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The Saga of the Intoxication Defence Continues: *Desjarlais* and its Application to Uttering Threats

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Case Commented On: *R v Desjarlais*, 2016 ABPC 182 (CanLII)

The defence of voluntary intoxication holds an awkward place in Canadian criminal law. Everyone who commits a crime must both do a guilty act (*actus reus*) and possess a guilty mind (*mens rea*) – even if that guilty mind is mere recklessness. But what if someone gets so drunk they commit a criminal act? What is the difference between someone who is sleepwalking and someone who is in a drunken stupor so severe they do not have the mental capacity comprehend their actions? Technically, neither hypothetical offender possesses a guilty mind.

True, voluntary intoxication is voluntary, sleepwalking is not. But *legally*, this distinction is irrelevant. The relevant *mens rea* is the mental state possessed *at the time of the offence*. Thus, public policy steps in. While sleepwalking is a defence to murder (see *R v Parks*, [1992] 2 SCR 871 (CanLII)), voluntary intoxication is not. However, the public policy argument against the intoxication defence does not strike such a chord if the offence becomes causing a disturbance.

Where does the law stand on the intoxication defence for uttering threats? (s. 264.1(1) of the *Criminal Code*). In July, Judge Allen of the Alberta Provincial Court in Edmonton produced a lengthy decision on this subject. The case is *R v Desjarlais*, 2016 ABPC 182 (CanLII). It involves a messy situation with multiple witnesses and plenty of credibility analysis; what is important for our purposes is that it involved a situation where the accused threatened to kill the complainant (para 88) while the accused was intoxicated to the point of being, in the words of different witnesses: "eight and one half to nine on a scale of ten," or "temporarily insane" (para 97).

Review of Law on Voluntary Intoxication as a Defence

Judge Allen conducts an extensive review of the law on voluntary intoxication as a defence (paras 98 - 129), beginning with the English common law. In *DPP v Beard*, [1920] AC 479 (English House of Lords), Lord Birkenhead ruled: "evidence of drunkenness that renders an accused incapable of forming the *specific intent to commit a crime* should be taken into consideration with other facts proved in order to determine whether or not the accused had the intent to commit a crime" (paras 99 - 100).

The Supreme Court of Canada adopted *Beard* in *R v MacAskill*, [1931] SCR 330 (CanLII). In *R v George*, [1960] SCR 871 (CanLII), "Fauteux J. held that voluntary intoxication is a defence to crimes such as robbery that involve a specific intent. However, he held that voluntary intoxication short of intoxication giving rise to insanity is not a defence to crimes of general intent" (*Desjarlais*, para 103).

The distinction between crimes of general and specific intent perpetuates the awkward position the intoxication defence holds, and a brief reminder becomes necessary. In *George*, the SCC distinguished *general intent* from *specific intent* (p 890):

> In considering the question of mens rea, a distinction is to be drawn between "intention" as applied to **acts done to achieve an immediate end** on the one hand and **acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object** on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. (Emphasis added)

For a simple example, imagine pushing a button to fire a rocket. If one pushes the button with the intent of causing the button to be pushed, one possesses general intent. If one pushes the button with the intent of firing the rocket, one possesses specific intent.

In a series of cases, the Supreme Court ruled that sexual assault was a general intent offence and thus that voluntary intoxication would not be a defence (*Leary v Queen*, [1978] 1 SCR 29 (CanLII)). With the enactment of the *Charter*, the Supreme Court revisited this decision in *R v Daviault*, [1994] 3 SCR 63 (CanLII). In this case the Supreme Court acquitted the accused because the Court had a reasonable doubt that the accused had the minimal intent to commit sexual assault because of evidence of extreme intoxication. Justice Cory, writing for the majority, held intoxication can be a defence to crimes of general intent when the accused proves "on the balance of probabilities that he or she was in a state of intoxication akin to automatism or insanity". To fulfil this onus, expert psychiatric evidence is needed" (*Desjarlais,* paras 115 - 116).

Controversy followed, and Parliament reacted by enacting s. 33.1 of the *Criminal Code*, prohibiting voluntary intoxication as a defence "where the accused departed markedly from the standard of care as described in subsection (2)" (s. 33.1(1)) and where the offence "includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person" (s. 33.1(3)).

I would suggest that while the distinction between general and specific intent offences may have originated with an attempt to analytically determine the requisite *mens rea* of an offence, the legislative intent of s. 33.1 was to prohibit intoxication as a defence where such a defence would be contrary to public policy.

Despite the legislative changes to the *Criminal Code* (and what I suggest was the intent of Parliament) the general/specific intent approach persisted. Recently, in *R v Tatton*, 2015 SCC 33 (CanLII), the Supreme Court adopted the analysis employed by Justice Sopinka's dissent in *Daviault* as to how to distinguish a specific intent from general intent offences. First, if the jurisprudence has classified the offence in a satisfactory manner, the jurisprudence should be adopted (*Tatton,* at para 32) Second (if the jurisprudence is unclear), two main considerations must be considered – the 'importance' of the mental element, and the social policy underlying the offence (*Tatton*, para 21, 26).

In *Tatton*, Justice Moldaver held that the 'importance' of the mental element comprised the "complexity of the thought and reasoning processes that make up the mental element of a particular offence" (para 34) and that "specific intent offences contain a heightened mental

element" (para 39). Justice Moldaver held that the social policy underlying the offence consideration required a consideration as to "whether alcohol is habitually associated with the crime in question" (paras 40 - 45).

Is Uttering Threats a Specific or General Intent Offence?

Judge Allen applies *Tatton* to rule that s. 264.1 is a general intent offence (paras 132 - 146). In doing so, Judge Allen concludes there is not satisfactory jurisprudence already classifying the offence (paras 132 - 135).

Judge Allen considers the 'importance' of the mental element of the *mens rea* of s. 264.1, and admits that "analysis may not give rise to a clear answer" (para 143). This is hardly surprising, but I digress. On the one hand Judge Allen recognizes that s. 264.1 contains the word "knowingly", which is more 'important' than mere recklessness. "Specifically, the *mens rea* is that the threatening utterances made must be meant to intimidate or to be taken seriously" (para 137). On the other hand, Judge Allen recognizes that the "mental element is closely tied to the prohibited act, i.e., that the threats were uttered. The mental element requires minimal mental acuity. The mental element does not require a heightened mental element, such as an ulterior motive, actual knowledge of any consequences, or intent to bring about those consequences" (para 142).

Judge Allen considers the social policy underlying the offence and rules that s. 264.1 "is an offence of unruly conduct where alcohol consumption is habitually associated with the offence. There is no lesser included general intent offence. The offence is not one where a harsh minimum sentence will be incurred upon conviction" (para 145). Therefore s. 264.1 is a general intent offence (para 146), and the defence of intoxication does not apply.

Judge Allen also rules that s. 33.1 applies to s. 264.1(1)(a) (threat to kill or cause bodily harm) because a threat to kill or cause bodily harm includes a threat of interference to bodily integrity (para 148). Therefore, voluntary intoxication to the extent of automatism or insanity is not a defence to s. 264.1(1)(a), but may be a defence to ss. 264.1(1)(b) and (c) (threats to damage property or to kill/injure an animal) (para 148).

Judge Allen concludes that "the voluntary intoxication of alcohol here provides no defence to the s. 264.1(1)(a) offence" (para 149).

My Commentary

Judge Allen's finding that there was not satisfactory jurisprudence classifying s. 264.1 can be challenged. The analysis of *R v Bone* (1993), 81 CCC (3d) 389 (Man CA) was considered by Judge Allen. In *Bone*, Twaddle J.A. "held that the offence of threatening was a specific intent offence and found the accused not guilty because of intoxication" (*Desjarlais*, para 133). This was dismissed by Judge Allen because the reasoning was "very brief" and subsequently not satisfactory (para 135). Judge Allen also noted that the SCC had not considered intoxication as a defence to explore whether s. 264.1(1) was a general or specific offence. Judge Allen seems to have ignored *R v McRae*, 2010 BCSC 558 (CanLII), in which Justice Romilly held that uttering threats is an offence of specific intent and that "the defence of intoxication could apply" (para 109). However, Romilly's J.'s reasoning could also be considered brief.

More broadly, I would argue that the above challenge falls into the trap laid by the antiquated and awkward distinction between general and specific intent. For this reason, the better challenge lies in abandoning general and specific intent altogether, and returning to the public policy concern that the distinction seeks to quell.

Tatton's social policy consideration as to "whether alcohol consumption is habitually associated with the crime" (*Tatton*, para 42) provides the example of sexual assault as an offence often associated with intoxication. I would argue that this consideration is overreaching when applied to uttering threats. Intoxication is habitually associated with crime generally, and one could make the case that *Tatton*'s social policy consideration would apply to all but a few *Criminal Code* offences. While this rational is compelling to crimes such as impaired driving (where intoxication makes up an element of the offence), or sexual assault (where the bodily integrity of the victim is compromised), it is less compelling for crimes that simply require the offender to have said something. A drunk automaton uttering threats is no different that a drunk automaton causing a disturbance, and indeed far less concerning that a sleepwalking automaton who commits murder.

I also note that Judge Allen's finding that s. 33.1 prohibits intoxication as a defence to uttering threats can be challenged. This challenge would necessarily challenge s. 33.1 itself, since the section explicitly mentions "the threat of interference", however such a challenge is not impossible. An argument could be made that uttering threats is really just an extreme example of causing a disturbance (as I alluded to above); to rule that a sufficiently impaired person possesses the *mens rea* for one but not the other is arbitrary and a violation of s. 7 of the *Charter*.

In *R v McLeod*, 2008 QCCQ 5726 (CanLII), Judge Gervais stated that: "Although the question can be debated, it appears reasonable now to consider that intoxication as a defence is no longer admissible for an offence committed under section 264.1 of the *Criminal Code*" due to the enactment of s. 33.1 (*McLeod*, para 39). Although this ruling appears to agree with *Desjarlais*, I suggest it is not very persuasive because it concedes that "the question can be debated". Considering the awkward place intoxication holds as a defence, if one thing is clear, it is that the defence's application will continue to be debated.

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