

# A Review of the Defense of Drunkenness in the Criminal Law

Donald N. Synowicki

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

---

## Citation Information

Synowicki, Donald N.. "A Review of the Defense of Drunkenness in the Criminal Law." *Osgoode Hall Law Journal* 2.2 (1961) : 231-239.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol2/iss2/4>

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.

## Notes

**A REVIEW OF THE DEFENSE OF DRUNKENNESS IN THE CRIMINAL LAW** Until comparatively recently, voluntary drunkenness was never an excuse for a crime. In fact, there is authority to show that some regarded it as an aggravation of the offence.<sup>1</sup> However, this view met with little success and the prevailing sentiment was that there were no concessions for drunken wrongdoers.<sup>1a</sup> This can be explained by the fact that the old English criminal law, which contained many capital crimes, "would hardly be impressed by the niceties of mediaeval ethical discrimination concerning inebriates".<sup>2</sup> This view of the older law is, perhaps, somewhat harsh as an explanation. Kenny explained that it was no defense, "for unlike insanity it had been produced voluntarily, and to produce it was wrong, both morally and also legally".<sup>3</sup>

Furthermore, the defense was regarded with suspicion in that it was feared that the state of drunkenness could be easily feigned or counterfeited. Others feared that, "There could rarely be a conviction for homicide if drunkenness avoided responsibility".<sup>4</sup> It was felt that one should not escape the results of his crime by reason of his own vice and misconduct.<sup>5</sup> These views seem to reflect more of an emotional condemnation of the drunkard rather than a reasoned analysis of its effect on the requisite mental element in a crime.

Both Hall<sup>6</sup> and Williams<sup>7</sup> discount the fear that the state of drunkenness would be resorted to by the criminal or one planning to commit a crime to avoid criminal responsibility. Certainly a normal person who wished to commit a crime would not want to incapacitate himself by becoming greatly intoxicated. He would rather attempt to escape detection than to rely on his drunkenness as an excuse.

Involuntary drunkenness, on the other hand, is a complete defense and this view is probably justified because the older jurists felt that it was not open to the same abuse as voluntary drunkenness.<sup>8</sup> But, Hall in his investigations has found that because the American judges have stressed that fraud and coercion are necessary to establish involuntary intoxication, "*involuntary intoxication is simply and*

<sup>1</sup> *Beverley's Case* (1683), 4 Coke 123b at 125; 69 E.R. 1118 at 1122. Coke regarded drunkenness as an aggravation.

<sup>1a</sup> G. Williams, *Criminal Law—the General Part* (London, Stevens & Sons, 1953), p. 370 footnote 8: "He that killeth a man drunk, sobur schal be hangyd."

<sup>2</sup> Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis, Bobbs-Merrill, 1960), p. 530; 1st ed. 1947, p. 429.

<sup>3</sup> Kenny, *Outlines of Criminal Law*, 16th ed. (Cambridge, University Press, 1952), p. 50.

<sup>4</sup> Wharton, *Criminal Law*, 12th ed. Rochester, Lawyers Cooperative Publishing Co., 1932), p. 95.

<sup>5</sup> *Supra* footnote 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* footnote 1a.

<sup>8</sup> *Supra* footnote 1a at p. 372.

*completely non existent*".<sup>9</sup> The factual situations of all the reported cases do not appear to support a single decision where the defendant was involuntarily intoxicated.<sup>10</sup> Hall concludes that it is almost necessary for one to be bound and restrained by force while the intoxicant is poured into his mouth before he can avail himself of the defense of involuntary drunkenness.

In the last one hundred and fifty years, the defense of drunkenness has involved a consideration of the relation of the state of drunkenness to the elements of a crime; namely, the *actus reus*, and the *mens rea*. The defense can only be completely understood and analyzed if considered with regard to these basic elements.

The leading case on the defense of drunkenness is the *Director of Public Prosecutions v. Beard*.<sup>11</sup> Here, the defendant, while ravishing a young girl, covered her mouth with his hand to stifle her screaming. In doing so he pressed his thumb on her throat, and as a result, she died of suffocation. The defendant when charged with murder, raised the defense of drunkenness. On appeal by the Director of Public Prosecutions, the House of Lords restored the conviction of Beard for murder.

Lord Birkenhead L.C., after a comprehensive review of the cases on the defense of drunkenness, laid down three propositions which today form the basis of the law on this subject. They are:

"1. That insanity, whether produced by drunkenness or otherwise, is a defense to the crime charged.

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 so 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."<sup>12</sup>

The decision is cited most often for the third proposition. It was for that reason that Beard had no defense to the charge of rape. But, the situation was further complicated by the fact that death resulted in the furtherance of a felony, and as a result, there was no need to show that Beard intended to cause the death of this little girl. All the prosecution had to show was that death resulted from the commission of a felony of violence and that he intended to commit that felony.<sup>13</sup> Lord Birkenhead L.C. at p. 507 says:

<sup>9</sup> *Supra* footnote 2 at p. 440.

<sup>10</sup> But see the case of *Pearson* (1935), 2 Lew. 144; E.R. 1108, where the accused's companions put alcohol into his ginger beer.

<sup>11</sup> [1920] A.C. 479 (H.L.).

<sup>12</sup> *Supra* footnote 11 at p. 500.

<sup>13</sup> This is of especial interest with regard to section 202 of the Criminal Code.

"There was no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such killing is by the law of England, murder".

Could Beard have pleaded that he was too drunk to intend to commit rape? It is unlikely, since in the circumstances, drunkenness "cannot normally negative an intent to rape, for rape cannot normally be committed unintentionally".<sup>14</sup> It can be said that the fact of rape implies the intention to commit the act, and the felony-murder rule would then apply.

Lord Birkenhead's three propositions will now be considered.

Over indulgence in alcohol may lead to permanent damage of the brain tissues which would result in insanity. Such a condition is known as *delirium tremens* or alcoholic dementia, and is a condition in which attacks can recur even when one has not been consuming any alcohol. Such a disease of the mind if regarded as insanity by the M'Naghten Rules, now section 16 of the *Criminal Code*, is a complete answer to any criminal charge. The accused is found not guilty but insane and is detained at Her Majesty's pleasure in an appropriate institution for the care and treatment of the mentally ill. Because of the uncertainty in the length of time of such confinement, the defense of insanity is usually limited to crimes which have the accused liable to capital punishment.

Originally, only habitual drunkenness causing permanent insanity was a defense to a crime.<sup>15</sup> However, in the case of *R. v. Davis*,<sup>16</sup> it was held by Stephen J. that temporary insanity caused by drunkenness also excuses the accused. His Lordship said:

"But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from the responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman and is to be treated as such, although his madness is only temporary".

This view was approved by Lord Birkenhead L.C. in the *Beard* case.

Because of the serious consequences of the results of a successful plea of insanity, the English practice is that the judge will not direct the jury on the question of insanity unless the defense is actually set up by counsel for the defendant.<sup>17</sup> The Canadian practice appears to be that if the defense of drunkenness is set up, the judge is also competent to direct the jury on the question of insanity even if it is not pleaded as a defense.<sup>18</sup>

<sup>14</sup> *Supra* footnote 1a at p. 378.

<sup>15</sup> *Burrow's case* (1823), 1 Lewin 75; 168 E.R. 965.

*Rennie's case* (1825), 1 Lewin 76; 168 E.R. 965.

<sup>16</sup> (1881), 14 Cox C.C. 563.

<sup>17</sup> *D.P.P. v. Beard*, [1920] A.C. 479 (H.L.).

<sup>18</sup> *R. v. Garrigan*, [1937] 3 W.W.R. 109; 4 D.L.R. 344; 69 C.C.C. 98 (B.C. C.A.).

Where a crime has as one of its constituent elements the requirement of a specific intent, the defense of drunkenness can be used in certain cases to negative that specific intent. It must be noted that although drunkenness may negative a specific intent, it does not necessarily constitute a complete defense to a crime. The effect may be to find that the accused has sufficient capacity to form an intent to commit a lesser crime; aggravated assault can be reduced to common assault and so on.

The first decision to point out that evidence of drunkenness is admissible to negative specific intent was the case of *R. v. Monkhouse*<sup>19</sup> where the accused was indicted for discharging a loaded revolver with intent to do grievous bodily harm. Lord Coleridge J. said:

"Drunkenness is ordinarily neither a defense nor an excuse for crime, and where it is available as a partial answer to the charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question or to take away from him the power of forming any specific intention".<sup>20</sup>

Although the prisoner was found guilty, the case is significant because it recognized the availability of the defense.

In *R. v. Doherty*,<sup>21</sup> the defense of drunkenness effectively reduced murder to manslaughter<sup>21a</sup> by negating the intent to do grievous bodily harm. In his charge to the jury, Stephen J. said:

"As a rule the use of a knife to stab or a pistol to shoot shows an intent to do grievous bodily harm, but this is *not* a *necessary* inference."<sup>22</sup> (Italics mine).

This view of Stephen J. impliedly overruled the view in *R. v. Meakin*<sup>23</sup> where it was held that intoxication can have no effect in the consideration of a specific intent to harm in the case of the use of a dangerous instrument by the accused. Stephen J. went on to say that drunkenness must be considered in rebutting the presumption that a man intends the natural consequences of his acts and also that,

"A drunken man may form an intention to kill another, or to do grievous bodily harm to him, he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober".<sup>24</sup>

Therefore, His Lordship not only recognized the availability of the defense but also the fact that it is important evidence going to intention and must be sufficient to negative that intention if it is to succeed as a defense.

<sup>19</sup> (1849), 4 Cox C.C. 55.

<sup>20</sup> *Supra* footnote 19 at p. 56.

<sup>21</sup> (1887), 16 Cox C.C. 306.

<sup>21a</sup> The defense of drunkenness is of no use in an indictment for manslaughter.

<sup>22</sup> *Supra* footnote 21 at p. 308.

<sup>23</sup> (1836), 7 Car. & P. 297; 173 E.R. 131.

<sup>24</sup> *Supra* footnote 22.

There was an attempt to extend the rule in the case of *R. v. Meade*<sup>25</sup> when Darling J. said that the presumption that man intends the natural consequences of his acts may be rebutted by showing the mind of the accused was so affected by drink that he was incapable of knowing that what he was doing was dangerous. It is readily apparent that this is a significantly wider and different test.

The rule in *Meade's Case* came under attack in *Beard's Case*<sup>26</sup> where Lord Birkenhead L.C. said:

"the proposition in *Meade's Case* in its wider interpretation is not, and cannot be supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Lord Coleridge J., which is more strictly in accordance with the earlier authorities."

The principle can be applied to any crime where particular intent is required as in the case of *Ruse v. Read*<sup>27</sup> where one who took a bicycle while drunk did not have the required *animus furandi* to permanently deprive the owner of it.<sup>28</sup> This case was followed in *R. v. Kinson*<sup>29</sup> where a woman, who, while under the influence of liquor, appropriated a sum of money, was excused because she did not have the required *animus furandi*.

These cases go to show that it is true that intoxication is not an excuse but is important evidence to establish the lack of a material element in certain crimes. Similarly, Glanville Williams suggests that although no judge has said that drunkenness can negative recklessness, it would follow from the above principles.<sup>30</sup>

As it can be seen, the words "specific intent" are not precise and beg definition. H. A. Snelling in a recent article suggests a meaning:<sup>31</sup>

"It now appears reasonably clear that the phrase 'specific intent' refers merely to some intent of a recognized character required by statute or common law as an essential element of a crime whether or not such intent needs to be referred to in the formulation of the charge in the indictment."

This view attempts to give one an appreciation of the proper meaning of the words "specific intent" and is useful for that purpose.

In the light of the above discussion, Lord Birkenhead's third proposition is really a corollary to the second proposition in that it really describes what degree of drunkenness is not sufficient to rebut the specific intent in the second proposition.

<sup>25</sup> [1909] 1 K.B. 895; 78 L.J.K.B. 476 (K.B.D.).

<sup>26</sup> *Supra* footnote 17.

<sup>27</sup> [1949] 1 All E.R. 398; 1 K.B. 377 (K.B.D.).

<sup>28</sup> But consider section 269 (1)(a) of the Criminal Code.

<sup>29</sup> (1957), 41 Cr. App. R. 208.

<sup>30</sup> *Supra* footnote 1a at p. 379.

<sup>31</sup> H. A. Snelling, *Drunkenness and Criminal Responsibility*, (1956-59), 30 Aust. L.J. 3.

Up to this point, the defense has been examined with regard to the subjective intent of the particular accused. There are, however, circumstances where the mental element is not looked at subjectively, but objectively. In this type of situation, the mental element of the particular accused is irrelevant. What is relevant is what is known as the "reasonable man" test. The test is basically: what would a reasonable man do or intend in these particular circumstances? Or, how would a reasonable man react in these circumstances? The conduct of the accused is evaluated by reference to the reasonable man.

The objective test is of use in considering the defense of provocation. This defense is applicable to reduce murder to manslaughter in the situation where the accused was provoked by his victim and the provocation was such that it would cause an ordinary person to lose his self-control. The effect of the drunkenness of the accused on the defense of provocation has had an interesting but somewhat unexplainable result in the English Courts. Since only that amount of provocation that would cause an ordinary man to lose his self-control, will excuse, of necessity, it is submitted that the drunkenness of the accused is irrelevant to the determination of this objective question. However, the English cases on this point do not reflect this submission.

In the case of *R. v. Thomas*,<sup>32</sup> Parke B. took the view that drunkenness can be considered in determining the question of provocation. In his direction to the jury, His Lordship said:

"Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober".

In *R. v. Birchall*,<sup>33</sup> the Court of Criminal Appeal took the same view.

Similarly, the case of *R. v. Letenock*<sup>34</sup> determined that provocation may be less, in order to reduce murder to manslaughter, in the case of a drunken than a sober man.

The ability of the defense of provocation to reduce murder to manslaughter is dealt with by section 203 of the *Canadian Criminal Code*. Section 203(2) which defines provocation, reads as follows:

"(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an *ordinary person* of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool". (Italics mine.)

The Code clearly states that only the provocation that will cause a *reasonable* man to lose his self-control will reduce a charge of mur-

<sup>32</sup> (1837), 7 Car. & P. 817; 173 E.R. 356.

<sup>33</sup> (1913), 29 T.L.R. 711.

<sup>34</sup> (1917), 12 Cr. App. R. 221.

der to manslaughter. This may, therefore, be in conflict with the English cases where drunkenness was taken into account in assessing provocation. To date, there have been no cases decided under this section where the accused claimed that he was more easily provoked because of his drunken condition. Therefore, it is difficult to predict which way our Courts will go in deciding this question.

It is submitted that drunkenness should not be taken into consideration in deciding the question of provocation. The test for determining provocation is objective and as a result, the intoxication of the accused is irrelevant on the issue of provocation. This does *not* mean that whenever the accused sets up the defense of provocation, that he cannot also set up the defense of drunkenness as well. If both defenses are available to him, he can rely on both, but the defenses are separate and distinct and the presiding judge must direct the jury to that end.<sup>35</sup>

This paper would not be complete without reference to the recent decision of the House of Lords in the case of the *Director of Public Prosecutions v. Smith*.<sup>36</sup> The result of this case is to apply the objective test when determining *mens rea* (the mental element) in the case of murder rather than the subjective test. The accused who was seated in a car containing stolen goods was told to pull over by a police officer. In attempting to escape he brought about the death of the police officer who had caught hold of the car, by driving at speeds between 30 and 60 miles per hour and swerving violently. In his defense the accused claimed that he did not intend to kill the police officer or do him harm but only wanted to shake him off. The accused's conviction of murder was confirmed by the House of Lords, reversing the Court of Criminal Appeal. The judgment of the Court was written by Viscount Kilmuir L.C.; Lords Denning, Tucker, Goddard and Parker concurring.

On the question of the requisite mental element, His Lordship said:<sup>37</sup>

"The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e., was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law . . . ."

<sup>35</sup> *Abel v. R.* (1955), 115 C.C.C. 119. (Que. Ct. of Q.B., Appeal Side).

<sup>36</sup> [1960] 3 All E.R. 161.

<sup>37</sup> *Supra* footnote 36 at p. 167.

If the above test is regarded as completely objective in the case where the unlawful act is "aimed" at another, then the particular mental idiosyncrasies of the accused are entirely irrelevant. It is only necessary to show that the act was aimed at the other party and if grievous bodily harm could be contemplated by a "reasonable man" as the natural and probable result of the wrongful act, the accused is guilty of murder, the necessary "intent" being satisfied.

However, His Lordship introduced an important proviso to this "objective test". The objective test is only to be used if the accused was in law responsible for his actions; whether he was, as His Lordship says:<sup>38</sup>

" . . . a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility".

This proviso requires an appraisal of the accused's competence from a subjective point of view i.e., whether this particular accused was *in fact* legally responsible. If so, then the objective test is used. If this proviso is limited only to the case where the accused is insane (not of sound mind) as the headnote and, to a certain extent, the proviso, itself implies, then evidence of drunkenness is admissible to show that it has caused actual insanity (*delirium tremens*) within the McNaghten Rules. Should insanity be found, permanent or temporary, the objective test would not be applicable.

However, the words of the proviso also require that the accused be "a man capable of forming an intent". These words give rise to further difficulty when one attempts to apply the law relating to drunkenness. Although, the inebriate may not be capable of forming a specific intent, he may be still capable of forming the requisite intent for the lesser offence. Therefore, by being "capable of forming *an intent*" (italics mine), the inebriate may be regarded as being a man in law responsible and accountable for his actions. If so, he could not escape the proviso and his "intent" would be determined by using the objective test.

On the other hand, the words "a man capable of forming an intent" may be read as, "a man capable of forming a *specific intent*". Then, it would follow that an inebriate who was incapable of forming a *specific intent*, would not be responsible and accountable for his actions and the objective test would not apply to determine his "intent".

In Canada, the crime of murder is dealt with in section 201 of the *Criminal Code*. Paragraph (c) of section 201 reads as follows:

"Culpable homicide is murder . . . (c) where a person, for an unlawful object, does anything that he knows or *ought to know* is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being" (Italics mine).

This paragraph contains a built-in objective test and would apply to the factual situation in the *Smith Case* and produce the same

---

<sup>38</sup> *Supra* footnote 37.

result. It would appear that the question of the drunkenness of the accused as a defence under this paragraph of section 201 would be irrelevant.

Paragraph (a) of the same section requires further consideration. It reads as follows:

"Culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not".

This paragraph of section 201 requires the subjective intent of the accused to be proven, and that is clear by sub-paragraph (i). With regard to sub-paragraph (ii), the pronouncement of Viscount Kilmuir L.C. may have a great effect, if followed in Canada. The word "knows" in section 201(a) (ii) may receive the same objective treatment that was established in the *Smith* case. That is to say, if one "aims" an unlawful act at another and causes him "bodily harm", the accused may be attributed with the knowledge that "an ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result". A similar result when applying the defense of drunkenness, as suggested above, would follow.

It is readily apparent that the strict rule that drunkenness is never an excuse for a crime is now subject to qualification. It has been seen that involuntary drunkenness is a complete excuse although its appearance in practice is very rare. Insanity, permanent and temporary, if caused by excessive consumption of liquor is also a complete excuse. Voluntary drunkenness may provide a complete answer to a charge where it is such as to prevent the formation of the intent specified, e.g., in theft. Further, it may provide a partial defense by reducing an aggravated offence requiring specific intent to a lesser offence when the accused was unable to form the specific intent. In this case, however, the rule is open to objection because it can apply only to a restricted number of charges and, furthermore, the term "specific intent" is incapable of precise definition. Certain situations appear to be fitted into the slot of "specific intent" only by way of an informed intuition on the part of the judges. Nor is the defense free from theoretical inconsistency as the cases on provocation show. This field requires serious judicial analysis and clarification.<sup>39</sup>

DONALD N. SYNOWICKI\*

---

<sup>39</sup> The effect of intoxication on the question of mistake has not been dealt with in this paper. It is submitted that this question would be more properly dealt with in a separate paper on mistake.

\*Mr. Synowicki is in the Third Year at Osgoode Hall Law School.