leary*, important changes have occurred in the evolution of criminal law principles. Many of these changes were prompted by the enactment of the Charter . It must now be seen whether, as a result of the passage of the Charter or the reasoning in subsequent cases of this Court, some modification of the rule established by *Leary* is required.

Passage of the Charter and Subsequent Cases of this Court

The passage of the Charter makes it necessary to consider whether the decision in *Leary* contravenes s. 7 or s. 11 (d) of the Charter . Those sections provide:

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.
 11. Any person charged with an offence has the right
- ...
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

There have been some statements by this Court which indicate that one aspect of the decision in *Leary* does infringe these provisions of the Charter . The first occurred in *R. v. Bernard*, *supra*. Bernard was charged with sexual assault causing bodily harm. He was tried by judge and jury and found guilty. Bernard admitted forcing the complainant to have sexual intercourse with him but stated that his drunkenness caused him to attack her. The issue was whether self-induced intoxication should be considered by the jury along with all the other relevant evidence in determining whether the prosecution had proved beyond a reasonable doubt the mens rea required by the offence. Bernard's appeal was dismissed by a majority of the Court. They all agreed that, as the defence of intoxication had not been made out on the evidence, s. 613(1) (b) (iii) (now s. 686(1) (b)(iii)) of the Criminal Code could be applied. Four sets of reasons were given.

McIntyre J. writing for himself and Beetz J. held that this was a general intent offence and that the intent involved related solely to the commission of an assault of a sexual nature. It was his position that a specific intent offence involves the performance of the prohibited actus reus coupled with an intent or purpose going beyond the mere performance of the act in question. He noted that the distinction was neither artificial nor irrational. He pointed out that drunkenness is not a true defence; however, it may be of significance and applicable in a specific intent offence when the accused is so intoxicated that he lacks the capacity to form the specific intent required to commit the crime. Nonetheless, drunkenness could not be a relevant factor in offences

requiring only a general intent. McIntyre J. observed that in those offences the mens rea can, as a rule, be inferred from the actus reus itself, since a person is presumed to have intended the natural and probable consequences of his actions.

Further, where the accused was so intoxicated as to raise a doubt as to the voluntary nature of his conduct, the necessary blameworthy mental state could be established by proving that he consumed alcohol voluntarily. Thus persons accused of general intent crimes could not put forward voluntary drunkenness as the basis for a defence. McIntyre J. found that such a conclusion did not violate either s. 7 or s. 11 (d) of the Charter, and was consistent with the principle that the morally innocent should not be convicted. Accused persons who voluntarily consume drugs or alcohol, thus depriving themselves of self-control leading to the commission of the crime, were not morally innocent and were criminally blameworthy. The ratio of McIntyre J.'s reasons is set out in Sopinka J.'s reasons.

Wilson J. (L'Heureux-Dubé J. concurring), agreed with the conclusion reached by McIntyre and Beetz JJ. However, she advocated a modification of the rule set out in Leary. Her reasoning proceeds in this way. Sexual assault causing bodily harm is an offence of general intent which requires only a minimal intent to apply force. Ordinarily the Crown can establish the requisite mental state by means of the inferences to be drawn from the actions of the accused. Wilson J. found that the Leary rule was perfectly consistent with an onus resting upon the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences, but she would have applied it in a more flexible form. In her view, evidence of intoxication could properly go before a jury in general intent offences if it demonstrated such extreme intoxication that there was an absence of awareness which was akin to a state of insanity or automatism. Only in such cases would she find that the evidence was capable of raising a reasonable doubt as to the existence of the minimal intent required for a general intent offence. Wilson J. put forward her position in this way at p. 887:

I believe that the Leary rule is perfectly consistent with an onus resting on the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences. I view it as preferable to preserve the Leary rule in its more flexible form as Pigeon J. applied it, i.e., so as to allow evidence of intoxication to go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence. I would not overrule Leary, as the Chief Justice would, and allow evidence of intoxication to go to the trier of fact in every case regardless of its possible relevance to the issue of the existence of the minimal intent required for the offence. [Emphasis added.]

She also noted that she had some real concerns about the validity of the use of self-induced intoxication as a substituted form of mens rea under the Charter. More specifically, she thought it would be unlikely that proof of the substituted element would lead inexorably to a conclusion that the minimum intent existed at the time of the commission of the criminal act.

Dickson C.J. (Lamer J. concurring) disagreed with the conclusion reached by the majority. Dickson C.J. found that the Leary rule constituted a violation of ss. 7 and 11 (d) of the Charter , and that it could not be justified under s. 1 . Section 7 was violated because the rule did not recognize "the fundamental principles of voluntariness and fault" (p. 852). Section 11 (d) was violated "by presuming an essential element required by s. 7 upon the proof of the fact of intoxication" (p. 853). He determined that evidence of self-induced intoxication should be considered by a jury along with all the other relevant evidence in determining whether the mens rea required to constitute the offence had been proved beyond a reasonable doubt. In his opinion, intoxication is relevant to determine whether the mental element required by the crime has been established. He observed that the customary requirement of proof of mens rea in general intent offences would not open the floodgates since intoxication to the extent that it simply lowers inhibitions or removes self-restraint or induces unusual self-confidence or aggressiveness does not relate to or affect the mens rea requirement needed to establish intentional or reckless conduct. Similarly, he noted that it would not avail an accused to simply get drunk in order to gain courage to commit a crime.

La Forest J. agreed with Dickson C.J.'s analysis of the law. He stressed that the requirement of mens rea in a truly criminal offence is so fundamental that it cannot, since the enactment of the Charter , be removed on the basis of a judicially developed policy. He observed that, although established common law rules should not lightly be assumed to violate the Charter , nonetheless when such a rule is found to violate a Charter right, that violation must be justified in the same way as would be a legislative enactment. Here, no adequate justification was presented for completely removing the mens rea aspect of general intent offences. However, he was of the view that s. 613(1) (b)(iii) of the Criminal Code could be properly applied as there had been no substantial wrong or miscarriage of justice occasioned by the strict application of the Leary rule to the facts of the case. He thus agreed with the result reached by the majority.

Thus, it can be seen that only two judges were of the view that evidence of intoxication could not, under any circumstances, be placed before a jury for its consideration. La Forest J.'s words stressing the importance of the establishment of mens rea in criminal offences supply strong support for adopting the position put forward by Wilson and L'Heureux-Dubé JJ. that the Leary rule should be modified to permit evidence of severe intoxication, resulting in the accused being in a state akin to insanity or automatism, to be adduced.

The same position was put forward by Wilson J., again concurred in by L'Heureux-Dubé J., in *R. v. Penno*, [1990] 2 S.C.R. 865. In my view, this position has much to commend it and should be adopted.

The Alternative Options

What options are available with regard to the admissibility and significance of evidence of drunkenness as it may pertain to the mental element in general intent offences? One choice would be to continue to apply the Leary rule. Yet, as I will attempt to demonstrate in the next section, the rule violates the Charter and cannot be justified. Thus this choice is unacceptable.

Another route would be to follow the O'Connor decision. Evidence relating to drunkenness would then go to the jury along with all other relevant evidence in determining whether the mental element requirement had been met. It is this path that is enthusiastically recommended by the majority of writers in the field. Yet it cannot be followed. It is now well established by this Court that there are two categories of offences. Those requiring a specific intent and others which call for nothing more than a general intent. To follow O'Connor would mean that all evidence of intoxication of any degree would always go to the jury in general intent offences. This, in my view, is unnecessary. Further, in *Bernard*, *supra*, the majority of this Court rejected this approach.

A third alternative, which I find compelling, is that proposed by Wilson J. in *Bernard*. I will examine the justifications for adopting this position in more detail shortly, but before doing that it may be helpful to review the nature of the Charter violations occasioned by a rigid application of the Leary rule.

How the Leary Rule Violates Sections 7 and 11(d) of the Charter

What then is the rule of law established by the decision in *Leary*? The conclusion of the majority in that case establishes that, even in a situation where the level of intoxication reached by the accused is sufficient to raise a reasonable doubt as to his capacity to form the minimal mental element required for a general intent offence for which he is being tried, he still cannot be acquitted. In such a situation, self-induced intoxication is substituted for the mental element of the crime. The result of the decision in *Leary*, applied to this case, is that the intentional act of the accused to voluntarily become intoxicated is substituted for the intention to commit the sexual assault or for the recklessness of the accused with regard to the assault. This is a true substitution of *mens rea*. First, it would be rare that the events transpiring from the consumption of alcohol through to the commission of the crime could be seen as one continuous series of events or as a single transaction. Secondly, the requisite mental element or *mens rea* cannot necessarily be inferred from the physical act or *actus reus* when the very voluntariness or consciousness of that act may be put in question by the extreme intoxication of the accused.

It has not been established that there is such a connection between the consumption of alcohol and the crime of assault that it can be said that drinking leads inevitably to the assault. Experience may suggest that alcohol makes it easier for violence to occur by diminishing the sense of what is acceptable behaviour. However, studies indicate that it is not in itself a cause of violence. See Interim Report of the Commission of Inquiry into the Non-Medical Use of Drugs (1970), c. 3.; "The Le Dain Interim Report", referred to by S. H. Berner, in *Intoxication and*

Criminal Responsibility (Law Reform Commission of Canada, 1975); Law Commission, Great Britain, Intoxication and Criminal Liability, Consultation Paper No. 127 (1993), at pp. 4 and 67; see also the references and additional information given in notes 14, 15, 16 and 18 at p. 4.; C. N. Mitchell, "The Intoxicated Offender -- Refuting the Legal and Medical Myths" (1988), 11 Int. J. L. & Psychiatry 77, at p. 89; S. S. Covington, "Alcohol and Family Violence", Paper presented at the 34th International Congress on Alcoholism and Drug Dependence, at p. 24; L. Wolff and B. Reingold, "Drug Use and Crime" (1994), 14:6 Juristat 1, at pp. 5 to 8 and 13; and Saskatchewan Alcohol and Drug Abuse Commission, Legal Offences in Saskatchewan: The Alcohol and Drug Connection (Research Report, February 1989). For example, in the SADAC Research Report of 1989, the following appears at p. 8:

While it is widely recognized that alcohol and drug abuse are associated with criminality, neither the extent of this association nor its nature has been clearly identified (Brain, 1986; Collins, 1988; Evans, 1986; MacLatchie, 1987; Pernanen, 1976).

...

... But more research is required in order to establish with confidence the nature or extent to which such offences are drug related. However, research conducted elsewhere would suggest that, at most, 10% of violent offences in Saskatchewan are drug related (Johnson, 1986).

Alcohol abuse, although it frequently accompanies violent behaviour, is not, in and of itself, a cause of violence. The standards advocated by Powers and Kotash (1982) to determine whether causal status should be accorded to alcohol abuse are adopted here. For Powers and Kotash, a factor must be both a necessary and a sufficient condition for a particular event to occur in order for it to qualify as a 'cause'. Consider the phenomenon of partner abuse (an all too prevalent form of assault) in this light.

In the words of Powers and Kotash:

Alcohol and drugs are not causally related to partner abuse in terms of being necessary or sufficient conditions for the violence. Substance abuse is not a necessary condition, in that a great proportion of the violence occurs in the absence of alcohol or drugs. Substance abuse is not a sufficient condition, for alcohol and drugs are often used without violent occurrence (1982:42).

Alcohol abuse can best be viewed as a 'facilitator' of violence. That is to say that in our culture, alcohol abuse makes it easier for violence to occur, either by blurring the boundaries between what is and what is not acceptable behaviour, or by removing conscious recognition of rules governing acceptable behavior altogether (Scott, 1988; Collins, 1988).

In addition, in some instances alcohol or drug abuse may serve as a conscious accompanier of violent behavior in that some offenders use alcohol or drug abuse to excuse a violent act (e.g., some instances of wife battering) (Coid, 1986; Powers and Kotash, 1982). [Comment: I would note that the effects referred to in the last two paragraphs have always been held to be insufficient to deny the existence of the requisite mental element.]

There is no simple causal relationship between alcohol or drug abuse and violent behavior (Brain, 1986). Patterns of violent behavior are shaped by a host of physiological, psychological, situational and socio-cultural factors. Among the various socio-cultural factors which shape patterns of substance abuse and violence, especially important are gender, age, socio-economic status and ethnicity (Coid, 1986). [Emphasis in original.]

In my view, the strict application of the Leary rule offends both ss. 7 and 11 (d) of the Charter for a number of reasons. The mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists. In this case, the requisite mental element is simply an intention to commit the sexual assault or recklessness as to whether the actions will constitute an assault. The necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused. However, the substituted *mens rea* of an intention to become drunk cannot establish the *mens rea* to commit the assault.

R. v. Whyte, [1988] 2 S.C.R. 3, dealt with the substitution of proof of one element for proof of an essential element of an offence and emphasized the strict limitations that must be imposed on such substitutions. The position is put in this way, at pp. 18-19:

In the passage from Vaillancourt quoted earlier, Lamer J. recognized that in some cases substituting proof of one element for proof of an essential element will not infringe the presumption of innocence if, upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element. This is another way of saying that a statutory presumption infringes the presumption of innocence if it requires the trier of fact to convict in spite of a reasonable doubt. Only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid. [Emphasis added.]

The substituted *mens rea* set out in Leary does not meet this test. The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime. Rather, the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, *mens rea* for a crime is so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice. See R. v. Vaillancourt, [1987] 2 S.C.R. 636.

In that same case it was found that s. 11 (d) would be infringed in those situations where an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence; see Vaillancourt, *supra*, at pp. 654-56. That would be the result if the Leary rule was to be strictly applied. For example, an accused in an extreme state of intoxication akin to automatism or mental illness would have to be found guilty although there was reasonable doubt as to the voluntary nature of the act committed by the accused. This would clearly infringe both ss. 7 and 11 (d) of the Charter. In my view, the mental element of

voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy. It simply cannot be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication would lead to the commission of the offence. It follows that it cannot be said that a reasonable person, let alone an accused who might be a young person inexperienced with alcohol, would expect that such intoxication would lead to either a state akin to automatism, or to the commission of a sexual assault. Nor is it likely that someone can really intend to get so intoxicated that they would reach a state of insanity or automatism.

Sopinka J. refers to the common law rules of automatism in order to support his position that voluntariness is not a requirement of fundamental justice. With respect I cannot agree. The decision of this Court in *Revelle v. The Queen*, [1981] 1 S.C.R. 576, predates the Charter. The rule that self-induced automatism cannot be a defence has never been subjected to a Charter analysis. In my view, automatism raises the same concerns as those presented in this case. Thus, to state that the rule in *Leary*, which precludes the accused from negating the mental element of voluntariness on the basis of an extreme state of intoxication, does not violate the Charter because the same principle has been developed in the context of the defence of automatism begs the very question which is now before this Court. The presumption of innocence requires that the Crown bear the burden of establishing all elements of a crime. These elements include the mental element of voluntariness. That element cannot be eliminated without violating s. 11 (d) and s. 7 of the Charter.

It was argued by the respondent that the "blameworthy" nature of voluntary intoxication is such that it should be determined that there can be no violation of the Charter if the *Leary* approach is adopted. I cannot accept that contention. Voluntary intoxication is not yet a crime. Further, it is difficult to conclude that such behaviour should always constitute a fault to which criminal sanctions should apply. However, assuming that voluntary intoxication is reprehensible, it does not follow that its consequences in any given situation are either voluntary or predictable. Studies demonstrate that the consumption of alcohol is not the cause of the crime. A person intending to drink cannot be said to be intending to commit a sexual assault.

Further, self-induced intoxication cannot supply the necessary link between the minimal mental element or mens rea required for the offence and the actus reus. This must follow from reasoning in *R. v. DeSousa*, [1992] 2 S.C.R. 944, and *R. v. Thérroux*, supra. Here, the question is not whether there is some symmetry between the physical act and the mental element but whether the necessary link exists between the minimal mental element and the prohibited act; that is to say that the mental element is one of intention with respect to the actus reus of the crime charged. As well, as Sopinka J. observes, the minimum mens rea for an offence should reflect the particular nature of the crime. See *R. v. Creighton*, [1993] 3 S.C.R. 3. I doubt that self-induced intoxication can, in all circumstances, meet this requirement for all crimes of general intent.

In summary, I am of the view that to deny that even a very minimal mental element is required for sexual assault offends the Charter in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the Charter. The

experience of other jurisdictions which have completely abandoned the Leary rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which need to be addressed. Studies on the relationship between intoxication and crime do not establish any rational link. Finally, as the Leary rule applies to all crimes of general intent, it cannot be said to be well tailored to address a particular objective and it would not meet either the proportionality or the minimum impairment requirements.

What then should be the fate of the Leary rule?

Approach That Should Be Taken When a Common Law Principle Is Found To Infringe the Provisions of the Charter

In *R. v. Swain*, [1991] 1 S.C.R. 933, Lamer C.J. (concurring in by Sopinka J. and myself) wrote on this issue. At page 978 he stated:

Before turning to s. 1, however, I wish to point out that because this appeal involves a Charter challenge to a common law, judge-made rule, the Charter analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the Charter, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the Charter. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

This then is the approach that should be adopted when a common law principle is found to infringe the Charter. This, again, militates in favour of the adoption of a flexible application of the Leary rule, as was suggested by Wilson J.

Justifications for the Adoption of the Flexible Approach Suggested by Wilson J.

As I have said, the position adopted by Wilson J. in *Bernard* has much to commend it and should be adopted. Indeed, the original case which is the basis for much of our jurisprudence pertaining to intoxication seems to confirm this position. In *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, Lord Birkenhead set out the three propositions which have been so frequently referred to in cases involving intoxication and criminal behaviour, at pp. 500-502:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases. The insane person cannot be convicted of a crime: . . . but, upon a verdict of insanity, is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause....
- . . .
2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. [Emphasis added.]

It does not appear to me that the decision was meant to create a complete bar to the defence of intoxication in the context of crimes of general intent. This appears from the subsequent statements of Lord Birkenhead found at pp. 504-5, and 507:

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 -- e.g., wounding with intent to do grievous bodily harm or with intent to kill. 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. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide. . . .

My Lords, drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately

and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is in other words to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

...

In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing raped. [Emphasis added.]

Thus, from the outset it appears to have been contemplated that evidence that the accused was too drunk to form the mental element required for a general intent offence could be presented and considered.

Further support for the modification of the Leary rule in favour of the more flexible rule suggested by Wilson J. comes from the fact that the decision in *Majewski*, supra, which was relied upon by the majority in *Leary*, has been the subject of severe criticism in the United Kingdom. The following extract from the Law Commission's *Intoxication and Criminal Liability*, supra, at p. 34 is an example:

The present law is therefore objectionable on three levels. It is very complicated and difficult to explain, to the extent that it is difficult to think that it operates in practice other than by its detailed rules being substantially ignored; it purports to apply a clear social policy, of ensuring that intoxicated people who commit criminal acts do not escape criminal sanctions, but only does so in an erratic and unprincipled way; and if taken seriously it creates many difficulties of practical application. It is therefore understandable that in other jurisdictions, and under the rational scrutiny of law reformers, other solutions have been sought to the problem of protecting society from those who commit criminal acts when in a state of intoxication.

Perhaps the result in these cases arose from the understandable desire to ensure that accused persons should not escape criminal responsibility by the consumption of alcohol. A few writers have sought, rather unconvincingly in my view, to uphold these decisions on this basis. See M. T. Thornton, "Making Sense of *Majewski*" (1981), 23 *Crim. L.Q.* 464; E. Colvin, "A Theory of the Intoxication Defence" (1981), 59 *Can. Bar Rev.* 750; A. Dashwood, "Logic and the Lords in *Majewski*", [1977] *Crim. L.R.* 532, 591; and S. Gardner, "The Importance of *Majewski*" (1994), 14 *Oxford J. Legal Stud.* 279.

Far more writers have supported the approach advocated by Dickson J. in *Leary*, and adopted in *O'Connor*. In my view, the most vehement and cogent criticism of both *Majewski* and *Leary* is that they substitute proof of drunkenness for proof of the requisite mental element. The authors deplore the division of crimes into those requiring a specific intent and those which mandate no more than a general intent. They are also critical of the resulting presumption of recklessness, and of the loss of a requirement of a true *mens rea* for the offence. They would prefer an approach that would permit evidence of drunkenness to go to the jury together with all the other

relevant evidence in determining whether the requisite mens rea had been established. Criticisms of the Leary and Majewski decisions can be found, for example, in the following: D. Stuart, *Canadian Criminal Law: A Treatise* (2nd ed. 1987), at pp. 363-83; J. C. Smith and B. Hogan, *Criminal Law*, supra, at pp. 218-32; A. W. Mewett and M. Manning, *Criminal Law*, supra, at pp. 76, 101 and 21 ff.; M. Goode, "Some Thoughts on the present state of the 'Defence' of Intoxication" (1984), 8 *Crim. L.J.* 104; G. F. Orchard, "Criminal Responsibility and Intoxication -- The Australian Rejection of Majewski", [1980] *N.Z.L.J.* 532; Judge G. Smith, "Footnote to O'Connor's Case" (1981), 5 *Crim. L.J.* 270, at pp. 276 ff.; T. Quigley, "Specific and General Nonsense?" (1987), 11 *Dalhousie L.J.* 75, at pp. 119-20; G. Orchard, "Surviving without Majewski -- A View from Down Under", [1993] *Crim. L.R.* 426, at pp. 429-30; S. J. Cavender, "The Lords Against Majewski and the Law" (1989), 21 *Bracton L.J.* 9; P. B. Schabas, "Intoxication and Culpability: Towards an Offence of Criminal Intoxication" (1984), 42 *U.T. Fac. L. Rev.* 147, at pp. 151-54; G. Virgo, "The Law Commission Consultation Paper on Intoxication and Criminal Liability -- (1) Reconciling Principle and Policy", [1993] *Crim. L.R.* 415, at pp. 418-20; S. J. Beaumont, "Drunkenness and Criminal Responsibility -- Recent English Experience" (1976), 54 *Can. Bar Rev.* 777, at pp. 782-83; T. Quigley, "Reform of the Intoxication Defence" (1987), 33 *McGill L.J.* 1, at pp. 5-9; and "Self-induced Intoxication and Criminal Responsibility" (1984), 58 *Aust. L.J.* 70. Some of these authors also frame their conclusions in terms of the rule in Leary constituting a violation of the Charter. See, generally, P. Healy, Case Comment on *R. v. Penno* (1992), 71 *Can. Bar Rev.* 143; T. Quigley and A. Manson, "Bernard on Intoxication: Principle, Policy and Points In Between -- Two Comments" (1989), 67 *C.R.* (3d) 168, 173; and P. Healy, "R. v. Bernard: Difficulties with Voluntary Intoxication" (1990), 35 *McGill L.J.* 610, at pp. 625 ff. For a specific discussion about the presumption of recklessness, see T. Quigley, "Specific and General Nonsense?", supra, at pp. 100-103; S. J. Cavender, "The Lords Against Majewski and the Law", supra, at pp. 13 ff.; D. Farrier, "Intoxication: Legal Logic or Common Sense?" (1976), 39 *Modern L. Rev.* 578, at pp. 580-81; and A. Dashwood, "Logic and the Lords in Majewski", supra, at pp. 539-41.

I find further support for adopting the approach suggested by Wilson J. in studies pertaining to the effect of the O'Connor and Kamipeli decisions which have been undertaken in Australia and New Zealand. (Reference to these studies can be found in the English Law Commission's *Intoxication and Criminal Liability*, supra, at pp. 60-63.) One of these studies was conducted in New South Wales, by means of a survey of approximately 510 trials (see Judge G. Smith, "Footnote to O'Connor's Case", supra). The author, Judge George Smith, concluded, at p. 277, that:

Those figures disclose that a "defence" of intoxication which could not have been relied upon pre-O'Connor was raised in eleven cases or 2.16 per cent of the total. Acquittals followed in three cases or 0.59 per cent of the total, but only in one case or 0.2 per cent of the total could it be said with any certainty that the issue of intoxication was the factor which brought about the acquittal.

...

It seems to me that no one with any experience of the criminal courts should be greatly surprised at this result for the simple practical reason that any "defence" of drunkenness poses enormous difficulties in the conduct of a case. To name but one, if the accused has sufficient recollection to describe relevant events, juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no recollection, he will be unable to make any effective denial of facts alleged by the Crown.

...

Certainly my inquiries would indicate that the decision in O'Connor's case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap.

That study clearly indicates that the O'Connor decision has not had an effect of any significance on trials or on the numbers of acquittals arising from evidence of severe intoxication.

There are some who argue that Wilson J.'s suggestion favours the extremely drunk while ignoring those who are less inebriated. (See, for example, T. Quigley, in "Bernard on Intoxication: Principle, Policy and Points In Between -- Two Comments", *supra*, at pp. 171-73.) I cannot agree with that contention. It must be remembered that those who are a "little" drunk can readily form the requisite mental element to commit the offence. The alcohol-induced relaxation of both inhibitions and socially acceptable behaviour has never been accepted as a factor or excuse in determining whether the accused possessed the requisite mens rea. Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite mens rea and will be found to have acted voluntarily. In reality it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence. Neither an insane person nor one in a state of automatism is capable of forming the minimum intent required for a general intent offence. Similarly, as the words themselves imply, "drunkenness akin to insanity or automatism" describes a person so severely intoxicated that he is incapable of forming even the minimal intent required of a general intent offence. The phrase refers to a person so drunk that he is an automaton. As such he may be capable of voluntary acts such as moving his arms and legs but is quite incapable of forming the most basic or simple intent required to perform the act prohibited by a general intent offence. I believe that Wilson J.'s modification of the Leary rule is a judge-fashioned remedy that can be adopted to remedy a judge-made law which, by eliminating the mental element of a crime, offends the Charter .

It is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful. Nonetheless, the adoption of this alternative would avoid infringement of the Charter .

I would add that it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk.

The appellant in this case is an elderly alcoholic. It is difficult if not impossible to present him in a sympathetic light. Yet any rule on intoxication must apply to all accused, including the young and inexperienced drinker. The strict rule in *Leary* is not a minor or technical infringement but a substantial breach of the Charter eliminating the mental elements of crimes of general intent in situations where the accused is in an extreme state of intoxication. I would think that this judge-made rule should be applied flexibly, as suggested by Wilson J., so as to comply with the Charter. Such an approach would mean that except in those rare situations where the degree of intoxication is so severe it is akin to automatism, drunkenness will not be a defence to crimes of general intent.

It should not be forgotten that if the flexible "Wilson" approach is taken, the defence will only be put forward in those rare circumstances of extreme intoxication. Since that state must be shown to be akin to automatism or insanity, I would suggest that the accused should be called upon to establish it on the balance of probabilities. This Court has recognized, in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, that although it constituted a violation of the accused's rights under s. 11 (d) of the Charter, such a burden could be justified under s. 1. In this case, I feel that the burden can be justified. Drunkenness of the extreme degree required in order for it to become relevant will only occur on rare occasions. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking. Justice Grenier in his reasons ([1991] R.J.Q. 1794) properly emphasized the need for expert testimony. He stated (at p. 1797):

[translation] The deposition of the expert Louis Léonard is of particular importance in this matter. The testimony of an accused to the effect that he was not aware of what he was doing is unlikely, in most cases, to constitute on its own a sufficient basis to permit the court to conclude that he was unaware owing to an excessive consumption of alcohol. Scientific evidence is almost essential to support a defence of automatism attributable to an advanced degree of intoxication.

Extreme intoxication akin to automatism or insanity should, like insanity, be established by the accused on a balance of probabilities. This I take to be the position put forward by Lamer C.J. in *R. v. Penno*, *supra*. At pages 877-78, the following appears:

For these reasons, I am of the view that the offence of having care or control of a motor vehicle while one's ability to drive is impaired is a general intent offence. It follows, as was decided by a majority of this Court in *Bernard*, that no defence of intoxication can negate the mens rea of this offence, although the question is still open as to whether intoxication giving rise to a state of insanity or automatism could achieve such a result.

The trial judge found that the appellant was very intoxicated. However, the appellant did not prove, on a balance of probabilities, that his intoxication was so great as to constitute insanity or automatism, nor was a state of insanity or automatism found by any of the judges in the courts below. On the facts of this case, I see no need to address the issue concerning the relevance of intoxication to negate the mens rea where such intoxication verges on insanity or automatism. [Emphasis added.]

Thus it is appropriate to place an evidentiary and legal burden on the accused to establish, on a balance of probabilities, that he was in a state of extreme intoxication that was akin to automatism or insanity at the time he committed the offence.

Result If the Mental Element Relates Solely to the Actus Reus Which Requires That the Prohibited Act Be Performed Voluntarily

Should it be thought that the mental element involved relates to the actus reus rather than the mens rea then the result must be the same. The actus reus requires that the prohibited criminal act be performed voluntarily as a willed act. A person in a state of automatism cannot perform a voluntary willed act since the automatism has deprived the person of the ability to carry out such an act. It follows that someone in an extreme state of intoxication akin to automatism must also be deprived of that ability. Thus a fundamental aspect of the actus reus of the criminal act is absent. It would equally infringe s. 7 of the Charter if an accused who was not acting voluntarily could be convicted of a criminal offence. Here again the voluntary act of becoming intoxicated cannot be substituted for the voluntary action involved in sexual assault. To do so would violate the principle set out in Vaillancourt, supra. Once again to convict in the face of such a fundamental denial of natural justice could not be justified under s. 1 of the Charter .

Summary of Proposed Remedy

In my view, the Charter could be complied with, in crimes requiring only a general intent, if the accused were permitted to establish that, at the time of the offence, he was in a state of extreme intoxication akin to automatism or insanity. Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication. This will undoubtedly require the testimony of an expert. Obviously, it will be a rare situation where an accused is able to establish such an extreme degree of intoxication. Yet, permitting such a procedure would mean that a defence would remain open that, due to the extreme degree of intoxication, the minimal mental element required by a general intent offence had not been established. To permit this rare and limited defence in general intent offences is required so that the common law principles of intoxication can comply with the Charter .

In light of the experience in Australia or New Zealand, it cannot be said that to permit such a defence would open the floodgates to allow every accused who had a drink before committing the prohibited act to raise the defence of drunkenness. As observed earlier, studies made in Australia and New Zealand indicate that there has not been any significant increase in the number of acquittals following the O'Connor and Kamipeli decisions.

Disposition

In the result, I would allow the appeal, set aside the order of the Court of Appeal and direct a new trial.

The reasons of Sopinka, Gonthier and Major JJ. were delivered by

Sopinka J. (dissenting) -- This appeal raises a single question of law: can evidence of extreme intoxication tantamount to a state of automatism negative the intent required for sexual assault, an offence which has been classified as an offence of general intent? The appellant challenges the correctness of this Court's decision in *Leary v. The Queen*, [1978] 1 S.C.R. 29, which held that voluntary intoxication can never negate the mens rea for an offence of general intent.

Facts

The facts which give rise to this appeal are not in dispute. The complainant is a 65-year old woman who is partially paralysed and thus confined to a wheelchair. She knew the appellant through his wife, who was the complainant's dressmaker and ran errands for her. The complainant testified that at approximately 6:00 p.m. on May 30, 1989, at her request, the appellant arrived at her home carrying a 40-ounce bottle of brandy. The complainant drank part of a glass of brandy and then fell asleep in her wheelchair. When she awoke during the night to go to the bathroom, the appellant appeared, grabbed her chair, wheeled her into the bedroom, threw her on the bed and sexually assaulted her. The appellant left the apartment at about 4:00 a.m. The complainant subsequently discovered that the bottle of brandy was empty. The trial judge found as a fact that the appellant had drunk the rest of the bottle between 6:00 p.m. and 3:00 a.m.

The appellant was a chronic alcoholic. He testified that he had spent the day at a bar where he had consumed seven or eight bottles of beer. He recalled having a glass of brandy upon his arrival at the complainant's residence but had no recollection of what occurred between then and when he awoke nude in the complainant's bed. He denied sexually assaulting her.

The defence called a pharmacologist, Louis Léonard, to testify as an expert witness. Mr. Léonard testified that the appellant's alcoholic history made him less susceptible to the effects of alcohol. He hypothesized that, if the appellant had consumed seven or eight beers during the day and then 35 ounces of brandy on the evening in question, his blood-alcohol content would have been between 400 and 600 milligrams per 100 millilitres of blood. That blood-alcohol ratio would cause death or a coma in an ordinary person. Mr. Léonard testified that an individual with this level of

alcohol in his blood might suffer an episode of "l'amnésie-automatisme", also known as a "blackout". In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his actions when he is in such a state and will likely have no memory of them the next day.

Mr. Léonard further testified that it is difficult to distinguish between a person in a blackout and someone who is simply acting under the influence of alcohol. He stated that if a person acting under the influence of alcohol behaves in a manner which requires higher cognitive functions or reflection, it is unlikely that the person is in a blackout. On the other hand, if the person departs from his normal behaviour to act in a gratuitous or violent manner, it is more likely that he is in a blackout.

The appellant was charged with one count of sexual assault. The trial judge found as a fact that the appellant had committed the offence as described by the complainant. However, he acquitted the appellant because he had a reasonable doubt about whether the appellant, by virtue of his extreme intoxication, had possessed the minimal intent necessary to commit the offence of sexual assault: [1991] R.J.Q. 1794. The Quebec Court of Appeal overturned this ruling: [1993] R.J.Q. 692, 80 C.C.C. (3d) 175, 19 C.R. (4th) 291, 54 Q.A.C. 27. The appellant now appeals to this Court as of right, pursuant to s. 691(2) (a) of the Criminal Code, R.S.C., 1985, c. C-46 .

Judgments Below

Court of Québec (Grenier Q.C.J.)

After reviewing the facts, the trial judge concluded that he was left with a reasonable doubt as to whether the appellant was suffering from a blackout when he assaulted the complainant. He noted the importance of the expert evidence of Mr. Léonard, stating, [TRANSLATION] "[s]cientific evidence is almost essential to support a defence of automatism attributable to an advanced degree of intoxication" (p. 1797). The trial judge also noted that he would have convicted the appellant if he had been convinced that the appellant was conscious of what he was doing when he committed the assault.

With respect to the applicable legal principles, the trial judge began by noting that, according to the traditional rule, self-induced intoxication may only be admitted to negate the mens rea of offences of specific intent. It may not be admitted to negate the mens rea of offences of general intent, including the offence of sexual assault. He then went on to consider the judgments of this Court in *Leary v. The Queen*, *supra*, and *R. v. Bernard*, [1988] 2 S.C.R. 833. After canvassing the various approaches to intoxication set out in these two cases, he held that the view of the majority of the Court was represented in the reasons of Wilson J. (L'Heureux-Dubé J. concurring) in *Bernard*. Thus, he adopted Wilson J.'s view that evidence of extreme intoxication to the point of insanity or automatism may be admitted to negate the mens rea of an offence of general intent.

The trial judge recognized that serious problems of public protection arise under the approach condoned by Wilson J., since it prohibits the state from exercising any means of control over an individual who commits a crime while in a state of extreme self-induced intoxication. However, the trial judge identified three responses to this concern. First, he noted that it is for the legislature, and not for the courts, to create a new offence. Secondly, he noted that even under the traditional approach, self-induced intoxication may lead to an absolute acquittal in the case of offences of specific intent such as theft for which there is no lesser and included offence of general intent. Finally, he indicated that in weighing the requirements of public protection against the requirement that the prosecution prove the existence of mens rea beyond a reasonable doubt, he preferred to give priority to the latter.

In the trial judge's view, the evidence did not establish that the appellant was intoxicated to the point of insanity. He also held that the evidence did not support the conclusion that the appellant only suffered a loss of memory after rather than during the incident. He reiterated his conclusion that the accused had raised a reasonable doubt as to whether he had been intoxicated to the point of automatism within the meaning of Wilson J.'s judgment in *Bernard*. Accordingly, the trial judge concluded that he had a reasonable doubt as to the existence of the minimal intent required for the offence of sexual assault. He therefore acquitted the appellant.

Quebec Court of Appeal

Brossard J.A.

Brossard J.A. began by reviewing the four opinions rendered by members of this Court in *Bernard*. He noted that the Quebec Court of Appeal in *R. v. Charest* (1990), 57 C.C.C. (3d) 312 and in *R. v. Ciciola*, C.A. Montréal, No. 500-10-000048-874, March 1, 1990, J.E. 90-629, had reasoned that a majority of the judges in *Bernard* agreed with Wilson J.'s statement that intoxication akin to insanity or automatism could negate the mens rea for an offence of general intent. However, he went on to point out that these two decisions were rendered prior to the Supreme Court of Canada's decision in *R. v. Penno*, [1990] 2 S.C.R. 865, where Lamer C.J. indicated that in his view, the question of whether intoxication akin to insanity or automatism could negate the mens rea of a general intent offence was still open.

Accordingly, Brossard J.A. held that the principles laid down in *Leary* and *R. v. George*, [1960] S.C.R. 871, were still binding upon him and thus the defence of self-induced intoxication resulting in a state equal to or akin to automatism or insanity, with the exception of delirium tremens, is not available as a defence to a general intent offence.

Thus, Brossard J.A. allowed the appeal, ordering that a verdict of guilty be entered and that the record be returned to the trial judge for sentencing.

LeBel J.A. (concurring)

LeBel J.A. also concluded that the traditional position excluding a defence of self-induced intoxication for offences of general intent was not modified by this Court's decision in *Bernard*. Accordingly, like Brossard J.A. he held that he was bound to apply the traditional rule.

Point in Issue

The sole point in issue is:

Does evidence of extreme self-induced intoxication, tantamount to a state of automatism, constitute a defence to the offence of sexual assault?

This is the issue as formulated by the parties although I recognize that there is disagreement as to whether intoxication is properly characterized as a "defence". Whether it is or not is not of any significance in this appeal. When referred to herein as a defence, it is subject to this comment.

Analysis

Sexual assault is a crime of general intent. In *Leary v. The Queen*, supra, a majority of this Court held that drunkenness is not a defence to a crime of general intent. While some of the judges of this Court have sought to overrule *Leary*, it has not happened. Accordingly, I agree with the Court of Appeal's decision that the trial judge was bound by the decision in *Leary*. Furthermore, I reject the appellant's submission that *Leary* ought to be overruled. In the remainder of these reasons I propose to trace the development of the law governing the defence of intoxication and identify the policy considerations which support the rule espoused in *Leary*. Then I will respond to the various criticisms of the *Leary* rule and in particular whether it contravenes either s. 7 or s. 11 (d) of the Canadian Charter of Rights and Freedoms. Finally, I will explain why, in my view, the alternatives which have been put forward are unsatisfactory.

A. History of the Leary Rule

The history of the defence of intoxication was outlined by Lord Birkenhead in the British case of *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, at pp. 494-95:

Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man....

Judicial decisions extending over a period of nearly one hundred years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time be affiliated upon a single or very intelligible principle.

See further R. U. Singh, "History of the Defence of Drunkenness in English Criminal Law" (1933), 49 L.Q. Rev. 528, and D. McCord, "The English and American History of Voluntary Intoxication to Negate Mens Rea" (1990), 11 J. Legal Hist. 372.

The intoxication "defence" as it now exists in Anglo-Canadian law is based upon three propositions set out by Lord Birkenhead in *Beard*, *supra*, at pp. 500-502:

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases....
- ...
2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Lord Birkenhead's reference to the "specific intent essential to constitute the crime" led subsequent courts to distinguish between offences of "specific" and "general" intent, and to admit the defence of intoxication only for specific intent offences. This interpretation of Lord Birkenhead's dictum was adopted by this Court in *R. v. George*, *supra*. A similar approach was taken in the United Kingdom in *Attorney-General for Northern Ireland v. Gallagher*, [1963] A.C. 349 (H.L.); *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386 (H.L.); and *Director of Public Prosecutions v. Majewski*, [1977] A.C. 443. The law of most American jurisdictions is also similar: *American Jurisprudence*, vol. 21 (2nd ed. 1981), "Criminal Law", § 155.

In Canada the unavailability of the defence of intoxication in prosecutions for rape was established in *Leary*. There, after an exhaustive review of the authorities, Pigeon J. concluded, at p. 57:

In my view, rape is a crime involving only a general intention as distinguished from a specific intention and is therefore a crime in which the defence of drunkenness can have no application.

In *R. v. Chase*, [1987] 2 S.C.R. 293, at pp. 301-2, after referring to the decisions in *Leary* and *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, McIntyre J., writing for the Court, held that like rape and indecent assault, sexual assault is an offence of general intent. Subsequently, in *R. v. Bernard*, *supra*, McIntyre J. (Beetz J. concurring) rejected the argument that the *Leary* rule relieves the Crown of its obligation to prove the mens rea of a general intent offence, stating, at pp. 878-79:

The fact that an accused may not rely on voluntary intoxication in such offences does not have that effect because of the nature of the offence and the mental elements which must be shown. The requisite state of mind may be proved in two ways. Firstly, there is the general proposition that triers of fact may infer mens rea from the actus reus itself: a person is presumed to have intended the natural and probable consequences of his actions. For example, in an offence involving the mere application of force, the minimal intent to apply that force will suffice to constitute the necessary mens rea and can be reasonably inferred from the act itself and the other evidence. Secondly, in cases where the accused was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may meet its evidentiary obligation respecting the necessary blameworthy mental state of the accused by proving the fact of voluntary self-induced intoxication by drugs or alcohol. This was the approach suggested in *Majewski*. In most cases involving intoxication in general intent offences, the trier of fact will be able to apply the first proposition, namely, that the intent is inferable from the actus reus itself. As Fauteux J. observed in *R. v. George*, supra, at p. 879, it is almost metaphysically inconceivable for a person to be so drunk as to be incapable of forming the minimal intent to apply force. Hence, only in cases of the most extreme self-intoxication does the trier of fact need to use the second proposition, that is, that evidence of self-induced intoxication is evidence of the guilty mind, the blameworthy mental state.

The result of this two-fold approach is that for these crimes accused persons cannot hold up voluntary drunkenness as a defence. They cannot be heard to say: "I was so drunk that I did not know what I was doing". If they managed to get themselves so drunk that they did not know what they were doing, the reckless behaviour in attaining that level of intoxication affords the necessary evidence of the culpable mental condition. Hence, it is logically impossible for an accused person to throw up his voluntary drunkenness as a defence to a charge of general intent. Proof of his voluntary drunkenness can be proof of his guilty mind. [Emphasis in original.]

McIntyre J. also rejected the argument that accused persons who commit crimes after voluntarily consuming drugs or alcohol are morally innocent.

In her separate concurring reasons Wilson J. (L'Heureux-Dubé J. concurring) agreed with McIntyre J.'s conclusion that the evidence of intoxication in the case simply was not capable of raising a reasonable doubt as to the existence of the minimal intent required to commit the offence. In obiter dicta Wilson J. expressed some doubt as to whether the Leary rule should be applied in cases where there was evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. However, she left this question open as it was not necessary to decide it in order to dispose of the appeal.

Dickson C.J. (Lamer J. concurring) dissented, holding that, among other things, the Leary rule violated ss. 7 and 11 (d) of the Charter. He was of the view that evidence of self-induced intoxication should be considered by the trier of fact along with other relevant evidence in determining whether the prosecution has proved beyond a reasonable doubt the mens rea required to constitute the offence. La Forest J. expressed his general agreement with the law as stated by Dickson C.J. thus indicating that he too doubted whether the Leary rule was consistent

with the Charter . However, these comments were also obiter dicta since La Forest J. agreed with McIntyre and Wilson JJ. that the appeal ought to be dismissed on the ground that there was no evidence that the accused was sufficiently intoxicated to raise a reasonable doubt as to whether he possessed the mens rea for the offence of sexual assault. Thus, although decisions written or concurred in by a majority of the judges in R. v. Bernard expressed doubts about the wisdom of the decision in Leary, that decision was not overruled.

The availability of the intoxication defence was also considered in R. v. Penno, supra, in the context of the offence of having care or control of a motor vehicle while impaired. Only the judgment of Wilson J. (L'Heureux-Dubé J. concurring) called into question the correctness of the Leary rule.

As a result, the decision in Leary still stands for the proposition that evidence of intoxication can only provide a defence for offences of specific intent but not for offences of general intent. Since sexual assault is a crime of general intent, intoxication is no defence to a charge of sexual assault. This rule is supported by sound policy considerations. One of the main purposes of the criminal law is to protect the public. This purpose would be frustrated if, as Lawton L.J. put it in the Court of Appeal in Majewski, supra, at p. 456, "the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal". Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community. The fact that an accused has voluntarily consumed intoxicating amounts of drugs or alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental disorder within the terms of s. 16 . Section 16 is not invoked in this case and therefore the circumstances in which alcohol or its effects may engage the provisions of that section are not in issue here.

B.Criticisms of the Leary Rule

The Leary rule has been roundly criticized in the academic literature as well as in the dissenting judgments of Dickson C.J. in Leary itself and in R. v. Bernard. The main grounds upon which the Leary rule has been attacked are as follows:

- 1.The Leary rule violates ss. 7 and 11 (d) of the Charter since it permits an accused to be convicted despite the existence of a reasonable doubt as to whether he has the mens rea of the offence charged.
- 2.The distinction between offences of specific and general intent is illogical.
- 3.The Leary rule is inconsistent with the defence of honest but mistaken belief in consent.

I will respond to each of these criticisms in turn.

- 1.The Leary Rule Violates Sections 7 and 11(d) of the Charter

The appellant's main objection to the Leary rule is that it allows an individual to be convicted even where the Crown has failed to prove beyond a reasonable doubt the requisite mens rea for the offence. This in the appellant's submission constitutes a violation of ss. 7 and 11 (d) of the Charter . This objection is based upon the assumption that a particular mens rea, namely the intent to perform the actus reus, is a constitutionally required element of the offence of sexual assault. This assumption is not warranted. In my view the Leary rule does not relieve the Crown of the responsibility of proving the existence of a mens rea or any of the other elements of the offence of sexual assault which are required by the principles of fundamental justice.

As McIntyre J. pointed out in *R. v. Bernard*, only in rare cases will accused persons be able to establish that they were so intoxicated that they were unable to form the minimal intent required to commit the offence of sexual assault. Thus, in the vast majority of cases there can be no question of the Leary rule violating ss. 7 and 11 (d) of the Charter . However, according to the findings of the trial judge, the present case is one of the rare cases in which the accused was sufficiently intoxicated to raise a reasonable doubt as to whether he intended to commit the offence of sexual assault. Application of the Leary rule in circumstances such as those of the case at bar obviously permits the accused to be convicted despite the existence of a reasonable doubt as to whether he intended to perform the actus reus of the offence of sexual assault. In my view this does not violate either s. 7 or s. 11 (d) of the Charter . None of the relevant principles of fundamental justice require that the intent to perform the actus reus of an offence of general intent be an element of the offence. In my opinion the requirements of the principles of fundamental justice are satisfied by proof that the accused became voluntarily intoxicated.

The premise upon which the alleged breach of fundamental justice is based is that symmetry between the actus reus, or some aspect of it, and the mens rea is constitutionally required. This, it is said, is a principle of fundamental justice which is of universal application. This issue has been recently thrashed out in relation to whether consequences forming part of the actus reus must be foreseen on an objective or subjective basis or some variation thereof. In *R. v. Creighton*, [1993] 3 S.C.R. 3, this Court divided on this issue with respect to the crime of unlawful act manslaughter. In the view of the Chief Justice, concurred in by three other members of the Court, including myself, the mental element required was foreseeability of death on a modified objective standard. The majority opinion, however, adopted an objective standard of foreseeability but limited to bodily harm. McLachlin J., speaking for herself and three other members of the Court, enunciated the following principles relating to the alleged requirement of symmetry between the actus reus and the mens rea, at pp. 53-54:

The second assumption inherent in the argument based on symmetry between mens rea and each consequence of the offence is that this is not only a general rule of criminal law, but a principle of fundamental justice -- a basic constitutional requirement. I agree that as a general rule the mens rea of an offence relates to the consequences prohibited by the offence. As I stated in *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 17, "[t]ypically, mens rea is concerned with the consequences of the prohibited actus reus." Yet our criminal law contains important exceptions to this ideal of perfect symmetry. The presence of these exceptions suggests that the rule of

symmetry is just that -- a rule -- to which there are exceptions. If this is so, then the rule cannot be elevated to the status of a principle of fundamental justice which must, by definition, have universal application.

It is important to distinguish between criminal law theory, which seeks the ideal of absolute symmetry between actus reus and mens rea, and the constitutional requirements of the Charter . As the Chief Justice has stated several times, "the Constitution does not always guarantee the `ideal'" (R. v. Lippé, [1991] 2 S.C.R. 114, at p. 142; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at p. 186; R. v. Finlay, [1993] 3 S.C.R. 103, released concurrently, at p. 114).

I know of no authority for the proposition that the mens rea of an offence must always attach to the precise consequence which is prohibited as a matter of constitutional necessity. The relevant constitutional principles have been cast more broadly. No person can be sent to prison without mens rea, or a guilty mind, and the seriousness of the offence must not be disproportionate to the degree of moral fault. Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied. [Emphasis added.]

McLachlin J. continued at p. 55 as follows:

Thus when considering the constitutionality of the requirement of foreseeability of bodily harm, the question is not whether the general rule of symmetry between mens rea and the consequences prohibited by the offence is met, but rather whether the fundamental principle of justice is satisfied that the gravity and blameworthiness of an offence must be commensurate with the moral fault engaged by that offence. Fundamental justice does not require absolute symmetry between moral fault and the prohibited consequences.

La Forest J., who agreed with McLachlin J. that the common law definition of unlawful act manslaughter did not violate the Charter , stated at p. 38:

In DeSousa, the Court relied on earlier authorities relating to unlawful act manslaughter, the relevant charge in the present case, and for my part I cannot distinguish between the mens rea requirement in the two offences. That an unlawful act may result in death or simply bodily harm is purely fortuitous. McLachlin J.'s reasoning on this point is persuasive.

The majority of the Court has, therefore, authoritatively determined that the general rule that the mental fault element of a crime must extend to the actus reus, including consequences forming part thereof, is subject to exceptions. It does not have universal application as a principle of fundamental justice. The principles of fundamental justice can exceptionally be satisfied provided the definition of the offence requires that a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence. In my opinion, for the reasons that follow, these requirements are satisfied in this case and, given the history of the Leary rule and its underlying social utility, an exception should be made to accommodate it.

The first requirement of the principles of fundamental justice is that a blameworthy or culpable state of mind be an essential element of every criminal offence that is punishable by imprisonment. This principle reflects the fact that our criminal justice system refuses to condone the punishment of the morally innocent. As both McIntyre and Wilson JJ. pointed out in *R. v. Bernard*, individuals who render themselves incapable of knowing what they are doing through the voluntary consumption of alcohol or drugs can hardly be said to fall within the category of the morally innocent. Such individuals possess a sufficiently blameworthy state of mind that their imprisonment does not offend the principle of fundamental justice which prohibits imprisonment of the innocent. As Lord Simon of Glaisdale put it in *Majewski*, *supra*, at p. 478:

Mens rea is therefore on ultimate analysis the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence. There is no juristic reason why mental incapacity (short of M'Naghten insanity), brought about by self-induced intoxication, to realise what one is doing or its probable consequences should not be such a state of mind stigmatised as wrongful by the criminal law; and there is every practical reason why it should be.

The Charter calls for a similar response. Central to its values are the integrity and dignity of the human person. These serve to define the principles of fundamental justice. They encompass as an essential attribute and are predicated upon the moral responsibility of every person of sound mind for his or her acts. The requirement of mens rea is an application of this principle. To allow generally an accused who is not afflicted by a disease of the mind to plead absence of mens rea where he has voluntarily caused himself to be incapable of mens rea would be to undermine, indeed negate, that very principle of moral responsibility which the requirement of mens rea is intended to give effect to.

The second requirement of the principles of fundamental justice is that punishment must be proportionate to the moral blameworthiness of the offender. This was held to be a principle of fundamental justice in *R. v. Martineau*, [1990] 2 S.C.R. 633, and *R. v. Creighton*, *supra*. There are a few crimes in respect of which a special level of mens rea is constitutionally required by reason of the stigma attaching to a conviction and by reason of the severity of the penalty imposed by law. Accordingly, murder and attempted murder require a mens rea based on a subjective standard. No exception from the principle of fundamental justice should be made with respect to these offences and, as specific intent offences, drunkenness is a defence.

By contrast, sexual assault does not fall into the category of offences for which either the stigma or the available penalties demand as a constitutional requirement subjective intent to commit the *actus reus*. Sexual assault is a heinous crime of violence. Those found guilty of committing the offence are rightfully submitted to a significant degree of moral opprobrium. That opprobrium is not misplaced in the case of the intoxicated offender. Such individuals deserve to be stigmatized. Their moral blameworthiness is similar to that of anyone else who commits the offence of sexual assault and the effects of their conduct upon both their victims and society as a whole are the same as in any other case of sexual assault. Furthermore, the sentence for sexual assault is not fixed. To the extent that it bears upon his or her level of moral blameworthiness, an offender's

degree of intoxication at the time of the offence may be considered during sentencing. Taking all of these factors into account, I cannot see how the stigma and punishment associated with the offence of sexual assault are disproportionate to the moral blameworthiness of a person like the appellant who commits the offence after voluntarily becoming so intoxicated as to be incapable of knowing what he was doing. The fact that the Leary rule permits an individual to be convicted despite the absence of symmetry between the actus reus and the mental element of blameworthiness does not violate a principle of fundamental justice.

It is further contended that the Leary rule violates the presumption of innocence because it permits an individual to be convicted despite the existence of a reasonable doubt as to whether or not that individual performed the actus reus of his or her own volition. This argument is premised upon the assumption that voluntariness is a constitutionally required element of the actus reus of an offence of universal application. Again, I do not think that this assumption is warranted.

It is true that as a general rule, an act must be the voluntary act of an accused in order for the actus reus to exist. See *R. v. Parks*, [1992] 2 S.C.R. 871, at p. 896, per La Forest J., and *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 17, per McLachlin J. This, as in the case of mens rea, is a general rule of the criminal law, but when elevated to a principle of fundamental justice it too, exceptionally, is not absolute. One well-recognized exception is made relating to the defence of non-insane automatism. As I explain below, automatism does not apply to excuse an offence if the accused's state is brought on by his or her own fault. The condition of automatism deprives the accused of volition to commit the offence but the general rule gives way to the policy that, in the circumstances, the perpetrator who by his or her own fault brings about the condition should not escape punishment. An accused person who voluntarily drinks alcohol or ingests a drug to the extent that he or she becomes an automaton is in the same position. The rules of fundamental justice are satisfied by a showing that the drunken state was attained through the accused's own blameworthy conduct.

2. The Distinction Between Offences of Specific and General Intent is Irrational

Another criticism of the current rules governing the availability of the intoxication defence is that the distinction between offences of specific and general intent is illogical. Critics of the rule contend that there is no principled basis for distinguishing between offences of general and specific intent and thus there is no logical reason why intoxication should be a defence to offences of specific intent but not to offences of general intent.

The appellant does not, however, take issue with the proposition that in general the distinction between offences of specific and general intent is a valid one. His submission is that when drunkenness reaches the stage of automatism, the distinction should no longer apply. This essentially was the tentative view of Wilson J. as expressed in her obiter statement in *R. v. Bernard* to which I referred above.

Notwithstanding the position of the appellant, I propose to briefly address the criticism of the rule that it is illogical. In my view, the concept has strong policy underpinnings which, despite the fact that its definition and application may have produced some illogical results, have permitted it to survive for over 150 years in England and to be adopted in Canada and most states of the United States.

The original concept that in some cases intoxication can negate mens rea was developed by Stephen J. in the nineteenth century in *R. v. Doherty* (1887), 16 Cox C.C. 306. Subsequently, in *R. v. Tolson* (1889), 23 Q.B.D. 168, Stephen J. explained the notion of mens rea by stating that the full definition of every offence contains, expressly or by implication, the requisite mental element. The task initially of defining the mental element is for the legislature but since frequently the statutory definition contains no explanation of this element it falls to the courts to do so. This definition, once arrived at, will reveal the purpose of the offence, that is, what is the social policy sought to be attained by criminalizing the particular conduct. The nature of the mental element and its relative importance serve as strong indicators as to whether drunkenness should be allowed to negate the mental element. If the policy sought to be advanced by the definition of the crime is not furthered by punishing those who lack the required mental state by reason of drunkenness, then it should be allowed to be introduced as a defence.

Although Stephen J. did not specifically label the distinction between offences in which drunkenness was admitted as a defence and those in which it was not, in *Director of Public Prosecutions v. Beard*, supra, these terms were formalized and have been used ever since not only in England but in other jurisdictions.

By reason of the fact that the mental element for various crimes varies from crime to crime and must frequently be implied from the nature of the offence and the wording of the statute, classification of specific and general intent offences has occurred on a case-by-case basis. This approach is bound to result in some illogical results which are exacerbated by applying the terms "specific" and "general" without regard to their policy underpinnings. In my opinion the terms "specific" and "general" in themselves do not fully spell out the policy that lies behind their use and should not be applied as if they were rigid statutory standards. Regard must be had for the policy behind them as outlined above.

The principles that emerge from the cases which serve as guidelines in classifying offences as specific or general intent offences are as follows. General intent offences as a rule are those which require the minimal intent to do the act which constitutes the actus reus. Proof of intent is usually inferred from the commission of the act on the basis of the principle that a person intends the natural consequences of his or her act. Without attempting to exhaust the policy reasons for excluding the defence of drunkenness from this category of offences, I would observe that it is seldom, even in cases of extreme drunkenness, that a person will lack this minimal degree of consciousness. Moreover, these are generally offences that persons who are drunk are apt to commit and it would defeat the policy behind them to make drunkenness a defence.

Specific intent offences are as a rule those that require a mental element beyond that of general intent offences and include "those generally more serious offences where the mens rea must involve not only the intentional performance of the actus reus but, as well, the formation of further ulterior motives and purposes" (per McIntyre J. in *R. v. Bernard*, supra, at p. 880). These are often referred to as "ulterior intent" offences. See Majewski, supra. Professor Colvin, in "A Theory of the Intoxication Defence" (1981), 59 Can. Bar Rev. 750, correctly points out that it is the further intent in addition to the basic intent that is the hallmark of ulterior intent offences. The policy behind this classification is in part the importance of the mental element over and above the minimal intent required for general intent offences. This distinction demands that the accused not be convicted if the added important mental state is negated by the drunken condition of the accused. Failure to prove the added element will often result in conviction of a lesser offence for which the added element is not required. One example is the offence of assault to resist or prevent arrest which is a specific intent offence. Absent the intent to resist arrest, the accused would be convicted of assault simpliciter, a general intent offence.

In addition to the ulterior intent offences there are certain offences which by reason of their serious nature and the importance of the mental element are classed as specific intent offences notwithstanding that they do not fit the criteria usually associated with ulterior intent offences. The outstanding example is murder. This is the most serious of criminal offences which carries a fixed penalty. By reason of the importance of the required mental element and the fixed penalty, this offence is classified as a specific intent offence. The defence of drunkenness is allowed so as to reduce the crime to manslaughter tempering the harshness of the law which precludes drunkenness as a consideration as to sentence. The classification of murder as a specific intent offence illustrates the proper application of policy in a case in which the application of the normal criteria might lead to a different result.

I accept that the application of the terms "specific" and "general" may lead to some illogical results. This is not surprising in light of the circumstances outlined above. Moreover, even the clearest unifying principle will in its application not produce perfect harmony. I am, however, convinced that the underlying policy of the Leary rule is sound. I am of the opinion that the criticism of the rule on the grounds of illogicality has been overdone. Applying criteria similar to the above, Professor Colvin has been able to explain "the broad pattern of the decisions emanating from the courts". See Colvin, supra, at p. 768.

With respect to the fact that some illogicality exists, I would refer to the statement of Lord Salmon in Majewski, supra, at pp. 483-84:

... I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous master.

McIntyre J. expressed a similar view in *R. v. Bernard* stating, at p. 878, that "any logical weakness in this position is justified on the basis of sound social policy".

Rather than jettison a rule that has stood for over 150 years, I would prefer to clarify the distinction in terms of its underlying roots. This requires that the mental element of offences be clearly identified and defined. This will assist in establishing the importance of the mental element as well as the purpose to be served in criminalizing the conduct. In applying the criteria for the identification of offences of specific and general intent, it can then be determined whether their application in a particular case serves the public interest in punishing the offender notwithstanding the absence of the *mens rea* associated with the offence.

This approach is particularly apt when application of the normal criteria relating to general and specific intent offences does not lead to a clear conclusion. A case in the Supreme Court of California, *People v. Hood*, 462 P.2d 370 (1969), provides a good illustration. The defendant was convicted of the offences of assault with a deadly weapon upon a peace officer and assault with intent to murder a police officer. On appeal Traynor C.J. considered whether evidence of the appellant's intoxication should be considered with respect to the offence of assault with a deadly weapon upon a peace officer or the included offences of simple assault or assault with a deadly weapon. Applying the criteria relating to specific and general intent he found that the offences could be placed in either class. It was therefore necessary to rely "on other considerations" (p. 378). After considering the nature of the offence, the mental requirement and the effect of alcohol on human behaviour he concluded as follows, at p. 379:

It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.

Applying the relevant criteria in this way, I see no reason to disagree with the traditional classification of sexual assault as an offence of general intent. Accordingly, the Court of Appeal was right in holding that the *Leary* rule applies and drunkenness cannot be relied on to negate the requisite intent.

3. *Leary* is Inconsistent With the Defence of Honest But Mistaken Belief in Consent

In *R. v. Bernard*, Dickson C.J. contended that the decision in *Leary* is inconsistent with the decisions in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Bulmer*, [1987] 1 S.C.R. 782; and *R. v. Robertson*, [1987] 1 S.C.R. 918, which established that an honest but mistaken belief in consent will negate the *mens rea* required for rape, indecent assault or sexual assault (a proposition affirmed in this Court's recent decision in *R. v. Osolin*, [1993] 4 S.C.R. 595). Whether or not self-induced intoxication may be considered a factor capable of inducing an honest but mistaken belief in consent is not presently before the Court and therefore I do not wish to express an opinion on this issue. However, I note that it is possible to reconcile the policy underlying the decision in *Leary* with the decisions in *Pappajohn* etc. This is illustrated by *R. v. Moreau* (1986), 26 C.C.C. (3d) 359 (Ont. C.A.), in which Martin J.A. held that as a result of *Leary* an accused cannot rely on self-induced intoxication as the basis for his belief

that the complainant consented, but this does not preclude an accused from relying upon other grounds for such a belief. The test is whether the accused would have made the same mistake if he had been sober. See also *R. v. Murray* (1986), 31 C.C.C. (3d) 323 (N.S.S.C.A.D.). Whether the drunkenness can be relied on to advance a defence of honest belief may involve policy considerations other than those that I have canvassed in this case and I prefer to leave that matter for another day. A conclusion in the affirmative would not necessarily be inconsistent with the application of Leary to offences of general intent.

C. Alternatives to the Leary Rule

A number of alternatives to the Leary rule were put forward. First, it was suggested that an extreme case of intoxication could be treated as akin to automatism. Second, it was suggested that it be treated as insanity. Finally, it was suggested that a third category be developed which would be a state equivalent to automatism but without the fault exception. This would be required to be proved on a balance of probabilities and perhaps would require the accused to continue in custody as in the case of insanity. In my view the alternatives are equally unsatisfactory.

In *R. v. Revelle* (1979), 48 C.C.C. (2d) 267 (Ont. C.A.), aff'd [1981] 1 S.C.R. 576, Martin J.A. stated at p. 272:

It is well established that if automatism is produced solely by drunkenness only the defence of drunkenness, which is limited to crimes of specific intent, need be left to the jury.

See also *R. v. Hartridge*, [1967] 1 C.C.C. 346 (Sask. C.A.); *Rabey v. The Queen*, [1980] 2 S.C.R. 513, at p. 552, per Dickson J. (dissenting), and *Bratty v. Attorney-General for Northern Ireland*, *supra*.

This proposition is only one manifestation of the more general rule that the defence of automatism is not available to a person whose automatous state is caused by his or her own fault or negligence. This rule recognizes that an individual who through his own fault or negligence renders himself intoxicated and subsequently commits a criminal offence is not entitled to the acquittal which would follow if the defence of automatism were made out. Such an individual is far from blameless. I see no reason to reject the authorities cited above and make the defence of automatism available to such an individual.

A second alternative to the Leary rule which has been suggested was that extreme cases of intoxication might be treated as insanity. I should note that both at trial and on appeal counsel for the appellant conceded that there was no evidence to suggest that the appellant was insane. In my view this point was properly conceded because as the law currently stands the evidence did not support the conclusion that the appellant was insane.

In order to support the defence of insanity an accused must show that he was suffering from a disease of the mind. Consumption of alcohol or drugs may give rise to conditions such as delirium tremens and certain other psychoses which qualify as diseases of the mind. This is made clear by Lord Birkenhead's first proposition in *Beard*, *supra*, as well as by the decisions in

cases such as *R. v. Malcolm* (1989), 50 C.C.C. (3d) 172 (Man. C.A.); *R. v. Mailloux* (1985), 25 C.C.C. (3d) 171 (Ont. C.A.), *aff'd* [1988] 2 S.C.R. 1029, and *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.). However, as a general rule the term "disease of the mind" does not include self-induced states caused by alcohol or drugs: *Cooper v. The Queen*, [1980] 1 S.C.R. 1149, at p. 1159, per Dickson J. (as he then was).

This aspect of Dickson J.'s reasons in *Cooper* was obiter dicta but I do not doubt its correctness. Since that decision was rendered this Court has acknowledged that the question of whether a condition should be treated as a disease of the mind has a substantial policy component. In *Rabey v. The Queen*, *supra*, the majority endorsed the reasons of Martin J.A. in the Court of Appeal, reported at (1977), 37 C.C.C. (2d) 461. At pages 472-73 of those reasons Martin J.A. stated:

Although the term "disease of the mind" is not capable of precise definition, certain propositions may, I think, be asserted with respect to it. "Disease of the mind" is a legal term, not a medical term of art; although a legal concept, it contains a substantial medical component as well as a legal or policy component.

The legal or policy component relates to (a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state. The medical component of the term, generally, is medical opinion as to how the mental condition in question is viewed or characterized medically. Since the medical component of the term reflects or should reflect the state of medical knowledge at a given time, the concept of "disease of the mind" is capable of evolving with increased medical knowledge with respect to mental disorder or disturbance.

This passage was quoted with approval by La Forest J. in *R. v. Parks*, *supra*, at pp. 898-99. Also pertinent are Dickson J.'s comments from *Cooper*, *supra*, at p. 1159. There, in discussing the definition of disease of the mind, Dickson J. said:

Underlying all of this discussion is the concept of responsibility and the notion that an accused is not legally responsible for acts resulting from mental disease or mental defect.

Policy considerations support Dickson J.'s dictum that self-induced states caused by alcohol or drugs normally should not be considered diseases of the mind. Individuals who through their own fault or negligence place themselves in an automatous state by consuming alcohol or drugs deserve to be held legally responsible for their actions. Unlike those whose conditions are not self-induced, such individuals have the opportunity to avoid entering an automatous state. Such individuals deserve to be punished for their crimes rather than dealt with under the provisions of the Criminal Code designed for individuals who are found not to be criminally responsible on account of a mental disorder. Those latter provisions embody concerns about protection of the public and treatment of the offender but, unlike the offence-creating provisions of the Criminal Code, are not concerned with deterrence, punishment or retribution. For these reasons I do not consider that there is any reason to overrule *Cooper* and hold that extreme intoxication should be treated as a disease of the mind.

The final alternative to the Leary rule is to create a new defence of automatism caused by voluntary intoxication which would have to be proved by the defence on the balance of probabilities. The argument in favour of this approach is presumably that individuals who can raise this defence are entitled to an acquittal because they will have shown that they lacked the requisite mens rea. It should be clear from the foregoing that I do not favour this course of action. Permitting an accused to raise such a defence would ignore the fact that those who commit criminal offences after voluntarily becoming intoxicated are not blameless. In my view such individuals possess a culpable state of mind which deserves to be considered a form of mens rea. It is not inconsistent with the principles of fundamental justice to punish such individuals for the crimes which they commit.

Conclusion

For all of these reasons, in my opinion the best course is for the Court to reaffirm the traditional rule that voluntary intoxication does not constitute a defence to an offence of general intent, subject to the comments I have made with respect to improvements in the definition and application of the distinction between offences of specific and general intent. If a different approach is considered desirable because the Leary approach does not comport with social policy, Parliament is free to intervene. I note that this observation was made by McIntyre J. in *R. v. Bernard* but Parliament has not intervened. It has been suggested that Parliament should create a new offence of dangerous intoxication. Such a recommendation was made by the Butler Committee in England and by the Law Reform Commission in Canada. (See Butler Committee Report on Mentally Abnormal Offenders (1975) (Cmnd. 6244, paras. 18.51-18.59) and Law Reform Commission of Canada, Recodifying Criminal Law, Report 30, vol. 1 (1986), at pp. 27-28.) Such legislation could be coupled with amendments to the Criminal Code to extend the defence of drunkenness to some or all offences to which it does not apply. Such changes, however, are for Parliament and not for this Court to make.

In *Majewski*, Lord Elwyn-Jones L.C. summed up the situation in words with which I fully agree. He stated, at p. 475:

It may well be that Parliament will at some future time consider, as I think it should, the recommendation in the Butler Committee Report on Mentally Abnormal Offenders (Cmnd. 6244, 1975) that a new offence of "dangerous intoxication" should be created. But in the meantime it would be irresponsible to abandon the common law rule, as "mercifully relaxed," which the courts have followed for a century and a half.

Disposition

The trial judge stated that but for his opinion that the appellant's extreme state of drunkenness constituted a defence, he would have convicted the appellant. I agree with the Court of Appeal that the trial judge erred in law in this regard. The Court of Appeal was right, therefore, to substitute a conviction. I would dismiss the appeal.

Appeal allowed, Sopinka, Gonthier and Major JJ. dissenting.

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