

---

# Mulligan v. The Queen

Graham Parker

*Osgoode Hall Law School of York University*

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Commentary

---

## Citation Information

Parker, Graham. "Mulligan v. The Queen." *Osgoode Hall Law Journal* 15.2 (1977) : 427-435.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol15/iss2/8>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

## *Mulligan v. The Queen*

By GRAHAM PARKER\*

The Supreme Court of Canada has recently been invited to examine the relationship between the insanity defence under section 16 of the *Criminal Code* and the partial defence of intoxication which is still governed by the common law. The law relating to the latter role is still dominated by the House of Lords in *D.P.P. v. Beard* although the tests laid down in that case have recently been subjected to scrutiny.

The Supreme Court of Canada was invited to take a broad approach to the problems of defining criminal responsibility and the ways in which *mens rea* could be negated by irresponsibility. The Court refused to accept the invitation and the psychiatric evidence was treated rather narrowly.

The accused was charged with the murder of his wife to whom he had been married one week. In the hours before the stabbing of his wife, Mulligan had consumed "a substantial amount of beer and some whiskey." Mulligan told the police that he did not mean to kill his wife but had gone berserk when she attempted to induce a miscarriage with a wire coat-hanger. There was some weak evidence to support this story: an untwisted coat hanger was found but Mrs. Mulligan was not in fact pregnant and there was no damage to her vagina or uterus.

The defences and partial defences raised were intoxication, insanity, and provocation. The only evidence given at the trial was that of a psychiatrist. This evidence was flimsy as the psychiatrist, Dr. Butler, had only interviewed Mulligan once for ninety minutes, six months after the killing.

Dr. Butler testified that, at the time of the killing, the accused was "in a dissociated state of reaction" which arose from "particular stresses in a certain environment" and, in particular, "a gross personality disorganization" and "acute breakdown" resulting from the wife's threatened abortion. Dr. Butler was of the opinion that the accused had a defence under section 16 of the *Criminal Code*. Mulligan, in the doctor's view, was "unable to appreciate the nature and consequences of his actions in the sense of being 'sensitively' aware of the nature and consequences of his actions." This dissociative state was caused by "a combination of psychological stress and alcohol."<sup>1</sup>

The jury convicted Mulligan of murder. The Ontario Court of Appeal in a unanimous decision, and the Supreme Court of Canada, by a 6 to 3 majority, dismissed his appeals against conviction. The major concern of this paper is the psychiatric evidence in relation to the partial defence of intoxication. This was also the sole question addressed by the Supreme Court of

---

© Copyright, 1977, Graham Parker.

\* Professor of Law, Osgoode Hall Law School of York University.

<sup>1</sup> (1976), 28 C.C.C. (2d) 266 at 269.

Canada. There was no complaint about the way in which the trial judge directed the jury on the insanity defence.

The issues raised in the Ontario Court of Appeal were:

1. That the learned trial Judge erred in failing to relate the evidence with respect to the appellant's mental state, apart altogether from the defences of insanity, provocation and intoxication, to the issue of the existence of the intent necessary to constitute murder.
2. That the learned trial Judge erred in instructing the jury that a sane person is deemed to intend the natural consequences of his act.
3. That the learned trial Judge erred in failing to direct the jury that if at the end of the whole case they were left in a state of reasonable doubt as to whether the offence proved was murder or manslaughter, that the jury should convict of manslaughter only.<sup>2</sup>

Speaking for the Court of Appeal, Martin J.A. stated:

The jury in finding the accused guilty of murder must necessarily have rejected the defence of intoxication. The jury in rejecting the defence of intoxication must have been satisfied beyond a reasonable doubt that the combination of emotional stress and the consumption of alcohol did not render the accused incapable of having the necessary intent.<sup>3</sup>

In addition, the Ontario appellate court found that the defence of non-insane automatism was not a possibility because the only causes of mental irresponsibility were disease of the mind or intoxication. On the second ground of appeal Martin J.A. decided that the trial judge had been in error because a jury should not be told that a sane person is "deemed" to intend the natural consequences of his act. However, the court decided that no substantial miscarriage of justice had occurred:

... the jury, having rejected the defences of insanity and intoxication, could not reasonably have failed to draw the inference that the accused intended to kill the deceased or to cause her bodily harm likely to cause death, being reckless whether or not death ensued and... a reasonable jury, properly instructed, ... would inevitably have reached a verdict of murder.<sup>4</sup>

The Court of Appeal also rejected the third ground, although in their view the jury direction was not free from mistakes.

The issues were reduced before the Supreme Court of Canada which granted leave to appeal on the question of whether the trial judge "as a matter of law, should, when dealing with the issue of drunkenness, have put to the jury the medical evidence of Dr. Butler respecting the dissociative state of mind..."<sup>5</sup> Martland J., for the majority, decided that the trial judge was under no obligation "to instruct the jury specifically to consider again, when dealing with the defence of drunkenness, Dr. Butler's evidence concerning dissociative reaction."<sup>6</sup>

---

<sup>2</sup> (1974), 18 C.C.C. (2d) 270 at 274.

<sup>3</sup> *Id.* at 276.

<sup>4</sup> *Id.* at 278-79.

<sup>5</sup> *Supra*, note 1 at 270.

<sup>6</sup> *Id.* at 272.

Dr. Butler had been questioned by the trial judge on the question of intoxication:

Q. Then let me ask you this. From the evidence that has been recounted to you by Mr. Kielb and Mr. McMurtry and from what you have been told by the accused, is it your view that the accused was intoxicated from the consumption of alcoholic beverage to such a degree that he was incapable of forming the intent at that time, forgetting about the dissociative state?

A. No, I don't think so. He had been functioning fairly well up to the point where he was faced with this emotional crisis. He apparently functioned fairly well after that. I have seen people playing the piano when they were drunk who would pass out and stay put for a few minutes and then continue on. They would have no memory for the time they had passed out and there was nothing else involved.

Q. Like a man who drives a car home, puts it in the garage, closes the door and has no recollection of doing it?

A. That is right.

Q. Then from your analysis and opinion, the accused was not intoxicated, that he was capable of forming the intent to kill as a result of the consumption of alcohol? You say it is this dissociative state?

A. I think it is a combination of the two.

Q. If one leaves aside the dissociative situation, you say he was intoxicated?

A. Yes, I think he was intoxicated.<sup>7</sup>

At another point, the doctor had said that alcohol had been a factor in the dissociative reaction but not a major one.

In a rather simplistic explanation of Dr. Butler's evidence, Martland J. noted the doctor's testimony that the dissociative reaction began at the time of, or immediately prior to, the offence. Justice Martland commented:

This is not, therefore, a case in which, because of a pre-existing condition, the appellant was more likely to become incapable as a result of consuming alcohol. If that had been the case, Dr. Butler's evidence would have significance in relation to the defence of drunkenness.<sup>8</sup>

This statement suggests that the accused was perfectly sane until 2:30 a.m. on November 11, 1972 and then became insane as the result of the behaviour of the victim. Perhaps the psychiatrist's evidence lent itself to that interpretation but surely that is not what Dr. Butler had in mind. On the insanity defence, which admittedly was rejected by the jury, the seeds of Mulligan's disorder were built into his psychological or physiological makeup and were raised from dormancy by the events of November 11. What pre-existing condition did Martland J. have in mind?

If the insanity defence, which was not before the Supreme Court of Canada, is ignored, there is a very different treatment of the facts and issues by the dissenting Spence J. Dr. Butler had referred to Mulligan's addiction to "speed" and his addiction to alcohol at the age of sixteen. Finally, the psychiatrist had stated that "some alcoholics become disturbed or deranged on a relatively small amount of alcohol."

---

<sup>7</sup> *Supra*, note 2 at 273.

<sup>8</sup> *Supra*, note 1 at 271.

Spence J. made a very thorough survey of the doctor's evidence and of the trial judge's very long jury summation. He quoted at length from the psychiatric evidence. Admittedly, there were some inconsistencies.<sup>9</sup> But the confusion may be more apparent than real. The psychiatrist said that the accused was drunk but under the *D.P.P. v. Beard* rule, perhaps he meant that the accused was not *so* drunk as to be incapable of forming the intent to commit the crime. Yet with the combination of intoxication and insanity, the expert witness was able to say that he could not form the necessary intent and this is the very issue which split the court.

The defence lawyer had submitted to the trial judge that the consumption of alcohol was only one element which the jury should consider in deciding whether the accused had the necessary intent. In addition, he argued that the external stress should be taken into account. Spence J. agreed that the jury was misdirected if they thought that they "could come to the conclusion that they should arrive at their decision by reference to only part of that evidence and exclude other evidence."<sup>10</sup>

Dickson J. agreed, and in a supplementary dissenting judgment, added some important comments. His remarks showed an inclination to examine the broader issues. The narrower rule to be extracted from this dissenting judgment would be that the trial judge should direct a jury on a subjective test for the intoxication defence which would take into account the effect of the alcohol "upon the particular accused, at the particular time, and in his then mental state."<sup>11</sup> Dickson J. has a very simple and straightforward explanation for this approach; that the mental condition of the accused is a relevant consideration because it affects capacity to form an intention.

On a broader basis, Dickson J. looked at intent and quite rightly pointed out that the evidence of drunkenness must be related to the accused's mental state:

A rigid categorization of defences, keeping medical evidence of insanity entirely separate from evidence of drunkenness is not only unrealistic but a departure from all that is embraced in the phrase *mens rea*.<sup>12</sup>

This approach, which unfortunately is in dissent, is to be applauded. The dissent refuses to place defences, and the evidence, in watertight compartments. It is reminiscent of a statement in *D.P.P. v. Beard*<sup>13</sup> by Lord Birkenhead L.C. which has been frequently considered by assiduous students of that case to be the true ratio of the decision. Lord Birkenhead said:

It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally, . . . a person cannot be convicted of a crime unless the *mens* was *rea*.<sup>14</sup>

---

<sup>9</sup> See quotation cited *supra*, note 7.

<sup>10</sup> *Supra*, note 1 at 277.

<sup>11</sup> *Id.* at 278.

<sup>12</sup> *Id.*

<sup>13</sup> [1920] A.C. 479.

<sup>14</sup> *Id.* at 504.

This suggests that if that troublesome term "specific intent" has any meaning, it refers to subjective *mens rea* which can be negated by intoxication. By extension of the remarks of the dissenters in *Mulligan*, this "specific *mens rea* can also be negated by a combination of intoxication and other factors affecting the mental state."

The highest court in Canada should be encouraged to develop legal principles of criminal law for this country. Particularly when the *Criminal Code* is silent, as it is with respect to the defence of intoxication, students of the criminal law, and the lower courts, would appreciate some exposition on such basic issues as *mens rea* and the defence and partial defences which negate or affect the mental element in crime.

Unfortunately, appointees to the Supreme Court of Canada are seldom lawyers who have specialized in criminal law or who have had a wide experience with this branch of the law at the trial level. The judgments tend to reflect this lack of expertise. Too often the majority judgments in the Supreme Court seem to be exercises in the re-examination of the evidence with the judges impliedly saying that they would have probably convicted the accused and leaving it at that. The substantive criminal law is given very little attention by the Court. There is little discussion of *mens rea*. Dickson J. is quite correct in his criticism that the majority judgment has created or perpetuated watertight compartments for *mens rea* which are contrary to good sense and also show lack of regard for extra-legal data which explain the workings of the human mind or the behavioural motivations of the accused.

The Supreme Court missed an excellent opportunity to revise the defence of intoxication and in particular the second rule in *D.P.P. v. Beard* which introduced the "specific intent" notion. No one seems to know the meaning of that term and it has been under attack in recent years. The Canadian courts are in disagreement as to its scope. In *R. v. George*,<sup>15</sup> Fauteux J. tried to explain the meaning of specific intent by distinguishing between an "intention as applied to acts considered in relation to their purpose" and an "intention as applied to acts considered apart from their purposes."<sup>16</sup> This may be a convenient rule for purposes of judicial discretion but it makes no sense in terms of legal logic. If the partial defence of intoxication is merely a mitigation, then this should be clearly stated, and meaningless formulae should be dispensed with. This confusion is most clearly seen in the disagreement in Canadian courts on the issue of whether intoxication can be a partial defence to the crime of rape.<sup>17</sup> This seems to be a crime which has a very obvious secondary purpose, to use Fauteux J.'s classification. The Ontario courts agree but the British Columbia courts will not admit a partial defence of intoxication in such circumstances.

---

<sup>15</sup> [1960] S.C.R. 871; (1960), 128 C.C.C. 289.

<sup>16</sup> *Id.* at 877.

<sup>17</sup> *Cf. Regina v. Vandervoort* (1961), 34 C.R. (Ont. C.A.) 380. *Regina v. Boucher* (1962), 39 C.R. 242 (B.C.C.A.) and *Regina v. Leary* (1976), 26 C.C.C. (2d) 522 (B.C.C.A.) which follows *Boucher* and decided that the principle in *D.P.P. v. Morgan*, [1976] A.C. 182 (H.L.) has not changed the law.

The *Beard* case was an unfortunate case on which to construct a rule because the House of Lords may well have decided on a very narrow *ratio decidendi* that intoxication will only rarely apply to a felony-murder situation. The same attitude is echoed by Fauteux J. in *George* when he says that "short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved."<sup>18</sup>

The House of Lords has recently examined it in *Majewski*<sup>19</sup> on the defence of intoxication itself, and has admitted that the defence is a compromise, a judge-made fiction, illogical and a sham, but declined to overturn the *Beard* rule because that was the job of the legislature. There are *dicta* in the *Majewski* judgments which recognise that very drunk persons who commit violent acts are dangerous and that society may need protection from such persons. Therefore their acquittal, because their *mens* was not *rea*, may not be an appropriate response and a category of "drunk and dangerous" offender should perhaps be created. Under the *Beard* rule, the easier but illogical route has been taken that manslaughter is not an offence of specific intent and therefore intoxication is an inappropriate defence. This has most recently been raised in the English case of *R. v. Lipman*,<sup>20</sup> which has been criticized as another illogical decision in this area of the law.<sup>21</sup>

Earlier reference has been made to the quality of judgment-writing in the Supreme Court of Canada which too often shows, at most, a review of the facts. This is certainly true of the majority judgment of Martland J. which does not quote a single case. At the very least, one would have thought that the Supreme Court might have referred to its own recent decision in *Perrault v. The Queen*<sup>22</sup> in which a judge well-versed in criminal law, Fauteux C.J., had examined a similar problem, the interrelationship of drunkenness and provocation. In addition, Fauteux C.J. had examined the important British decision of *Attorney-General for Northern Ireland v. Gallagher*<sup>23</sup> which discussed the more general issue of the relationship, if any, between intoxication and insanity. Not even the dissents in *Mulligan* cite these two decisions.

The majority in *Perrault* followed Lord Denning in *Gallagher* to the extent that the defence of provocation must be based on the objective test of the reasonable person. Fauteux C.J. decided that when the accused failed on both tests individually he could not combine them for a successful defence. (The accused was acquitted by an Alberta judge sitting without a jury and the Crown successfully appealed the acquittal.) Indeed, the two partial defences cancelled each other out; if only a reasonable person can claim provocation, then that does not include an intoxicated accused. If a person

---

<sup>18</sup> *Supra*, note 15 at 879 (S.C.R.).

<sup>19</sup> [1976] 2 W.L.R. 623 (H.L.).

<sup>20</sup> [1970] 1 Q.B. 152 (C.A.).

<sup>21</sup> See Glazebrook, 85 L.Q.R. 28 at 45 as quoted by English in [1970] Crim. L.R. 15 at 22.

<sup>22</sup> [1971] S.C.R. 196 (S.C.C.).

<sup>23</sup> [1963] A.C. 349 (H.L.).

simply becomes provoked because he gives way to a passion because he is intoxicated, then that can not be a defence.

The minority took a different approach. First, Laskin J. was critical of the appeal court for substituting a verdict of its own. Secondly, he was of the opinion, impliedly shared by Dickson J. in *Mulligan*, that it was wrong to confuse "the effect of drunkenness on the capacity to form the requisite intent with the question whether there was such intent in fact."<sup>24</sup> This statement is not meant to make any incursion on the defences of provocation or drunkenness but is simply saying that the trial judge must be satisfied that intent exists. In Laskin J.'s opinion, the trial judge had not properly addressed himself to this issue. This view of the dissenting justice reiterates the *mens rea* must be *rea* argument and follows the traditional view that all the elements of the offence must be proved.

This opinion was shared by the English Court of Appeal in *Sheehan*,<sup>25</sup> a murder case. The conviction was quashed. While the appeal court agreed that a drunken intent was still an intent, the following general principle was added:

[T]he jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inference as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.<sup>26</sup>

In succinct form, the views of the court in *Sheehan*, and of the dissenting judges in *Mulligan* and *Perrault* suggest that the principle in *Woolmington v. D.P.P.*<sup>27</sup> is more important than the second rule in *Beard v. D.P.P.* There are also indications in a recent Manitoba case that at least one judge was concerned about the narrow *Beard-Perrault* rule. O'Sullivan J.A. stated the following:

... the question is not whether the accused had the capacity to form the intent but whether he in fact formed the intent or had the fore-sight, which the definition of the crime requires... It would be a very remarkable thing if the law required proof of an actual intention, or actual foresight in the case of a sober man, but dispensed with that requirement as soon as there was evidence that he had taken drink. A defence that the accused did not intend or foresee the consequences of his conduct, which would be quite incredible if he were sober, may be readily credible if he was drunk.<sup>28</sup>

The cases which have been examined may not seem germane to the peculiar facts of *Mulligan*, because none of them involves the issue of insanity. Certainly *Attorney General of Northern Ireland v. Gallagher* is a case which cannot be ignored although it is hoped that it will not be followed in Canada. That case is in error because it does not look at the large issue of *mens rea* and takes the compartmentalized view which Dickson J. found unsatisfactory.

---

<sup>24</sup> *Supra*, note 22 at 207.

<sup>25</sup> [1975] 1 W.L.R. 739.

<sup>26</sup> *Id.* at 744.

<sup>27</sup> [1935] A.C. 462.

<sup>28</sup> Commentary in [1975] Crim. L.R., 340 cited in *Regina v. Ducharme* (1976), 28 C.C.C. (2d) 478 at 479 (Man. C.A.).

It can be distinguished because Lord Denning found that Gallagher was not suffering from a disease of the mind brought on by drink. In *Mulligan*, the expert evidence showed that the drink was a contributing factor.

*Gallagher* can be attacked on a broader basis than arguments about the evidence. Lord Denning was wrong in equating what he calls "the Dutch courage" rule from *Beard* (drinking to give oneself courage to do the killing) with psychopathy induced by drinking. The following shows the superficial approach of Lord Denning, as well as the moralistic stance which he often adopts in criminal cases:

The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do. A psychopath who goes out intending to kill, knowing it is wrong, and does kill, cannot escape the consequences by making himself drunk before doing it.<sup>29</sup>

This shows compartmentalizing of the human mind at its very worst. The Supreme Court of Canada goes one step further: the majority in *Mulligan* manages to arrive at somewhat the same conclusion without even discussing the law. The facts are enough for them.

#### *Addendum*

The Supreme Court of Canada has given some further thought to the problem of intoxication as a partial defence to a criminal charge. In *Leary v. The Queen*,<sup>30</sup> the majority (6 of 9 judges) have decided that the British Columbia decision in *Boucher* should be preferred to the Ontario rule in *Vandervoort*; the prevailing view now is that rape is a crime of general intent and intoxication is not an available defence.

Pigeon J., for the majority, wrote a conventional judgment embracing the *Beard* rules and Fauteux J.'s distinction in *George* between general intent and specific intent. In *George*, Fauteux J. had described the former as "intention as applied to acts considered in relation to their purposes" and the latter as "intention as applied to acts considered apart from their purposes." This distinction may sound plausible but seems to have little practical use. Indeed, Dickson J., dissenting in *Leary*, goes further and calls it an "irrational dichotomy" because "there are not, and have never been, any legally adequate criteria for distinguishing the one group of crimes from the other."

In the light of Dickson J.'s remarks in *Mulligan*, these additional remarks in *Leary* are worth further thoughtful study:

There is much to be said for the view that drunkenness should not be regarded as standing alone but rather as possibly contributing to some condition inconsistent with criminal responsibility. Thus, insanity caused by excessive drinking affords an answer to a criminal charge but it is the insanity to which attention is directed and the cause of the insanity is irrelevant. The law has always distinguished intoxication, however gross, from insanity, permanent or temporary, induced by intoxication; psychiatry draws no such distinction.

When an accused, in answer to a criminal charge, says that he was so sodden as to be virtually an automaton, incapable of knowing what he was about, his

---

<sup>29</sup> *Supra*, note 23 at 382.

<sup>30</sup> (1977), 33 C.C.C. (2d) 473; 37 C.R.N.S. 60 (S.C.C.).

defence is not drunkenness but an absence of voluntariness caused by excessive drinking. The question then is whether the act was voluntary. Likewise, when the offence with which he is charged includes a mental element which must be established by the Crown, such as intention or recklessness, it should be open to an accused to contend that upon all of the evidence the Crown has failed to establish the requisite mental element. The law should take no note of the inducing cause which led to the incapacity or lack of intent. On the other hand, it is generally recognized that the usual effect of drinking is merely to remove self-restraints and inhibitions and induce a sense of self-confidence and, perhaps, aggressiveness. If the accused was drunk at the time of the alleged offence but it is proved that he did the act intentionally or recklessly, it is irrelevant that but for the drinking he would never have done the act. The intent or recklessness, constituting the necessary mental element, is present and the fact that, by reason of drink, his judgment and control relaxed so that he more readily gave way to his instinctual drives, avails him nothing.

Students of the criminal law, all of whom would undoubtedly like to see more rationality in the law of crime, can take heart that there is a judge on the Supreme Court of Canada who is giving some serious thought to these problems.