

# Innocent If Intoxicated? Part 1: Before *Brown*

## An Overview of the Defence of Extreme Intoxication Prior to the Decision in *R v Brown*

On May 13, 2022, the Supreme Court of Canada (“SCC”) rendered its judgement in *R v Brown* (“*Brown*”). The decision struck down section 33.1 of the *Criminal Code*, which eliminated self-induced intoxication as a defence to certain types of crimes. This case generated significant controversy at lower levels of the court system, and the decision from the SCC was no different. A quick Google search reveals news headlines such as: “Supreme Court ruling makes Canada a less-safe place” and “Supreme Court of Canada ruling a setback for women.”<sup>[1]</sup> One commentator even went as far as saying that this ruling allows rapists and murderers to walk free.<sup>[2]</sup>

So, what was the *Brown* case about, and why did it cause such a firestorm of controversy? This is the first article in a two-part series that will address these questions. This first article examines the history of what has become known as the extreme intoxication defence in Canada, while the second focuses on the *Brown* ruling itself.

## Before 1994, Intoxication Was No Defence for General Intent Offences

In 1994, the SCC released a landmark decision on the use of intoxication as a defence to a criminal act. This case was *R v Daviault*. Before *Daviault*, the common law (law created through court decisions) only allowed a defence of extreme intoxication for “specific intent” offences, not for “general intent” offences. Whereas specific intent offences (e.g. murder) require that a defendant intended to cause a particular kind of criminal *harm*, general intent offences (e.g. manslaughter) require only that they intended to perform a particular criminal *act*, regardless of whether they intended to produce the harm that resulted from that act.

Throughout the 20th century, several English cases restated the rule that extreme intoxication is only a valid defence for specific intent offences. In 1963, the English judge Lord Denning stated the rule as follows: “If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge ... in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary.”<sup>[3]</sup>

In *R v Leary*, the Supreme Court of Canada affirmed this same principle, which meant that voluntary intoxication — however extreme — could not be used to escape liability for most crimes in Canada. However, this changed dramatically in 1994.<sup>[4]</sup>

## ***Daviault* Allows the Defence of Extreme Intoxication for General Intent Offences**

In 1994, the decision in *Daviault* reformed the Canadian common law to expand the defence of extreme intoxication beyond specific intent offences. *Daviault* revolved around the sexual assault of a 65-year-old woman who was partially paralysed and restricted to a wheelchair. The accused was a chronic alcoholic who, that night, had drunk seven or eight beers and approximately 35 ounces of brandy. In his testimony, he denied sexually assaulting the victim, saying that he did not remember anything that happened after arriving at the victim's home.<sup>[5]</sup> During the trial, an expert witness noted that the amount of alcohol the accused drank would have caused a moderate drinker to fall into a coma or die. The witness also noted that the accused could have been in a state of automatism where he had no awareness of his actions and had lost contact with reality.<sup>[6]</sup> Such a state has been defined as when a person is capable of movement but does not have voluntary control; when there is a disconnect between their mind and their body.<sup>[7]</sup>

The cases mentioned above, including *R v Leary*, were decided before the enactment of the *Charter of Rights and Freedoms* ("*Charter*") in 1982. However, *Daviault* was decided twelve years after the passage of the *Charter*, and the question before the Court was now whether banning the defence of extreme intoxication for general intent offences violated any *Charter* rights. Specifically at issue were:

1. Section 7 of the *Charter*, which protects the right of a person not to be deprived of life, liberty, or security of the person "except in accordance with the principles of fundamental justice."<sup>[8]</sup>
2. Section 11(d) of the *Charter*, which states that an accused must be "presumed innocent until proven guilty."<sup>[9]</sup>

The Supreme Court in *Daviault* found that the common law principle adopted by the SCC in *R v Leary* violated both these *Charter* sections. For the Court, the rights contained in these sections were breached because the principle from *Leary* unjustifiably substituted the *mens rea* of an offence.<sup>[10]</sup> To explain this point: for general intent offences, the common law principle effectively substituted the intention to commit the criminal act with the intention to become intoxicated. With this substitution, a person's intention to become drunk would be enough to satisfy the mental element of a general intent offence, even without proof they intended to commit the criminal act.

According to the SCC, eliminating the *mens rea* for an offence in this way violates sections 7 and section 11(d) of the *Charter*. In finding that the law violated section 7, the Court defined the voluntariness requirement as a principle of fundamental justice, suggesting that a person should not be criminally liable for something they did not voluntarily choose to do.<sup>[11]</sup> Further, the Court held that section 11(d) was violated by the fact that someone may raise a reasonable doubt as to the voluntariness of their actions yet still be convicted of a general intent offence, thereby violating the presumption of innocence.<sup>[12]</sup>

When a law is found to violate a *Charter* right, it may nonetheless be justified and upheld under the *Oakes* test, a two-part test derived from section 1 of the *Charter*. However, in *Daviault*, the Court stated that the violations were too “drastic,”<sup>[13]</sup> and that the law could accordingly not be “saved” under section 1.

Rather than striking down the law, though, the Court modified the common law principle from *Leary* to make it compatible with the *Charter*. Adopting the flexible approach taken by Justice Wilson in a previous case (*R v Bernard*), the *Leary* principle was altered to make the defence of extreme intoxication available for general intent offences *in exceptional circumstances*.<sup>[14]</sup> These exceptional circumstances were those in which an accused could show that their state of extreme intoxication was akin to automatism or insanity. To use the Court’s words, this type of “[d]runkness of the extreme degree ... will only occur on rare occasions.”<sup>[15]</sup> On such occasions, the onus will be on the accused to prove that they were in such a state, and expert evidence would be needed to verify their claim.<sup>[16]</sup> Therefore, because of the Court’s judgement in *Daviault*, a modified common law principle was created to allow for the use of extreme intoxication as a defence for general intent offences “on rare occasions.”

## **Parliament Codifies the Original Common Law Principle From *Leary***

Following the Supreme Court of Canada’s judgement in *Daviault* there was significant public outcry, and pressure mounted on the federal government to respond.<sup>[17]</sup> In 1995, Parliament responded to this pressure by passing section 33.1 of the *Criminal Code*. Section 33.1 stated that no defence of extreme intoxication would be available for general intent offences that involved an interference with the bodily integrity of another person (e.g. assault).<sup>[18]</sup> While plenty of observers welcomed Parliament’s response,<sup>[19]</sup> legal experts had concerns that section 33.1 ran afoul of the *Charter*.<sup>[20]</sup> For example, in 2017, one legal scholar noted that a *Charter* challenge seemed inevitable, given that section 33.1 effectively restored the guilt-by-proxy regime that was invalidated in *Daviault*.<sup>[21]</sup>

Despite these concerns, it took until *R v Brown* in 2022 for the issue of section 33.1’s validity to make it to the SCC. My second article in this series will examine *R v Brown*, explaining why the SCC unanimously struck down section 33.1 of the *Criminal Code*, and considering what might happen next.

<sup>[1]</sup> Warren Kinsella, “*Supreme Court ruling makes Canada a less-safe place*”, Toronto Sun, May 17, 2022 [Kinsella]; Elizabeth Sheehy, Isabel Grant & Kerri A Froc, “*Supreme Court of Canada ruling a setback for women*”, Toronto Star, May 13, 2022.

<sup>[2]</sup> Kinsella, *supra* note 1.

<sup>[3]</sup> *Bratty v Attorney-General for Northern Ireland*, [1961] 3 WLR 965, [1963] AC 386 at 410.

- [4] *R v Leary*, [1978] 1 SCR 29, [1978] 1 RCS 29 [*Leary*].
- [5] *R v Daviault*, [1994] SCJ No 77, [1994] 3 SCR 63 at paras 71-72 [*Daviault*].
- [6] *Ibid* at para 73.
- [7] *R v Brown*, 2022 SCC 18.
- [8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
- [9] *Ibid*.
- [10] *Daviault*, *supra* note 5 at para 40.
- [11] *Ibid* at para 44.
- [12] *Ibid* at para 43.
- [13] *Ibid* at para 47.
- [14] *Ibid* at paras 50-53.
- [15] *Daviault*, *supra* note 5 at para 63.
- [16] *Ibid* at para 67.
- [17] Debra Black, "A licence to rape? Women fear that a Supreme Court ruling tells men sexual assault is okay as long as they're drunk", *Toronto Star*, October 27, 1994; "Drunks who rape and go free; Top court ruling means law should be changed", *Montreal Gazette*, October 4, 1994.
- [18] *Criminal Code*, RSC 1985, c C-46, s 33.1.
- [19] Stephen Bindman, "Drunk defence to be outlawed", *Calgary Herald*, February 25, 1995
- [20] *Ibid*.
- [21] Michelle S Lawrence, "Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the Criminal Code" (2017) 40:3 MLJ 391 at 393.