COMMENTS
CHRONIQUE DE JURISPRUDENCE

R. v. *Bernard*: Difficulties with Voluntary Intoxication

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Synopsis

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Introduction

Over a forceful dissent a majority of the Supreme Court of Canada in *Leary*[1] adopted two central elements of the rule in *Majewski*:[2] that voluntary intoxication can negate specific intent and that it can suffice for proof of general or basic intent. *Leary* was decided some five years before the *Canadian Charter of Rights and Freedoms* came into force and, for better or worse, began the tectonic transformation of Canadian jurisprudence. In *Bernard*[3] the rule in *Leary* was challenged in the Supreme Court. It survived but the result leaves the law in an untidy state.

The full court of nine judges heard *Bernard* but two resigned and took no part in the decision. The two that decided to sustain *Leary* and *Majewski* have since retired.[4] Four opinions were delivered: one plainly for the rule (McIntyre and Beetz JJ., both now retired), one plainly against it (Dickson C.J.C. and Lamer J.), one proposing a compromise (Wilson and L'Heureux-Dubé JJ.) and the last "in general agreement with the law as stated by the Chief Justice"[5] but joining with all of the others in the application of the proviso (La Forest J.).[6] The cacophony of opinion and reliance on the proviso are two reasons to suggest that in an appropriate case the Court should soon reconsider the issue. Reconsideration will be necessary, if only to clarify the state of authority after *Bernard*.[7]

On appeal from conviction of sexual assault causing bodily harm the defence conceded that the appellant had forced the complainant to have intercourse. He had also punched and threatened her. The accused gave no evidence but the prosecution adduced a statement to police in which Bernard admitted forcing the complainant. That statement contained the only evidence of intoxication, as noted by the judge in his instructions:

> Only the accused, in his statement, says: "I was all drunked up too." There was no evidence of drunkenness except that statement, and it is open to you to accept it and find that he was drunk, but even if he was drunk, drunkenness is no defence to the charge alleged against this accused.[8]

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[1][1978] 1 S.C.R. 29, 33 C.C.C. (2d) 473, 74 D.L.R. (3d) 103 [hereinafter cited to S.C.R.].

[2][1977] A.C. 443, [1976] 2 All E.R. 142 (H.L.).

[3][1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1, 67 C.R. (3d) 113 [hereinafter cited to S.C.R.]. *Quin* v. *R.*, [1988] 2 S.C.R. 825, 67 C.R. (3d) 162, 45 C.C.C. (3d) 570, was heard and decided with *Bernard*; the division of the Court was the same.

[4]Thus four of the nine judges now sitting have expressed no view and Dickson C.J.C. will retire in June 1990.

[5]*Supra*, note 3 at 892.

[6]*Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

[7]An opportunity for reconsideration, at least in part, has arisen in *R.* v. *Penno* (1986), 18 O.A.C. 31, which was heard in the Supreme Court on 31 January 1990: File No. 20234 (under reserve as of 9 May 1990).

[8]*Supra*, note 3 at 862.

Leave was granted[9] on whether sexual assault is an offence of general or specific intent and, if the former, whether self-induced intoxication is a defence to crimes of general intent.

On matters of principle and policy, the division between the opinions of McIntyre J. and Dickson C.J.C. adds little to the long-standing controversy that began with *Beard*[10] and has continued in cases, reports, articles and books, especially over the past fifteen years.[11] McIntyre J. found no reason under the *Charter* or otherwise to disturb *Leary*. He reaffirmed the distinction between general and specific intent, distinguished them in the traditional way, and for good measure declared that the distinction is real, cogent and not fictitious.[12] In language reminiscent of *Beard*, McIntyre J. refers to the effect of intoxication on the accused's capacity to form the requisite specific intent. He also endorses the second proposition in *Majewski*[13] with the assertion that proof of voluntary intoxication can be proof of *mens rea*.[14] He departs from *Majewski* by saying that this proposition should be understood as an alternative to inference from the *actus reus* as a means of proof. In substituting voluntary intoxication for basic intent as an alternative element of fault, McIntyre J. allows that what might be lost in strict logic is gained by "policy so compelling that it possesses its own logic."[15] The policy is that sodden people who do bad things deserve conviction

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[9][1986] 1 S.C.R. vi (*coram* Lamer, Le Dain and La Forest JJ.).

[10]*D.P.P* v. *Beard*, [1920] A.C. 479 (H.L.). Lord Birkenhead reviewed the authorities and sought to distil their import in these three celebrated propositions:

> 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.

[11]See *R.* v. *O'Connor* (1980), 146 C.L.R. 64, 29 A.L.R. 449, [1980] Vict.R. 635 (H.C.), in which a slight majority of the High Court of Australia elected not to follow *Majewski* and to follow the dissenting reasons of Dickson J. in *Leary*. *O'Connor* was affirmed and clarified in *R.* v. *Martin* (1984), 51 A.L.R. 540, 58 A.L.J.R. 217 (Aust. H.C.) and followed by a unanimous Court in *Chretien* [1981] 1 S.A. 1097. For discussion see C.R. Williams, [1980] Ann. Survey Aust. L. 91-104; C.R. Williams, [1984] Ann. Survey Aust. L. 54-55; P. Fairall, "*Majewski* Banished" (1980) 4 Crim. L.J. 264; M. Goode, "Some Thoughts on the Present State of the 'Defence' of Intoxication" (1984) 8 Crim. L.J. 104.

[12]*Supra*, note 3 at 863.

[13]*Supra*, note 2 at 475-476, Elwyn-Jones L.C.

[14]*Supra*, note 3 at 879.

[15]*Ibid.* at 880.

and punishment, at the very least for doing those things if not for being bad people. It is an old and popular view[16] from which few dissent. But it is blunt policy that raises difficulties in theory and practice when enforced by a blunt rule.

The premise of the dissent is that intoxication can negate *mens rea* without negating capacity. In Dickson C.J.C.'s view the distinction between specific and general intent is specious because specificity of itself has no normative value in the interpretation of intent. Mental states might usefully be described or identified as having greater or lesser particularity, but that is no more than common usage and plain words.[17] Accordingly, the distinction between specific and general intent should be abandoned: intoxication should be defined as an exculpatory claim of general application in the denial of *mens rea* and evidence of it should be generally admissible for that purpose. His objection to the rule, as in *Leary*,[18] is that its sole purpose is to erect a substantive estoppel to bar otherwise available exculpatory claims or to bar otherwise relevant evidence to support some other exculpatory claim. Dickson C.J.C. does not expressly dissent from the reasons of policy that support this objective and his opinion shows considerable support for them.[19] The nub of his dissent is that the rule in *Leary* and *Majewski* rests upon analytical nonsense and implements its aim with such bluntness that it conflicts with fundamental principles of criminal justice.

On any account voluntary intoxication can have legal significance in two ways. First, it can be part of the substantive law in so far as it might be defined as an element of guilt or an exculpatory claim. Second, intoxication can be given as evidence of inculpatory elements or exculpatory claims, either where intoxication is in issue as a matter of substantive law or where it is not.[20] The cardinal distinction between substantive law and evidence, combined with the distinction between inculpation and exculpation, thus allows four permutations. Controversy has always concerned which ones should be permissible. In this regard the proposal for compromise suggested by Wilson J. in *Bernard* warrants scrutiny. All three major opinions raise questions about the ambit of intoxication as a matter of substantive law and evidence. Finally, *Bernard* marks the first occasion on which the Supreme Court of Canada has examined the constitutional validity of the rule in *Leary* and *Majewski* under the *Charter*.

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[16]*Reniger* v. *Fogossa* (1551), 1 Plow. 1 at 19, 75 E.R. 1 at 30.

[17]See J. Hall, *General Principles of Criminal Law*, 2d ed. (Indianapolis: Bobbs-Merrill, 1960) at 546-548; G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) at 850-852.

[18]See also *R.* v. *Mulligan*, [1977] 1 S.C.R. 612, 28 C.C.C. (2d) 266, 66 D.L.R. (3d) 627.

[19]*Supra*, note 3 at 847-849.

[20]For example, where evidence of intoxication might be adduced to support an independent defence, justification or excuse.

I. The Proposed Compromise

The general premise of Wilson J.'s opinion is that as a matter of substantive law, intoxication is incapable of raising a reasonable doubt against the prosecution's case. She would recognise two exceptions. The first is for specific intent and so she adheres to the orthodoxy of *Leary* and *Majewski*. Second, Wilson J. would allow evidence of intoxication to support an acquittal for lack of general intent where "it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism" or, as she says elsewhere, where extreme intoxication is verging on insanity or automatism.[21] She postulates that only cases of extreme intoxication could raise a reasonable doubt against intent, and thus she would relax the rigour of *Leary* and *Majewski* if evidence supporting intoxication were strong.[22] In any other case, she says, evidence of intoxication should not go to the jury as an independent basis for acquittal. This sweeping obiter would exclude intoxication as a defence to any other mental state in the defining elements of an offence and exclude evidence of intoxication as a support for any other exculpatory claim. Wilson J. does not explore these implications. Nor does she explore whether general intent and voluntariness are synonymous, which is another of the substantial questions implicated in her analysis.

On practical grounds her proposal would be difficult to administer. In a complex case the judge might have to leave incapacity[23] as a general defence, with the supporting evidence of intoxication, and then intoxication itself as a defence where it does not quite reach incapacity but negates intent, and then intoxication as a partial defence that mitigates specific intent and allows for conviction of an included or alternative offence of general intent. For an offence of basic intent, he would leave out the last option. And all this in combination with any other available exculpatory claims! Assuming the judge gets it right, his hard work might go for naught. A jury would be hard pressed but to boot the accused before the bench for sentence because he seemed deserving or out the door because he did not.

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[21] *Ibid.* at 884, 887. This phrase comes from the opinion of Martin J.A. in *R.* v. *Swietlinski* (1978), 22 O.R. (2d) 604, 44 C.C.C. (2d) 267, 94 D.L.R. (3d) 218 (C.A.), aff'd [1980] 2 S.C.R. 956, 55 C.C.C. (2d) 481, 117 D.L.R. (3d) 285. It is an odd phrase in so far as Canadian law, like that of England and Wales, does not recognise intoxicated automatism as a defence to offences of basic intent. See *R.* v. *George*, [1960] S.C.R. 871, 128 C.C.C. 289; *Majewski*, *supra*, note 2; *R.* v. *Lipman*, [1970] 1 Q.B. 152 (C.A.); *R.* v. *Schmidtke* (1985), 19 C.C.C. (3d) 390 (Ont. C.A.).

[22] Such a position would perhaps be most applicable to cases of intoxication by drugs other than alcohol.

[23] *I.e.*, insanity.

Others also have emphasised the degree of intoxication, notably Lord Denning in *Gallagher*,[24] but this is an unnecessary and intractable criterion for inclusion in the rule. It is a difficult issue to formulate as a question of law for the judge and, moreover, it will govern the deliberations of the jury as a matter of course. Consider on Wilson J.'s terms how a judge must ascertain whether an evidential burden has been met. He would ask himself whether a reasonable jury, properly instructed, could find on the evidence a reasonable doubt as to whether the accused had the requisite intent. He would have to consider the measure of consumption and the measure of its effect in order, finally, to determine whether it is akin to incapacity. If Wilson J. would have a judge leave extreme intoxication as a possible denial of general intent and intoxication as a denial of specific intent, the difference as a matter of substantive law would lie in the degree of intoxication, which is inherently a matter of fact. These are operations best left to the jury, and the judge need only ask whether evidence of intoxication is sufficient to induce reasonable doubt on intent. Although much of the substantive law is intelligible only by the interpretation of adjectives and adverbs, there is little to be gained by introducing such concepts when they can be avoided. This lesson should be clear from the history of "general" and "specific" intent.

II. The Scope of Intoxication

A. Intoxication and Capacity

Even today, long after it became an anachronistic curio, Lord Birkenhead's speech in *Beard* continues to have an influence on the analysis of intoxication. The central difficulty with *Beard* was that Lord Birkenhead ran capacity and intent together in a manner that failed to disclose the meaning of either or the relations and distinctions between them. There is no indication that he intended that the terms should bear an elaborate or sophisticated meaning that was previously unknown to the common law. Moreover, as regards "intent", it seems clear enough that in contemporary usage intent was used as a term to denote any mental state.[25] In later interpretations, however, Lord Birkenhead's *dicta* in *Beard* seemed to force a choice in formulation between involuntariness and the absence of *mens rea*, a choice that to this day remains largely unarticulated and certainly unresolved in the courts.[26] According to the assessment in *Beard*,

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[24]*A.G. Northern Ireland* v. *Gallagher*, [1963] A.C. 349 (P.C.). See also A.C.E. Lynch, "The Scope of Intoxication" [1982] Crim. L.R. 139 and 392.

[25]E. Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986) at 254 ff.; D. Stuart, *Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1987) at 364 ff.

[26]"Incapacity" raises a question whether it is the synonym of involuntariness and, if it is, the further question whether voluntariness is concerned solely with *mens rea* or with the mental element in the *actus reus*.

either intoxication was the touchstone for alternative modes of incapacity;[27] or for an alternative between incapacity (insanity caused by intoxication) and a substantive defence of intoxication that negates intent.[28] The former presupposes a unique concept of incapacity or involuntariness, due to intoxication, that is distinguishable from insanity.

In *Bernard* these alternative formulations and permutations of them are reconsidered by the Court. Wilson J. concludes that intoxication will support the negation of specific intent, or in extreme cases, the negation of voluntariness: she would deny that in the absence of extreme intoxication there can be a negation of "minimal" intent. This view leaves a notion of partial capacity, which in effect must be equivalent to basic intent. The Chief Justice denies the distinction between specific and general intent and says that the trier of fact should ascertain whether, on the evidence, intoxication was sufficient to negate *mens rea*; he says nothing of substance on the extent to which intoxication can negate voluntariness. McIntyre J., like Lord Birkenhead, seems to run questions of incapacity, voluntariness and intent together without discrimination.

Where capacity is not in question, intent is an open issue on the evidence, and thus intoxication would always be relevant to this issue were it not for English and Canadian authority that intoxication can only be left as a defence to specific intent. In most jurisdictions of the Commonwealth capacity and intent have been prised apart and it is agreed that intoxication can negate intent without negating capacity.[29] A majority of the Supreme Court of Canada has yet to assert this position. The Court repeatedly reaffirmed the second and third propositions in *Beard*[30] (varying the third to account for *Woolmington*[31]) and endorsed instructions to the effect that intoxication could only justify acquittal if it denied the accused's capacity to form the requisite intent.[32] In *Young*[33] the Supreme Court elected not to reconsider the aptness of such instructions and in *Vasil*[34] Lamer J. deferred the question for some future case (*Bernard*, as it hap-

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[27]*I.e.*, insanity (under Lord Birkenhead's first proposition) or intoxication.

[28]Hence there are now only two defences of incapacity at common law, insanity and automatism, which are supplemented by the partial defence of diminished responsibility under s. 2 of the *Homicide Act 1957* (U.K.), 1957, c. 11. There is a similar defence in several jurisdictions of the Commonwealth but not in Canada.

[29]In England and Wales it was given impetus by the advice of the Privy Council in *Broadhurst* v. *R.*, [1964] A.C. 441 (P.C.). See *Sheehan & Moore* (1975), 60 Cr. App. R. 308; *R.* v. *Pordage*, [1975] Crim. L.R. 575 (C.A.); *Garlick* (1980), (1981) 72 Cr. App. R. 291. See also *R.* v. *Kanipeli*, [1975] 2 N.Z.L.R. 610 (C.A.); *O'Connor*, *supra*, note 8; *Martin*, *supra*, note 8.

[30]Reproduced at note 10, *supra*.

[31][1935] A.C. 462 (H.L.).

[32]*MacAskill* v. *R.*, [1931] S.C.R. 330, 55 C.C.C. 81, 3 D.L.R. 166; *Malanik* v. *R.*, [1952] 2 S.C.R. 335, 14 C.R. 367, 103 C.C.C. 1; *George*, *supra*, note 21; *Perrault* v. *R.*, [1971] S.C.R. 196, [1970] 5 C.C.C. 217, 12 D.L.R. (3d) 480; and *Swietlinksi*, *supra*, note 21.

[33][1981] 2 S.C.R. 39, 59 C.C.C. (2d) 305.

[34][1981] 1 S.C.R. 469, 58 C.C.C. (2d) 97, 121 D.L.R. (3d) 41.

pens). At the same time lower appellate courts had already held that it would be a misdirection of the jury to say that intoxication could avail only if it negated the capacity to form specific intent.[35] In *Bernard*, as in *Leary*, Dickson C.J.C. asserts a general proposition that evidence of self-induced intoxication should be considered by the trier of fact, with all other relevant evidence, to determine whether the prosecution has proved the *mens rea* required to constitute the offence. The generality of this proposition raises difficulties, discussed below, but one of them is not the conflation of capacity and intent. McIntyre J., by contrast, summarises the authorities as follows: voluntary intoxication may be advanced to negate specific intent if the accused was so affected by intoxication that he lacked the capacity to form the intent required to commit the crime but it cannot negate general intent. Elsewhere he emphasises the effect of intoxication on "minimal intent", voluntary conduct, self-control and the like. If he means capacity, his opinion can only be construed as a rare, late attempt in the Commonwealth to vindicate *Beard*, quite apart from *Leary*, on its own terms. If he does not mean capacity, but some affirmative mental state such as intent, knowledge or recklessness, his opinion is simply a farrago of undiscriminated terms.

The opinion of Wilson J. is opaque on this point. While accepting the categories of general and specific intent, she says that *Leary* should be relaxed to allow evidence of extreme intoxication to negative the minimal intent required for offences in the former category.[36] She speaks throughout of the "minimal intent"[37] required for the offence, which would seem in context to be synonymous with general or basic intent. Where extreme intoxication negatives minimal intent there is a state akin to insanity or automatism, and this is literally the equivalent of saying that it is akin to incapacity. "Minimal intent" therefore appears to be something of a euphemism that can mean alternatively basic intent, capacity or voluntariness. She says that she means something akin to incapacity.[38] Having concluded that the evidence in *Bernard* was insufficient, she said that there was no reason to consider whether voluntary intoxication could be a valid substitute for the "minimal intent which characterizes conscious and volitional conduct."[39] The meaning she ascribes to minimal intent is thus inscrutable. If it is akin to incapacity, she must concede that extreme intoxication can negate intent, recklessness or even knowledge in many instances. There is nothing to be gained here by re-examining the debate on specific and general intent except to note that the distinction, retained by Wilson J., is unnec-

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[35]*R.* v. *Otis* (1978), 40 C.C.C. (2d) 304 (Ont. C.A.); *R.* v. *Dees* (1978), 40 C.C.C. (2d) 58 (Ont. C.A.); *R.* v. *Seguin* (1979), 45 C.C.C. (2d) 58 (Ont. C.A.); *R.* v. *McKinlay* (1986), 53 C.R. (3d) 105 (Ont. C.A.).

[36]*Supra*, note 3 at 887.

[37]*Ibid.* at 882, 883, 884, 887, 889, 890.

[38]*Ibid.* at 884, 887.

[39]*Supra*, note 3 at 889.

essary to the substance of her proposal. If she is prepared to allow intoxication as a complete answer to minimal intent, the crux of her suggestion lies in the extremity of intoxication rather than the specificity of intent. As it has no other function in the law,[40] and on her own account of intoxication it has no substance, she can abandon the distinction between general and specific intent without altering her position.

B. Intoxication as a Defence to Alternative Mental States

None of the opinions in *Bernard* examines implications for offences comprising alternative[41] or compound[42] mental states (or both). This is less problematic in the opinions of McIntyre and Wilson JJ. than in the dissent. By restricting intoxication to specific intent, McIntyre J. would exclude its application to any other mental state, whether an alternative or a compound, although to this he had earlier declared an exception to allow intoxication as a defence to murder committed recklessly.[43] Wilson J. would maintain the same restriction, apart from her proposed extension to general intent in cases of extreme intoxication. In both of these opinions, however, there is no clear statement of what either judge means to convey by "intent". This same difficulty arises with the dissent. Even supposing the abolition of the distinction between specific and general intent, it remains to clarify the meaning of intent. Although Dickson C.J.C. says that the rule in *Leary* allows conviction without proof of intent, he also says more broadly that voluntary intoxication should be available to rebut *mens rea*. Here too it might be asked whether the Chief Justice uses *mens rea* as a generic term for all mental states and, in particular, whether intent signifies the narrower notion of purpose and foresight of consequences or, again, the looser meaning of all mental states. If he is suggesting that intoxication should be a defence to

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[40]J.C. Smith & B. Hogan, *Criminal Law*, 6th ed. (London: Butterworths, 1988) at 212.

[41]*E.g.*, where recklessness or intent will suffice.

[42]*I.e.*, where different mental elements are required in respect of different issues, as where reckless or intent is required as regards the circumstances of the *actus reus* and only recklessness with regard to the consequences.

[43]*Swietlinski, supra*, note 21; *Cooper* v. *R.*, [1983] 1 S.C.R. 240, 74 D.L.R. (3d) 731. See *Vasil, supra*, note 34. This is an example of secondary decisions being forced as a consequence of the distinction between specific and general intent. The exception for reckless murder is plainly a decision in policy that reflects the severity of the charge and the consequences of conviction. The Law Commission makes the same exception in its *Draft Code*, U.K. Law Comm. No. 177 (London: H.M.S.O., 1989) at cl. 22(4). However, rigorous enforcement of the distinction between specific and general intent also produces silly anomalies for attempts to commit offences of basic intent. As such attempts are themselves typically offences of specific intent, it would entail that intoxication should avail for the attempt but not the completed offence.

all mental states,[44] it would signal a striking expansion of intoxication as a defence.

An acceptable defence of intoxication is one that is neither overinclusive nor underinclusive. It seems plain that this notional balance can never be achieved without some rough line-drawing that occasionally subordinates logic to policy. As noted by Dickson C.J.C., the opponents of *Leary*, *Majewski* (and now *Bernard*) seek not to reverse the priority of logic and policy but to ensure that neither prevails over principle. In England the Law Commission accepts that the categorisation of intent is false and that voluntary intoxication should be admitted to negate intent and knowledge, as defined in clause 18, but generally not other mental states. Clause 22 of the Law Commission's *Draft Code*[45] would achieve this by specifying that voluntary intoxication is not available against elements of recklessness (distinguished from heedlessness or *Caldwell*[46]), objective *mens rea* or simple negligence. Only by implication would it lie against knowledge and intent. For offences comprising alternative mental states the judge would leave voluntary intoxication on intent or knowledge but not recklessness; for compound mental states, of course, intoxication would be left only on intent or knowledge. The *Draft Code* would create an exception for reckless murder but the exception only highlights another clash between logic and policy. If alternative mental states must be taken as equally sufficient elements of guilt under the substantive law, is it not invidious to allow intoxication against one alternative but not the other? A possible answer would be to extend voluntary intoxication in any offence to any mental state that is prescribed as an alternative to knowledge or intent. The Law Commission rejects this because it would embrace most elements of *mens rea*. This decision is pragmatic and not inconsistent with principle. It also avoids two difficult issues. The first is that

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[44]A further problem raised obliquely by the Chief Justice is what is included in the set of mental states. Nor did the Chief Justice (or any other judge) explore the ramifications of his or her opinion with respect to the rule in *R.* v. *Mitchell*, [1964] S.C.R. 471, whicb on a charge of first degree murder requires a judge to tell the jury that planning and deliberation can be negatived by a lesser degree of intoxication than is required to negative intent to commit murder. This is a rule that depends upon discrimination between different mental states and different degrees of intoxication. The need for such a distinction was affirmed by a majority of the Supreme Court in *Wallen* v. *R.* (12 April 1990) File No. 20762. Lamer and Cory JJ. affirmed *Mitchell* while La Forest J. concluded that there need be no "hard and fast" rule requiring such a direction.The problem considered in *Wallen* would further complicate the challenge facing the trial judge who follows the opinion stated in *Bernard* by Wilson J.: see text, *supra,* following note 24.

[45]*Supra*, note 43.

[46][1982] A.C. 341 (H.L.), Lord Diplock. The exclusion of recklessness is consistent with the position in cl. 2.08 of the *Model Penal Code,* American Law Institute, *Model Penal Code and Commentaries: Official Draft and Revised Comments* (Philadelphia: American Law Institute, 1985). See also *Majewski*, *supra*, note 2 at 475; *Caldwell*, *supra* at 355. The difference, of course, lies in the interpretation of recklessness. For a survey of issues and cases in the aftermath of *Caldwell*, see A. Ward, "Making Sense of Self-Induced Intoxication" [1986] Camb. L.J. 247; S. White, "Offences of Basic and Specific Intent" [1989] Crim. L.R. 271.

despite the formal equivalence of alternative mental states (either is sufficient for conviction) they are not substantively or normatively equivalent concepts of culpability. Intent is not always equivalent to knowledge and recklessness is certainly not intent. Second, there is radical uncertainty about whether some elements of fault, notably negligence, can properly be described as mental states.[47]

The Law Reform Commission of Canada recommends a general rule that "No person is liable for a crime if, by reason of intoxication, he or she fails to satisfy the culpability requirements specified by its definition."[48] To this a majority would add two provisos. First, if all other elements in the definition are satisfied, that person is liable for committing the crime charged while intoxicated, except in cases of causing death, where the second proviso would expose the accused to conviction and punishment for manslaughter. A minority accepted the general rule but, instead of the provisos, would substitute a single exception, that the general rule "shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake."[49]

These are wider, looser proposals than those in the *Model Penal Code*[50] or the *Draft Code* of the Law Commission, and nothing in the commentary provided by the Canadian Commission explains the decisions taken in reaching their conclusions.[51] The general rule, supported unanimously, presupposes that intoxication can and should be admitted to negate all mental states. The minority would exclude intoxication as a defence to negligence but it is not clear whether this decision rests on a notion that negligence is not a mental state or other grounds of policy. Canadian law has not yet merged the analysis of recklessness with objective *mens rea* and negligence,[52] although recent decisions of the Supreme Court suggest that the erosion of principle and the clarity of language has begun.[53] As a result, even assuming that subjective orthodoxy holds sway, the Commission's proposed general rule is far broader than Wilson J.'s test and quite possibly wider than that proposed by the Chief Justice in dissent. A judge would have to leave or consider intoxication as a complete answer to

[47]This has been an acute problem since *Caldwell* and is squarely addressed in the *Draft Code* and *Commentary*.

[48]*Recodifying Criminal Law* (Revised and Enlarged Edition) Report 31 (Ottawa: Law Reform Commission of Canada, 1987), cl. 3(3)(a) at 30-32.

[49]*Ibid.*

[50]*Supra*, note 46.

[51]For further discussion, see T. Quigley, "Reform of the Intoxication Defence" (1987) 33 McGill L.J. 1.

[52]*Sansregret* v. *R.*, [1985] 1 S.C.R. 570, 18 C.C.C. (3d) 223, 17 D.L.R. (4th) 577.

[53]*R.* v. *Tutton & Tutton*, [1989] 1 S.C.R. 1392, 69 C.R. (3d) 289; *R.* v. *Waite*, [1989] 1 S.C.R. 1436. In this case the Court was again badly split, making the state of the law difficult to discern. The decision in *R.* v. *Anderson* (1 March 1990) File No. 19464 (S.C.C.) does nothing to change the law.

any discrete element of purpose, recklessness or knowledge, whether that element bears on circumstances or consequences, and whether or not it is defined in the statement of the offence as an alternative mental element. Given these various permutations, they obviously do not denote normative equivalents. The Commission apparently sees no reason to discriminate among them for the purpose of restricting the ambit of intoxication as a defence. Two observations follow. First, the Commission's rule has a wider ambit than the defence of intoxication at common law and will produce a higher incidence of intoxication defences simply because there is a high incidence of intoxication in the commission of criminal offences. With that there must be some increased probability of success because, for example, intoxication will more readily raise a reasonable doubt against recklessness as to circumstances. The second observation is that the first does not appear to cause concern in the Law Reform Commission of Canada. Others disagree.

C. Evidence of Intoxication to Support Exculpatory Claims

Another point not addressed by Wilson or McIntyre JJ. in *Bernard* is the extent to which evidence of intoxication should be admitted to give colour to some other exculpatory claim.[54] Intoxication is typically invoked to support a variant of mistake, either where mistake itself is alleged or where a misperception of the accused, induced by intoxication, is said to enhance the mental element of a claim such as provocation, self-defence or duress.[55]

It would seem axiomatic in policy, if not in logic, that if the substantive defence of intoxication is circumscribed by limitations, the admissibility of evidence of intoxication to support any other exculpatory claim should at least have no wider application. The operation of this axiom is difficult to discern in the cases. With regard to mistake of fact, an affirmative argument for admitting evidence of intoxication is that it would be invidious to exclude it because it can contribute indirectly to the same effect that the defence of intoxication achieves directly (denial of *mens rea*). This argument was never entrenched in the authorities. Nevertheless, it is a position that has attracted strong criticism since the decisions in *Morgan*[56] and *Pappajohn*,[57] which declared that in England and Canada an honest mistake of fact will deny *mens rea*, even if unreasonable.

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[54]The Chief Justice discusses in passing the tension between *Leary* and *Pappajohn* v. *R.*, [1980] 2 S.C.R. 120, as part of an argument that *Leary* has been implicitly if not expressly attenuated by subsequent cases (*supra*, note 3 at 855-58).

[55]Since this paper was written Mr Kenneth Campbell has published a lengthy assessment of part of this question in "Intoxicated Mistakes" (1989) 32 Crim. L.Q. 110. See also Quigley, *supra*, note 51.

[56]*D.P.P.* v. *Morgan*, [1976] A.C. 182 (C.A. and H.L.).

[57]*Supra*, note 54. With reference to *Pappajohn*, it was suggested by Ritchie J. in *Reilly* v. *R.*, [1984] 2 S.C.R. 396, 15 C.C.C. (3d) 1, 13 D.L.R. (4th) 161, at 404 S.C.R., very much *en passant*, that intoxication could support a defence of mistake.

Allowance for unreasonable mistake is one aspect of concern, and there have been powerful proponents for the incorporation of reasonableness within the standard for mistake. Within this broader context, another aspect is the fear that if evidence of intoxication were allowed to enhance a claim of mistake it would acquire wider application and relevance than it is allowed as a substantive defence.

This point was addressed in *Woods*, where the accused argued that evidence of intoxication was relevant to a claim of mistaken belief in consent. The Court was concerned with the construction of section 1(2) of the *Sexual Offences (Amendment) Act 1976*[58] and, of course, with *Majewski*. Griffiths L.J. said that the admission of the evidence of intoxication to support mistake would be "a surprising result ... utterly repugnant to the great majority of people" because it would allow intoxication to support mistake while it is excluded as a substantive defence.[59] Thus the evidence of intoxication was rejected as "legally irrelevant" in any case of rape and possibly in relation to other offences.[60] It would appear that Griffiths L.J. overstates the matter. *Woods* can be compared with *Moreau*,[61] in which Martin J.A. attempts to reconcile mistake of fact induced by intoxication with the rule in *Leary*.[62] He says that evidence of intoxication can support mistake of fact but the defence will not lie unless the mistake bears on an element of specific intent. This is a remarkable attempt to sustain two distinct lines of logic: the first is that if intoxication is admissible directly as a defence against intent it should be admissible to support mistake and thus indirectly deny intent. The second is that if it is relevant to intent through mistake it can only be relevant within the limits set by *Leary*. If the distinction between basic and specific intent were judicially repealed *Moreau* need only be modified by removing the restrictive limitation.

In England, however, *Woods* would continue to bar evidence of intoxication in support of mistake of fact and, as regards sexual offences, the Law Commission maintains and extends this position to mistaken belief in a matter of defence.[63] As a rule of general application, the *Draft Code* is not so sweeping. It would restrict the admission of evidence of intoxication on mistake to the class of offences for which the defence of intoxication is available: that is, offences of intent or knowledge. The Law Reform Commission of Canada would bar a defence of mistake of fact to offences that can be committed reck-

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[58](U.K.) 1976, c. 82.

[59](1982), 74 Cr. App. R. 312 at 315.

[60]In *Fotheringham* (1988), 88 Cr. App. R. 206 (C.A.), evidence of voluntary intoxication was not allowed to support a claim of mistaken belief that the complainant was the accused's wife.

[61](1986), 51 C.R. (3d) 209 (Ont. C.A.). See also Smith & Hogan, *supra*, note 40 at 216.

[62]The Court was concerned with s. 272(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, which is similar in terms to s. 1(2) of the *Sexual Offences (Amendment) Act 1976*.

[63]Cl. 88.

lessly or negligently "where the lack of knowledge is due to the defendant's recklessness or negligence as the case may be".[64] Thus mistake of fact would not lie against such offences if it were held that error induced by intoxication was due to recklessness or negligence. That is, presumably, a question for the judge. This recommendation would seemingly not bar mistakes of fact in offences of intent, even where intoxication is intentional!

The relevance of voluntary intoxication to claims of justification and excuse cannot be governed by the same logic or policy. Unlike voluntary intoxication or mistake of fact, these claims cannot be limited by the rule in *Leary* or *Majewski* because their effect is not to deny an element of guilt. There are Canadian cases in which evidence of intoxication has been admitted to support the mental element in claims of provocation,[65] self-defence and duress. For any of these claims a jury must ask first whether a reasonable person in the circumstances would have cause for any one of these claims and, second, whether the accused actually had reasonable cause. Intoxication is irrelevant to the first and might arguably be relevant to the second, although its relevance might be more damning than favourable. The position of the Chief Justice in *Bernard*, however, if extended to justifications and excuses, would be that evidence of intoxication should be admitted and left for the jury to determine its value. The Law Reform Commission of Canada is not explicit on this question. Their recommendation as regards mistaken beliefs as to defences is that it should be a good defence in relation to specified exculpatory claims but unavailable where the offence charged is a crime of negligence and the mistaken belief arose through the accused's negligence. It must follow that for any offence of purpose, knowledge or recklessness evidence of intoxication would be admissible to support a claim of mistaken belief in a matter of defence. To the extent that the Commission is silent on this conclusion it must be taken as indifferent to it or supportive. It is a troublesome notion because in some cases it could condone such curiosities as drunkenly excused or justified homicide.

In England and Wales the common law remains in flux. In *Jaggard* v. *Dickinson*[66] the Divisional Court allowed evidence of intoxication to support a mistaken belief in consent, seemingly allowing such evidence to enhance any claim of mistaken belief as to a matter of defence, without limitation by *Majewski*. *Jaggard* was decided by Donaldson L.J. and Mustill J. shortly before the same Court, composed of Donaldson L.J. and Hodgson J., decided *Albert* v. *Lavin*.[67] The later decision appeared to support the proposition that a mistaken belief in a matter of defence must be reasonable, by contrast to a mistake of fact

[64]*Supra*, note 48, cl. 3 (2) (b) at 30.

[65]For example, *Taylor* v. *R.*, [1947] S.C.R. 462; *Wright* v. *R.*, [1969] S.C.R. 335; *Olbey* v. *R.*, [1980] 1 S.C.R. 1008.

[66][1981] Q.B. 527.

[67][1982] A.C. 546 (D.C. and H.L.).

bearing upon a definitional element of the offence.[68] On appeal the Law Lords did not address the question. In *Young*,[69] however, the Courts-Martial Appeal Court ruled that self-induced intoxication was not a relevant factor in assessing a statutory defence of mistaken belief in the nature of a controlled drug. The Court accepted *Jaggard* as "persuasive authority" but undercut its practical effect by saying that the reason supporting the alleged mistake must involve "the wider concept of objective rationality" rather than individual or personal considerations. The Court added that reference to the standard of a reasonable sober man is "an unnecessary gloss". Likewise in *O'Grady*[70] the Court of Appeal also rejected the argument that evidence of intoxication could enhance a claim of mistake as to self-defence, irrespective of the nature of the offence. This conclusion would appear to be a departure from the Court's earlier decision in *Gladstone Williams*,[71] later affirmed by the Privy Council in *Beckford*.[72] Those cases apply *Morgan* to mistake on a matter of defence and must be taken as having eclipsed the reasons given in the Divisional Court in *Albert* v. *Lavin*. *Young* and *O'Grady* can be distinguished from *Williams* and *Beckford* on a broad basis of public policy and on the narrower ground that only these cases deal specifically with the relevance of intoxication to mistake on a matter of defence. *O'Grady* does not declare in terms that mistakes as to matters of defence must be reasonable but, as declared in *Woods*, *Young* and *Fortheringham*, that evidence of intoxication is legally irrelevant in any case. The net effect is the same, of course, because it requires the jury to assess the accused's claim on the basis that he was sober.

The Law Commission concluded that *Jaggard* is overly broad because it would appear to admit evidence of intoxication in any case and is not limited by Majewski. It also concluded that *O'Grady* is overstated in denying evidence of intoxication relevance in any case as support for a mistaken belief in a matter of defence. It proposes to limit the admissibility of evidence of intoxication in support of justifications and excuses to those offences where the defence of intoxication would itself be available. Thus it would appear that intoxication could be adduced to support a justification or excuse raised against an offence in which knowledge or intent is an element. The requirement for reasonableness in such instances[73] will deny value to evidence of intoxication in most cases but not quite all. The jury must ask itself a counterfactual question, whether a person in the position of the accused could not have been mistaken if sober. If not, there is an end but if so evidence of intoxication might be relevant in determining whether he actually was mistaken.

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[68]*Morgan, supra*, note 56.
[69](1984), 78 Cr. App. R. 288.
[70][1987] Q.B. 995 (C.A.).
[71](1983), 78 Cr. App. R. 276.
[72][1988] A.C. 130 (P.C.) rev'g the Court of Appeal of Jamaica.
[73]Cl. 22.

III. Substance or Proof?

Of central importance to any assessment of *Leary*, *Majewski* and *Bernard* is whether the rule is one of substantive law or proof.[74] McIntyre J. claims that the rule in *Leary* is evidentiary. He emphasises at several points that it does not change the elements of the offence charged, including basic intent, and thus does not relieve the prosecution of the burden to provide basic intent beyond reasonable doubt. Such proof, he says, can be achieved in one of 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. ... 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 regarding the necessary blameworthy mental state of the accused by proving the fact of voluntary self-induced intoxication by drugs or alcohol.[75]

The first proposition is indeed common law, although were it not for the essential word "may" the second clause would conjure the spectre of *Jim Smith*. If sound, the second proposition is a dwarf *Smith*.[76]

On its face the second assertion appears to be self-contradictory. If the accused was in fact "so intoxicated as to raise doubt as to the voluntary nature of his conduct", proof beyond reasonable doubt of capacity (and *a fortiori* intent) would be impossible. No distinction is drawn between voluntariness and *mens rea*, which leaves open the inference that McIntyre J. equates voluntariness with basic intent. This is not only an echo of *Beard* itself but would seem to say that where there is doubt about capacity there can still be proof of intent to the required standard if there is proof of intoxication. This would weave the third proposition in *Beard* together with *Smith*, long discredited by the courts in Canada and by Parliament in England and Wales. McIntyre J. must be taken to mean that even in cases where evidence of intoxication could raise a doubt against capacity, proof of voluntary intoxication can supply proof of capacity and basic intent. Save for the reference to capacity, this was the position in *Majewski* but there it was explained as a rule of substantive law rather than proof: evidence of intoxication produced by the defence eliminates the requirement for proof of basic intent by eliminating intent as a necessary element of guilt and substituting voluntary intoxication for it. According to the gloss in *Majewski*, voluntary intoxication is not a means of proving intent but a blameworthy mental state that will suffice as an alternative to basic intent if and only if a contingency is met in the course of trial, that is if voluntary intoxication is

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[74]See Smith, "Intoxication and the Mental Element in Crime" in P. Wallington & R.M. Merkin, eds, *Essays in Memory of Professor F.H. Lawson* (London: Butterworths, 1986) 119.

[75]*Supra*, note 3 at 878-879.

[76]*D.P.P.* v. *Smith*, [1961] A.C. 290 (H.L.).

put in issue. The Lords could not have called this a rule of evidence without traversing section 8 of the *Criminal Justice Act 1967*[77] and returning to a travesty of the presumption of innocence not radically dissimilar from *Smith*.

Thus McIntyre J. misstates either *Leary* or *Majewski* by making two assertions that are irreconcilable. The first is that basic intent remains an essential element of the offence. The second is that the necessary blameworthy mental state can be proved by voluntary intoxication, which on his own terms presupposes that intoxication is not the same as intent. It is one thing to say that intoxication is consistent with intent but another to say that it is basic intent for the *actus reus* charged. His assumption is that evidence of intoxication simply does not preclude intent. He goes on to invest intoxication with added and artificial value by saying that it is not only consistent with intent but proof of it. This can only make sense if intoxication is intent. But this is alchemy unless proof of intoxication must always pass for proof of voluntariness and basic intent. McIntyre J. would succeed in describing the rule in *Leary* as a rule of evidence only if he characterised it as a mandatory presumption that compels proof beyond reasonable doubt of basic intent upon proof of voluntary intoxication. This view, of course, is consistent with *Smith* but patently inconsistent with the presumption of innocence because, for a cluster of discrete reasons, no such presumption can as a matter of law extinguish reasonable doubt.[78] It does violence to the autonomy of the trier of fact in considering the evidence. Second, it is an artifice in which the premise (intoxication) purports to vest the inference (intent) with artificial weight that could not be sustained in every case. Third, the proposed inference is open to attack on the basis that the premise cannot by itself compel the inference in any case because intoxication simply is not intent but at most a circumstance that might be relevant to intent, depending on the other evidence. For these reasons, and others, McIntyre J.'s characterisation of the rule in *Leary* entails a flat contradiction of *Woolmington* and the presumption of innocence by allowing conviction in the absence of proof of a necessary element. McIntyre J. does not address these objections.

Although McIntyre J. insists that *mens rea* is required, his analysis of the second mode of proof fails and leaves a rule of substantive law. He can only be taken to mean that the rule is one of substantive law. In response to the objection that the rule creates an offence of absolute liability because the prosecution need not prove basic intent, he does not repeat (as he would be expected to do for consistency with himself) that basic intent must be proved.

> Criminal offences, as a general rule, must have as one of their elements the requirement of a blameworthy mental state. The morally innocent ought not to be

[77](U.K.) 1967, c. 80.

[78]McIntyre J. has participated in several decisions to this effect. A recent example is *R.* v. *Whyte*, [1988] 2 S.C.R. 3, 51 D.L.R. (4th) 481.

> convicted. It is said that the *Leary* rule violates this fundamental premise. In my opinion, the *Leary* rule clearly does not offend this essential principle of criminal law, but rather upholds it. The *Leary* rule recognizes that accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control, leading to the commission of a crime, are not morally innocent, and indeed are criminally blameworthy.[79]

This makes sense if voluntary intoxication is substituted *ex cathedra* as an alternative to basic intent, and indeed that is precisely what McIntyre J. suggests when he says with reference to *Leary* and *Majewski* that "voluntary intoxication was a sufficient substitute for the fault element in crimes of general intent".[80] But it contradicts his earlier claims.[81] The substitution leads to the startling proposition that the elements of criminal liability can vary according to a contingent event, that the accused at his trial puts in evidence of voluntary intoxication. This is an arresting variation of the principle of legality, in two senses. First, judges are reluctant to add new content to the definition of crimes, especially statutory crimes.[82] Second, it is conventional that the necessary elements of liability in any offence are not contingent upon the production of evidence by the accused,[83] except in the limited sense that evidence of a justification or excuse (if adequate) must be negatived by proof beyond reasonable doubt (thus being a contingent element of the offence). Even if evidence were allowed to support a permissive inference of intent, it would be open to challenge on the basis that it is rationally insufficient. Voluntary intoxication, whether it be construed as getting drunk or being drunk, simply is not the same as intent. If it were, proof of intoxication would have to be synonymous with proof of basic intent in all cases and on evidence of either party.[84] McIntyre J. says that the moral culpability of voluntary intoxication precedes the *actus reus*. If so, it cannot prove the *mens rea* accompanying the *actus reus* beyond reasonable doubt; and it cannot satisfy the requirement for contemporaneity.[85] If voluntary intoxication is a mental state, it is a state that is relevant to some other *actus reus*. The liability for being 'morally guilty', or at least not morally innocent, lies either in getting intoxicated before committing the *actus reus* charged or being intoxicated while committing it.[86] The former is inconsistent with the requirement of contemporaneity, as is the latter if intoxication denies capacity. It might be noted that this

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[79]*Supra*, note 3 at 880.

[80]*Supra*, note 3 at 874.

[81]McIntyre J. himself describes the conclusion in *Majewski* and *Leary* as a rule of substantive law: "that voluntary intoxication was a sufficient substitute for the fault element in crimes of general intent", *supra*, note 3 at 874. See Smith & Hogan, *supra*, note 40 at 127.

[82]Contempt is the only common-law offence in Canadian criminal law.

[83]See G. Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965).

[84]And drunken intercourse, for example, would be *prima facie* rape (or sexual assault in Canada).

[85]Smith & Hogan, *supra*, note 40 at 209 ff.; Colvin, *supra*, note 25 at 266.

[86]Smith, *supra*, note 74 at 125.

notion of liability for intoxication is also the very reason given by McIntyre J. in his conclusion that the rule in *Leary* does not offend the *Charter*. Nowhere in his opinion does McIntyre J. refer to the doctrine of substitution advanced by Lamer J. in *Vaillancourt*. This is frankly astonishing because his statement of the law is entirely dependent on the notion that voluntary intoxication is the equivalent of basic intent; and thus it must be equally dependent on that doctrine.

The only plausible alternative to this fiction is a distinct offence of criminal intoxication, a notion that has had distinguished proponents in private writings and published reports.[87] The Butler Committee recommended an offence of dangerous intoxication[88] but that recommendation was rejected by the Criminal Law Revision Committee[89] and sustained by the Law Commission[90] on the basis that the proposed offence and punishment were unrelated to the criminal act charged. In the report of the *C.L.R.C.* Professors J.C. Smith and Glanville Williams dissented and recommended a special verdict that the act charged was committed while intoxicated, for which the accused would be liable to the same range of punishment as if he were convicted on the indictment as charged. The Law Reform Commission of Canada took up this minority proposal and, as noted previously, a majority of the Commission have retained it in their final report to Parliament. But for cases of homicide, this recommendation would appear to favour acquittal on the offence charged but liability for committing that same offence while intoxicated. Drunken theft is thus an alternative to theft and drunken rape to rape. It would not take a prosecutor long to think this through; nor would defence counsel linger over a challenge to the constitutional validity of such a rule. The alternative rests upon pure fiction: that the culpable commission of the *actus reus* is the equivalent of drunken but non-culpable commission of the same act. Even if the fiction were not so thoroughly distasteful, the utility of the proposed alternative must lie not in the construction of liability but the relevance of intoxication to disposition after conviction. The Commission does not specify whether intoxication should be taken as a mitigation of liability or as an aggravation that is equivalent to *mens rea*. If the former,

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[87]For example, G. Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens, 1961); A.J. Ashworth, "Reason, Logic and Criminal Liability" (1975) 91 L.Q.R. 102; A.J. Ashworth, "Intoxication and General Defences" [1980] Crim. L.R. 556; Fletcher, *supra*, note 17 at 850-852.

[88]U.K., Committee on Mentally Abnormal Offenders (Butler Report), Cmnd. 6244 (1975) at paras. 18.51 ff.

[89]U.K., Criminal Law Revision Committee, "Fourteenth Report, Offences Against the Person", Cmnd. 7844 (1980) at paras 257-279.

[90]Law Commission, *supra*, note 43 at paras 8.33-8.51. The *Draft Code* confirms the position taken in the report of the team of experts that was appointed by the Commission to prepare a tentative draft code: *Codification of the Criminal Law*, Law Comm. No. 143 (London: H.M.S.O., 1985), cl. 26 and commentary at paras 9.7-9.22.

it restates settled law; if the latter, it is not different in substance than *Leary* or *Majewski*.

Characterisation of the rule in *Leary* and *Majewski* as one of substantive law or evidence is also at the heart of the dissent by Chief Justice Dickson. He says that as a rule of substantive law it is inconsistent with section 7 of the *Charter*. That provision, which guarantees that any person shall not be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, has been interpreted as meaning *inter alia* that any penal offence for which imprisonment can be imposed must include a blameworthy mental element among its ingredients.[91] It has also been interpreted as meaning that the offence can include alternative or substituted mental elements provided that they are equivalent or at least commensurate *inter se* and proportional to the gravity or stigma of the offence and punishment.[92] On this view, Dickson C.J.C. says that the rule in *Leary* eliminates intent from the offence where there is sufficient evidence of voluntary intoxication. The equation of voluntary intoxication with basic intent not only compounds the nonsense of the supposed distinction with specific intent but it amounts to an elimination of intent from the offence.[93] As this exposes the accused to conviction and punishment in the absence of a blameworthy mental state, it offends section 7 and cannot be saved by the notion of substitution.

To be precise, then, the inconsistency with section 7 is that there is no element of fault. But it is a conclusion that is also wholly incompatible with the Chief Justice's second constitutional proposition, that the rule in *Leary* violates the presumption of innocence. The essence of this objection is that, if proof of voluntary intoxication compels proof of basic intent, it operates as a mandatory presumption to compel conviction where there will often be reasonable doubt. This conclusion is tenable if and only if basic intent remains an essential element of the offence, yet the previous objection to the rule under section 7 is that this element does not exist when the rule comes into play. The inconsistency of the rule with the presumption of innocence exists where the substantive law requires proof of fault and the presumption provides no more than a fiction of proof.

The two constitutional claims advanced by Dickson C.J.C. are both concerned with the proposition that proof of intoxication can be proof of intent. As a rule of substantive law, this can only mean that in cases where there is evidence of intoxication adduced by the defence proof of it will suffice as an alternative to proof of intent. To state the rule in *Leary* as a rule of substantive law would

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[91]*Reference re Section 94(2) Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

[92]*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399.

[93]Smith, *supra*, note 74; Smith & Hogan, *supra*, note 40 at 211-212; A.D. Gold, "An Untrimmed Beard: The Law of Intoxication as a Defence to a Criminal Charge" (1977) 19 Crim. L.Q. 34.

require a rule of law, legislative or judicial, in the following form: "In any offence requiring proof of *actus reus* and *mens rea*, proof of X or Y will suffice as proof of *mens rea*." As a rule of proof, it can only mean that intoxication not only supports the inference of intent but compels it in cases where proof of intent is a necessary condition of conviction. To state the rule in *Leary* as a presumption would require a rule of law in the following form: "In any offence requiring proof of *actus reus* and *mens rea*, in which X is the element of *mens rea*, proof of Y will suffice as a premise to support or compel proof of X." A mandatory presumption of this kind is open to objection on several grounds, not the least of which is that the trier of fact is compelled by a rule of law to find an essential element proved, despite manifest possibility of reasonable doubt. These two hypothetical statements are irreconcilable. In the first X or Y are alternative elements, each sufficient and at least one of them necessary for conviction. In the second, X is the only mental element and the rule merely gives recognition to a particular indirect means of proving X. In the result, the defect of the rule in *Leary* can only lie in one or the other of the two objections advanced by the Chief Justice. One presupposes that an element of fault is absent while the other presupposes that it is present.

It is a fallacy that rules of substantive law can entail a violation of the presumption of innocence in the sense of the requirement for proof of guilt beyond reasonable doubt. In *Vaillancourt*[94] the Supreme Court of Canada declared the felony-murder rule in section 213(d) unconstitutional for two reasons. The first was that the provision violated the principles of fundamental justice by exposing the accused to conviction and punishment for murder in the absence of any mental element that bears directly on homicide. The second reason was that as a consequence of the violation of section 7 there was also a violation of the presumption of innocence because the prosecution could secure a conviction for murder without proof of that mental element. The Court did not say that the offence created a presumption by which proof of the underlying offence allowed an inference of the ingredients of murder, and indeed that is plainly not the nature or effect of the provision. The fallacy, therefore, is that if the constitutional deficiency of the felony-murder offence is that it lacks an element, the prosecution can scarcely be accused of violating the presumption of innocence by failing to prove an element that does not exist.

There can be no analysis of the presumption of innocence without prior analysis and ascertainment of the elements of an offence. The requirement for proof of guilt beyond reasonable doubt, which is the core of the presumption of innocence, cannot be met in any case without first knowing what guilt is. There can only be a violation of the presumption of innocence if some legislative or judicial rule could allow a conviction without proof beyond reasonable doubt of all

[94]*Supra*, note 92.

the elements on the basis of particular evidence of facts adduced and admitted for consideration by the trier of fact. In this sense the definition of guilt under the substantive law will certainly affect the presumption of innocence but the converse is not true. As a rule of law, the presumption of innocence cannot define guilt; nor does it define the adjectival rules of valid procedure and evidence for proof of guilt, apart from the constituent features of the requirement for proof beyond reasonable doubt. The presumption of innocence can inform decisions about the content of the substantive and adjectival law but as some kind of reason that is not a rule. One might say that it offends my sense of criminal justice if a person could be convicted in the absence of proof of X. But the decision that X is an element is not legally compelled by the requirement for proof of X or, therefore, by the presumption of innocence. To say that it is compelled by the presumption of innocence is to say that the presumption of innocence means something in substantive law that is distinguishable from the requirement for proof of guilt beyond reasonable doubt. It would define innocence as the absence of fault and the presumption of innocence as a constitutional guarantee of freedom from conviction and punishment unless a minimal element of fault is found in the definition of the offence and later proved. That is possible but it is apt to produce confusion.

The conflation of substantive law and the presumption of innocence is also apparent in the opinion of Wilson J. in *Bernard*. She adverts to the proposition adopted by McIntyre J., and attacked by Dickson C.J.C., that proof of voluntary intoxication can be proof of basic intent. Wilson J. doubts that this proposition had been incorporated into Canadian law in previous decisions of the Supreme Court. She says that the validity of this assertion need not be decided but she presses on, noting twice that her view on the matter is tentative. She does not undertake to characterise the proposition as a rule of substantive law or as a presumption but concludes, in brief, that a rule to the effect that voluntary intoxication is a substituted element for basic intent would violate the presumption of innocence. This cannot work. A substitution of alternative elements is a phenomenon of the substantive law only. It cannot be said that the presence of an alternative in the definition of the offence violates the requirement for proof of guilt because the substantive law says that proof of guilt can be made by proof of either alternative. It is possible to say that the alternatives are unacceptable but that is not a reference to the requirement for proof of guilt. There could be a violation of the presumption of innocence if proof of voluntary intoxication were sufficient for proof of basic intent because it would allow for a claim of proof on the essential element of intent by a fiction that is not proof. A claim that there has been a violation of the presumption of innocence is inconsistent with a claim that there is a substituted element.

Conclusion

Five of the seven judges who participated in *Bernard* concluded their opinions by saying that, whatever the correct statement of law might be, the appeal should be dismissed on the proviso. The evidence of intoxication was conspicuously slight. Taken at its highest, it is difficult indeed to see how it could support a reasonable doubt and it is inconceivable that an error committed in relation to such slender evidence could suffice to avoid dismissal of the appeal, even allowing that in Canada an appellate court can order a new trial on a successful appeal by the accused. The tricky question is whether reliance on the proviso by these five judges of the Supreme Court is properly regarded as the ratio of their judgment. If so, *Majewski*, *Leary* and *Bernard* are all up for reconsideration by the Supreme Court because all of the opinions supporting dismissal in *Bernard* are *obiter*.