

Intoxication

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Objectives of Reform:

Reform of the criminal law should be guided by several concerns: (1) the criminal law should reflect society's values and beliefs regarding criminal liability; (2) the law should be logically consistent with its underlying principles; (3) and lastly, criminal law should be designed to deter harmful behaviour. Reform of the law of intoxication should follow these same principles.

First, most of the Canadian public believe that individuals should be free to consume legally available intoxicating substances. The consumption of such substances is a part of Canadian culture. Although society is tolerant of the use of such substances, it does not extend its tolerance to intoxicated individuals who commit harmful acts. Most people feel strongly that such individuals should be subject to criminal punishment. It must be noted that although the author could find no reported studies specifically on Canadian attitudes on intoxication and criminal liability, most discussions of law reform in this area appear to proceed on the assumption that Canadians are opposed to allowing any defence to a criminal offence which is based on evidence of voluntary intoxication. Therefore, for the purpose of this policy analysis, it is assumed that Canadians are opposed to allowing any defence to a criminal offence which is based on evidence of voluntary intoxication. In many respects then, becoming intoxicated to such a degree that one consciously or unconsciously creates harm is viewed as morally blameworthy. A new law of voluntary intoxication should reflect this view.

Secondly, there are two important underlying principles of Canadian law; first, there should be no criminal liability without intent and, second, that a subjective standard should be used to determine whether an accused possessed the necessary intent. The present law with respect to evidence of voluntary intoxication has been criticized on the basis that it is not consistent with these principles.

Lastly, it goes without saying that criminal law can have an important deterrent effect on undesirable behaviour. The criminal law should, to the furthest extent possible, identify and respond to undesirable behaviour.

Current Law:

The defence of intoxication does not exist at common law or in the *Criminal Code*. A true defence arises only when the accused is shown to have had the *mens rea* and to have committed the *actus reus* for an offence but asserts that because of some other factor, he has a

defence that entitled him to an acquittal.⁶⁹ Evidence of intoxication by itself or with other evidence can only cast doubt upon whether the requisite *mens rea* or *actus reus* for an offence existed. The present law categorizes criminal offences as specific and general intent offences for the purposes of determining the relevancy of evidence of voluntary intoxication. Evidence of voluntary intoxication which is less than the degree of rendering someone in a state akin to automatism or insanity is considered irrelevant to determining the *mens rea* of general intent offences. Conversely, for specific intent offences, evidence of intoxication is relevant to establishing the *mens rea*.

There are three significant problems with the present state of the law. Firstly, the distinction between general and specific intent offences is unclear and difficult to apply. Secondly, the exclusion of evidence of voluntary intoxication results in a departure from a subjective approach to *mens rea*. Thirdly, there is an unjust disparity in treatment of an accused who is in a state akin to automatism in comparison to that of an accused who is impaired to a lesser degree.

Intoxication and Criminal Liability:

An understanding of the relationship of intoxication to crime and criminal liability is relevant to the decision on policy. This can be gained from considering evidence from jurisdictions which have different laws with respect to evidence of voluntary intoxication and from different disciplines which study how intoxication effects behaviour. It is also useful to speculate about the possible effects of any particular policy.

(1) The experience in other jurisdictions

Australian law considers evidence of intoxication relevant to determining whether an accused possessed the *mens rea* and *actus reus* for an offence. Studies on the effect of this policy indicate how rarely evidence of intoxication will function to negate the *mens rea* of an offence. Very few acquittals have occurred and in those cases where acquittals have occurred the intoxication was very extreme.⁷⁰ In a study by Judge G. Smith⁷¹ which was based on a sample of 510 trials, it was found that in only eleven cases was the defence of intoxication raised where it had previously been unavailable. Only three of these eleven cases resulted in acquittals. Only one acquittal could be characterized as being attributable to evidence of intoxication.

⁶⁹ A.W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworth & Co. Canada Ltd, 1985) at 194.

⁷⁰ Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication* (November 1986).

⁷¹ "Footnote to O'Connor's Case" (1981), 5 *Crim.L.J.* 270

In some countries which have moved to policy which allows evidence of intoxication to be relevant to all offences, law reform initiatives have focused on limiting the relevance of evidence of intoxication. This is probably indicative of the fact that the public's attitudes in these countries favour a legal system which does not provide for a defence based on evidence of intoxication. It is interesting that despite the fact that the policy in Australia has resulted in few acquittals, the Review Committee in its Draft Commonwealth Code proposed a return to the English system of categorizing offences to determine the relevance of evidence of intoxication.⁷² The South African Law Reform Commission recommended that there be an offence of criminal intoxication. This recommendation was made in response to the court's rejection of the specific-general intent distinction.⁷³

(II) The relationship between intoxication and crime

There has been much research into the relationship between the use of intoxicating substances and crime. Often it is assumed that the use of illegal intoxicating substances causes criminal behaviour. This is probably due to the fact that media presentations of crime focus on its relationship to the use of illegal drugs.⁷⁴ There is no clear evidence to support this hypothesis.⁷⁵

Many people do commit crimes while intoxicated with legal substances such as alcohol as well as illegal substances. There is some evidence of a relationship between violence and alcohol.⁷⁶ Studies have also shown that victims of violence are also often under the influence of intoxicating substances.⁷⁷ While there may be a correlation between the occurrence of violence and use of alcohol, many social scientists are reluctant to conclude that the use of alcohol causes violence.

Different types of intoxicating substances affect people in different ways. Some substances are depressants; some are stimulants. They may produce changes in people's personalities that may result in a greater predisposition to engage in harmful activities. For instance, alcohol intoxication may result in a relaxation of inhibitions in such a way as to increase an

⁷² I. Leader-Elliott, "Voluntariness, Intoxication and Fault" (1991) 15 *Crim.L.J.* 112 at 112.

⁷³ South African Law Commission, Offences Committed under the Influence of Liquor or Drugs (January, 1986).

⁷⁴ Anton R.F. Schweighofer, "The Canadian Temperance Movement: Contemporary Parallels" (1988) 3 *Canadian Journal of Law and Society* 175 at 178.

⁷⁵ P. Bucknell & H. Ghodse, The Criminal Law Library-No.2: Misuse of Drugs (London: Waterlow Publishers Limited, 1986) at 29. The LeDain Commission in Canada reported that there was little evidence in Canada to indicate that cannabis use was associated with crime. See A Report of the Commission of Inquiry into the Non-Medical Use of Drugs (Ottawa: Information Canada, 1972) at 273.

⁷⁶ See studies by Wolfgang, Voss and Heburn, McClintock and Radzinowicz as cited in D. Farrier, Drugs and Intoxication (London: Sweet & Maxwell, 1980) at 46.

⁷⁷ *Ibid.* at 48.

individual's likelihood to engage in violent activities. However, often such intoxicating substances do not effect an individual's capacity to form the intent to do an activity but simply alter the person in such a manner as to make them more predisposed to make particular decisions or engage in particular behaviours which result in harm.

(III) Acquittals and Evidence of Intoxication

Even the strongest proponents of a policy which allows evidence of intoxication to be relevant to the determination of the existence of *mens rea* and *actus reus* for all offences recognize that such an approach may result in acquittals which are unacceptable to the public. For instance, the defence of mistake coupled with evidence of intoxication in the context of sexual assault may lead to greater acquittals.⁷⁸ Another example of an unacceptable acquittal would occur when an individual becomes so intoxicated that he or she is not aware of his or her actions. Such a policy would fail to deter individuals from becoming so intoxicated that they may commit a harmful act.

Law Reform Commission Proposals:

The Law Reform Commission of Canada has proposed a special category of liability to deal with the voluntarily intoxicated accused.

3(3) Intoxication.

(a) General Rule. No one is liable for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.

(b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2) and 3(3)(a), unless the intoxication is due to fraud, duress, compulsion or reasonable mistake,

(i) everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of causing death, for committing that crime while intoxicated; and

(ii) everyone falling under clause 3(3)(a) who causes the death of another is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.⁷⁹

⁷⁸ The proposed reform of the Criminal Code with respect to sexual assault may eliminate a defence of mistake based on a honest belief that consent was given.

⁷⁹ *Supra*, note 20 at 30.

These provisions present a policy which is consistent with the interests and perspective of the Canadian public. The public is opposed to the idea that the introduction of evidence of intoxication may result in an individual escaping punishment for his or her harmful actions. This policy reflects this concern by creating a category of liability which specifically targets the voluntarily intoxicated accused who may otherwise escape liability. The liability of the accused is based upon the act of becoming voluntarily intoxicated and committing a criminal offence.

Such a policy would deter individuals from engaging in such behaviour more effectively than other policy alternatives because the act of becoming intoxicated is identified as a basis for finding criminal liability. Effective deterrence is only achieved if the behaviour to be deterred is identified sufficiently. In the case of the use of intoxicants, it is in society's interest to deter individuals from becoming intoxicated to the degree that they may be more predisposed to commit harmful acts. While it must be recognized that criminal law is limited in its ability to deter behaviour,⁸⁰ the law has an important symbolic function in explicitly identifying negative behaviour.

This policy is, to some extent, inconsistent with the underlying principle that there be no criminal liability without demonstrating criminal intent, but most of the policy choices in this area represent some departure from a subjective *mens rea* standard. The Law Reform Commission provisions make evidence of intoxication relevant to determining the *mens rea* and *actus reus* of all offences; however, by creating a different category of liability, the policy departs from a subjective intent standard. It provides for liability even if the accused did not possess the necessary *mens rea* for an offence because of his or her intoxication. It is, however, consistent with the interests of deterrence and other social values. Moreover, the departure from a subjective standard is preferable to other policy solutions because it explicitly identifies the basis for the departure. Other policies try to maintain the appearance of consistency with the subjective standard by equating the act of becoming intoxicated with particular levels of intent or by arbitrarily determining for some offences that evidence of intoxication is irrelevant.

In comparison to the various alternative directions for policy, the Canadian Law Reform Commission's recommendation is the most consistent with the policy objectives of criminal law reform. Although the provisions represent a departure from the subjective standard of criminal liability, it would affect very few accused. Most individuals would not receive an acquittal because evidence of intoxication was relevant to the determination of their liability. These provisions capture the few individuals who would escape criminal liability because of the admittance of such evidence. This accords with the public's view of intoxication and with society's interest in deterring harmful behaviours. It is, therefore, recommended that Canada adopt the provisions recommended by the majority of the Canadian Law Reform Commission.

⁸⁰ Deterrence Theory is based on the assumptions that people are rational and that crime is the result of an individual assessing the costs and benefits of a particular actions. In the case of many criminal activities, it is questionable whether these assumptions are correct. Therefore, the deterrent value of law with respect to some offences is questionable. For a good discussion of deterrence theory, see Allen E. Liska *Perspectives on Deviance* (Englewood:Prentice-Hall, Inc., 1981) at 94.