



Learning Network & Knowledge Hub Webinar

The Supreme Court of Canada's
Extreme Intoxication Decisions:
Why We Should Care

Presented by: Jacqueline Benn-John
and Elizabeth Sheehy



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The Supreme Court of Canada's Extreme Intoxication Decisions Why Women Should Care

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Learning Objectives

1. Participants will come away with an understanding of the difference between an “intoxication” defence and an “extreme intoxication” defence;
2. Participants will be able to assess the available evidence and reach their own informed opinions regarding whether the extreme intoxication defence poses a threat to the rights of women; and
3. Participants will be able to participate in discussions around Parliament’s response to the Court’s decisions via Bill C-28.

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Glossary

- **Specific Intent Offences**: offences that require proof of a special form of intent, such as intention to produce certain consequences (like intent to kill, for murder)
- **General Intent Offences**: offences that require proof only of intent to commit the immediate act (like the intent to apply force without consent, for assault)
- **Mere intoxication**: mild to moderate intoxication
- **Significant intoxication**: sufficient intoxication as to prevent the accused from forming intent for a specific intent crime
- **Extreme Intoxication**: intoxication to such a degree that the person is rendered akin to an automaton, without even bare volition

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Canadian law pre-1994

- Law was ambivalent about how intoxication should be treated
- Distinction between “specific intent” crimes and “general intent” crimes
- **Mere intoxication** is never a defence
- **But significant intoxication** can be, available only for specific intent offences (murder, theft, attempts and parties to manslaughter/sexual assault)
- **Intoxication never available for general intent offences** (manslaughter, assault, sexual assault)

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The *Charter* is used to nullify common law rule re general intent offences

- *R v Daviault* decided by the Supreme Court in 1994
- Daviault engaged in chronic alcohol use and attacked and sexually assaulted a woman friend who was semi-paralyzed and used a wheelchair
- At trial acquitted on the basis that he acted “involuntarily”
- Québec Court of Appeal overturned and ordered a new trial
- On Daviault’s appeal to Supreme Court, judges used the presumption of innocence (s 11(d)) and fair trial rights (s 7) to conclude common law rule violated the *Charter*

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Thus was Born the Extreme Intoxication Defence

- The accused must have available a defence if he was “morally innocent” ie he did not possess the required mental state for guilt (ie the intent to touch another in a sexual manner, being reckless or willfully blind as to her non-consent) or he was in a state akin to automatism, such that acting without volition
- To access this defence, accused must prove, on a balance of probabilities, that he was in a state akin to automatism such that he was incapable of forming the intent to commit the offence or of controlling his actions; expert evidence normally required
- Result is acquittal

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Daviault results in new defence efforts, to the detriment of women

- In the 12 month period after the release of *Daviault*, we found 30 *reported* instances where the defence attempted
- 12 clear VAW: 6 sexual assaults; 5 spousal assaults; and killing of woman in the sex trade
- Most failed, but 4/6 successful cases involved spousal assault

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With advice from women's organizations, Parliament responds

- **33.1 (1)** It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
- **(2)** For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
- **(3)** This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

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S 33.1 in action: 1995-2021

- 86 *reported* cases where s 33.1 cited as one reason to reject an intoxication defence
- 35 sexual assault; 5 spousal assault; and 23 additional cases involved female victims (ex: Brown broke into the home of an elderly woman living alone; Chan killed his father and maimed his father's partner; Sullivan attacked and gravely injured his mother) = 63/86
- Among the perpetrators were 80 men; 6 women
- 16 were constitutional challenges to the law (including *Brown*, *Chan* and *Sullivan*)

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R v Brown; R v Sullivan; R v Chan: 2022

- Brown consumed 14-18 mixed drinks and ate magic mushrooms all evening; Alberta CA denied him a defence
- Chan allegedly consumed 2 handfuls of magic mushrooms (4X previous consumption) and drank an unspecified number of beers; Ontario CA made extreme intoxication defence available and ordered new trial
- Sullivan swallowed 30-80 Wellbutrin pills in an alleged suicide attempt; Ontario CA acquitted him using the defence

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R v Brown: 2022

- Ruling on substance of constitutional challenge rendered in *Brown*
- Court held that s 33.1 violates ss 7 and 11(d) of the *Charter* by requiring conviction in the absence of proof of any intent or voluntariness, and by presuming guilt
- Court stipulated that **women's competing claims are not to be balanced in the analysis of s 7**, but are instead part of general societal interests to be considered at the justification stage

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R v Brown: 2022

- Turning to s 1, the Court held that women's ss 7, 15 and 28 rights cannot salvage the constitutional violation of the rights of the accused
- **PS, it has NEVER upheld a s 7 violation using s 1**, so women will never win, with grave implications for other sexual assault legislation that is currently under constitutional attack by accused men
- It did state that the state has an interest in holding extremely intoxicated offenders accountable and recognized the potential impact on women and children

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However....

- The Supreme Court suggested **two legislative options, both bad for women:**
 - 1. New generic offence of criminal intoxication
 - 2. Introduction of a new criminal negligence standard that would require proof of foreseeability of extreme intoxication and harm to another arising from the consumption of intoxicants

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Dispelling myths

- **Brown did not** in any way suggest that the extreme intoxication defence cannot be used for sexual assault
- **Brown did not** state that alcohol consumption can never ground an extreme intoxication defence; it said it would be “inappropriate here to foreclose a finding ... through any intoxicant taken alone” if an accused person can find an expert willing to support it.
- **Brown did nothing** to otherwise change the rule that intoxication is no defence to general intent crimes, unless and until it rises to the “extreme” level

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In the result...

- **Mere intoxication** is never a defence
- **Advanced intoxication** remains a defence only for specific intent offences; accused need only raise a doubt that he did not form the requisite intent due to intoxication
- Intoxication is not a defence to general intent crimes, **unless the accused can prove, on a balance of probabilities that he was extremely intoxicated** such that he was in a state akin to automatism, unable to control his actions or form any kind of intent
- Accused will also need expert evidence to support extreme intoxication defence

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Bill C-28

- **33.1 (1)** A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
 - (a) all the other elements of the offence are present; and
 - (b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.
- (2) **For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.**
- (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.
- (4) In this section, **extreme intoxication** means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour.

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Merits of Bill C-28?

- Rejected the option of new criminal offence of “criminal intoxication”
- Swift response: introduced June 17; Royal Assent June 25
- But no real consultation and ignored input from feminist experts that Crown will not be able to prove that a reasonable person could have foreseen that they could lose control and in consequence harm another
- Stifled all discussion, debate through expedited legislative process; “study” of the bill to come in 2023

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What can we possibly do?

- Prepare briefs for the March 2023 committee hearings
- Liaise with like-minded women’s groups, including NAWL
- Document and share any cases that come to your attention via media or otherwise where extreme intoxication is being argued
- Document and share the (anonymous) concerns of women and the impacts you observe as a result of the extreme intoxication defence

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LEARNING NETWORK & KNOWLEDGE HUB WEBINAR
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DECISIONS: WHY SHOULD WE CARE

JULY 19TH, 2022

Jacqueline Benn-John, PhD
Women's Support Network of York Region

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AGENDA

- Introduction
- What does the Extreme Intoxication Defence mean?
- What are its Implications?
- How do we uphold the rights of survivors?

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INTRODUCTION

- Be better able to understand how the extreme intoxication defence poses a threat to the rights of women and gender-diverse people.
- Be better able to provide information to survivors about what to expect when engaging with the criminal justice system.
- Gain knowledge about the systemic limitations of the criminal justice system in responding to sexual violence cases, as well as gain awareness of other support, healing, and justice options for survivors.
- Enhance their knowledge of how to provide supportive responses to survivors who are seeking to understand the defence, possible implications, and options for survivors.

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WHAT DOES THE
EXTREME INTOXICATION
DEFENCE MEAN?



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IMPLICATIONS?

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THANK YOU



Jacqueline Benn-John, PhD



jbennjohn@womenssupportnetwork.ca



womenssupportnetwork.ca