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Who is Responsible for Extreme Intoxication?

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What you are about to read is not the usual case commentary. I will not summarize, analyze, or otherwise slice and dice the decision from the Alberta Court of Appeal in *R v Brown*, 2021 ABCA 273 (CanLII), a case upholding the constitutionality of s 33.1 of the *Criminal Code*, RSC 1985, c C-46. Rather, I will provide context for the case, setting out the underlying principles at stake and the controversies underpinning the conflicting legal perspectives. Section 33.1 was a response by our lawmakers to the Supreme Court of Canada's ultimate decision in *R v Daviault*, 1994 CanLII 61 (SCC), [1994] 3 SCR 63, which found the rule against using intoxication as a defence for general intent offences unconstitutional under s 7 of the *Charter* (Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), where the accused was in a state of extreme intoxication. Section 33.1 promptly foreclosed this limited defence where the accused person used violence against or interfered with the bodily integrity of any person. Although the section was added to the *Criminal Code* in 1995, a mere one year after the release of *Daviault*, it is only recently that appellate courts have weighed in on the constitutionality of that section.

The appellate response has been as uneven as the initial line of Supreme Court cases on the issue. In Ontario, for instance, the majority of the Court of Appeal struck down the section in the *Chan/Sullivan* cases (see *R v Sullivan*, 2020 ONCA 333 (CanLII); leave to SCC granted 2020 CanLII 102975 and to be argued on October 12, 2021). While in *Brown* all three justices of the Alberta Court of Appeal panel agreed the section was constitutional, each arrived at this finding separately, applying differing visions of what the law purports to do. Whatever the approach, the *Brown* decision effectively criminalizes extreme self-induced intoxication by reorienting the traditional concepts of *mens rea* and capacity. The decision on this issue is not so much as interesting in what it says – these perspectives have been expressed before – but in what it doesn't say. What it doesn't mention is the often unmentionable in our society – the reality of the addicted substance abuser who drinks to excess, not because they wish it but because they must.

Extreme intoxication is considered a capacity issue, along with automatism and mental disorder. Capacity issues are proto-substantive criminal law issues. They arise *before* the elements of the offence are engaged. Capacity is concerned with the ability or capacity of the accused person, due to mental disorder, automatism or extreme intoxication, to formulate the required *mens rea* or criminal intent. Capacity issues occur *before* entering into the inquiry of whether an accused person has the required *mens rea* for an offence. Capacity issues do not arise in every case. In law, we

presume people have capacity. We elide over questions concerning the accused person's mental state unless the facts warrant deeper analysis.

Capacity issues are not owned by the criminal law. These are public policy issues and personal ones. Mental health and addiction are societal concerns, but they also impact relationships, livelihood, and self-autonomy. It is no wonder then that the law is ill-equipped to deal with the panoply of issues connected to capacity. This likely explains why, in criminal law, capacity is treated very much like it was hundreds of years ago. There have been attempts to modernize the approach through the common law and the *Charter*, but the fact remains that old ideas take hold and cannot be redrawn to create an approach with which everyone, in law and out, can agree. But without legal clarity, capacity issues will continue to obscure and confuse and will continue to marginalize those caught within them.

I have previously written on the *Brown* decision for ABlawg (see "Does Criminal Law Have the Capacity to Respond to the Intoxicated Automaton?") In that case commentary, the issue was not the constitutionality of s 33.1 but the application of the law relating to extreme intoxication and automatism, which were both in issue in the case. I have also previously written for my own blog website on the impact of s 33.1 on the law of intoxication and the *mens rea* or fault element concerns raised by the section (see "Section 33.1 & How Intoxication Became a Form of *Mens Rea*" (May 5, 2015), online: ideablawg.ca [*How Intoxication*]). I also teach these issues in my 1L criminal law class. I have pondered deeply the concerns raised with self-induced intoxication, and I still believe that there must be a better legal way to deal with them. But I am getting ahead of myself. Let me first outline the context, layout the controversies, and let the reader decide.

Moral Responsibility Provides the Context

The touchstone for this discussion is s 33.1 of the *Criminal Code*. As noted above, this section is the government's response to the Supreme Court of Canada's 1994 decision in *R v Daviault*, which found the rule against using intoxication as a defence for general intent offences unconstitutional to the extent that it prohibited the defence of extreme intoxication for those offences. The rule was an old one, arising from English common law, which received the Canadian stamp of approval in the earlier SCC decision of *Leary v The Queen*, 1977 CanLII 22 (SCC), [1988] 2 SCR 833. As discussed in my previous blog on the issue (see How Intoxication), intoxication as a defence sits uncomfortably within criminal law principles. On the one hand, there is the criminal responsibility of the person who willing becomes intoxicated and places themselves in a position where they run the risk of committing an offence. On the other, there is the foundational principle that only those individuals who act with the required fault element are criminally responsible for a crime. The point of contention between these duelling principles is the concept of moral responsibility.

Criminal law is about deciding who is to blame for the prohibited actions and who, therefore, should be punished for them. In our morally based justice system, only those accused persons who have the required fault element or *mens rea* are liable. Professor H.L.A. Hart, in his seminal treatise *Punishment and Responsibility* (see HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1978)), extended this principle by suggesting that "punishments for different crimes should be proportionate to the relative wickedness or seriousness of the crime" (at 162). The more serious the crime, the greater the

punishment. This principle can be refined further. A person who commits the crime intentionally is committing a more serious crime than the person who commits it unintentionally. But how about those who have no capacity to commit the crime? According to Prof. Hart, capacity involves "understanding, reasoning and control of one's conduct" (at 227). A person who has capacity is responsible for their actions. They have made the reasoned choice to commit the crime. But the person who lacks capacity cannot be considered responsible. They are unable to understand, reason and control their conduct. They lack autonomy and cannot make the correct 'legal' decision to comply with the law. Such a person should not be punished as they cannot be held morally responsible for their conduct.

Moral Responsibility & the Capacity Conundrum

In this commentary, I will be focusing on extreme intoxication. However, capacity, as already mentioned, can be an issue when a person is suffering from a mental disorder, in a state of automatism, and when extremely intoxicated. For a more in-depth discussion of age and capacity, see my previous blog on the issue here. When a person is in these states, they are unable to make the correct legal choice to comply with the law. In law, they are not considered morally blameworthy because they cannot make the free and informed choice to comply. If punishment is to fit the crime and if our morally based justice system punishes those who intend to commit a crime more harshly than those who do not, then to punish a person who had no capacity to choose would be punishing the morally innocent. In capacity issues, the moral and the legal overlap.

Also, the legal and the physiological unite. Whether a person can understand, reason, and make the correct choice, are physiological or psychological determinations. They are bodily functions that are impaired by mental disorder or impaired consciousness brought about by automatism or extreme intoxication. Although the physicality of the state is open to scientific interpretations, whether a person is impaired to such an extent that they are no longer morally and legally responsible is solely a legal determination. Such a decision, according to Justice Dickson in the 1979 *Cooper* decision (see *Cooper v The Queen*, 1979 CanLII 63 (SCC), [1980] 1 SCR 1149), a case describing the legal meaning of mental disorder, necessarily has medical aspects to it (at 1153 to 1159). Yet, the ultimate finding of legal responsibility is wholly within the province of the trier of fact.

Responsibility is a slippery concept. Is a person who is suffering from a mental disorder responsible for their conduct if they refuse to take the medication that will give them capacity? Is the person who enters an automatic state, such as in an epileptic episode, responsible if they see the trigger signs for the episode but don't take mitigating steps? Is the person who willingly consumes drugs or alcohol to such an extent that they are unable to control their actions responsible for their conduct? And how do all these concerns engage *Charter* principles? It is this last question, which is at the crux of the constitutionality of s 33.1.

Moral Responsibility and the Constitutional Dilemma

The common law principle requiring fault for criminal offences was elevated to *Charter* status through the application of s 7 of the *Charter* (see e.g. *R v Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 SCR 636 and *R v Martineau*, 1990 CanLII 80 (SCC), [1990] 2 SCR 633). Crimes require

a minimum fault element of either objective or subjective *mens rea*. Some 'true crimes' required a minimum subjective form of *mens rea* to fulfill the proportionality requirement referenced by Prof. Hart. Again, moral responsibility, free choice, and control lay at the core of these fundamental principles. This same concept not only carved the contours of a crime but also impacted the individual's ability to formulate that fault element. In this way, a person who was not morally responsible at the time of the commission of the offence could not commit it.

In the case of s 33.1 both the minimum fault element requirement for a crime and an individual's capacity to formulate that intent intersect when extremely intoxicated. Critics of s 33.1 maintain that the section substitutes the voluntary consumption of an intoxicant for the required fault element of the specific crime in question. Such substitution creates an artificial fault element that is untethered to the crime in question, creating a questionable kind of fault based on an action and intent that precedes the actual commission of the offence. The understanding, reasoning, and choice is not made in relation to the offence but in relation to the voluntary consumption of the drug and/or alcohol in question.

As an aside, not only does s 33.1 raise fault element concerns, but this substitution also runs counter to another fundamental criminal law principle requiring that *mens rea* and *actus reus* of a crime coincide (see the seminal English decision in *Fagan v Metropolitan Police Commissioner*, [1969] 1 QB 439, [1968] EWHC 1 (QB). In applying s 33.1, the self-induced intoxication occurs before the doing of the prohibited act. Although the intoxication continues during the act, at the time of the act, the intention to become intoxicated does not exist as it is complete and therefore exhausted. In using self-induced intoxication as the fault element, the stale-dated past act of and intention to become intoxicated is used for present intention. When viewed this way, s 33.1 is not only legally suspect but is also contrary to logic and common sense.

This skewed reasoning creates a constitutional dilemma. It can then be argued that the connection between self-induced intoxication as a form of *mens rea* and the fault element requirements as guaranteed by the *Charter* requires a legal leap in logic. To find a person has the capacity and required intent for the offence based on a consumption decision made before any offence is committed in which the person likely never considered the risks of committing a crime due to their voluntary ingestion stretches the *Charter* guarantee of a minimum level of *mens rea* for a crime to the breaking point. Not only is the voluntary consumption no longer a viable *mens rea* substitute, but it is an artificial one based on a purely legal construct. In reality, the crime no longer requires any fault element. The only viable foundation for this substitution cannot be found in a legal argument but in a public policy concern alone.

The supporters of s 33.1 find no issue with this *mens rea* substitution. There is a clear causal connection morally and legally between the extreme intoxication and the commission of the crime. In Justice Michael Moldaver's *Tatton* decision (see *R v Tatton*, 2015 SCC 33 (CanLII) at para 43) and in Justice Frans Slatter's decision in *Brown* (at paras 37 to 45), they reference the established connection between crime and intoxicants, which liberate a person's reason and affect their ability to make good legal choices. People who drink to such an extent that they no longer have the capacity are making a choice to drink knowing that drink can lead to illegal conduct. Such people are not morally or legally innocent and are responsible for their crimes. This position is deeply based in morality. It is also anchored in public policy. To find someone not criminally responsible

for a heinous crime such as murder or sexual assault based on their own moral weakness incentivizes the wrong message and diminishes the seriousness or wickedness, as Prof. Hart deemed it, of the crime. One should not escape criminal responsibility through the recreational use of alcohol or drugs.

Section 33.1 & Addiction

This brings us to the real concern with s 33.1, which is the potential criminalization of addiction. Moral responsibility employs the blame game. It requires us to decide who will carry the burden of the dire effects of the conduct. But, as we have seen, determining responsibility is not a precise science. Rather, it is nuanced as we follow the thread of choice to the time and place of when an individual decides to consume intoxicants or not. Superimposed on this individual choice are criminal law principles, which are fundamental to our sense of justice. These are concepts that engage the protection of the morally innocent, the need for control and choice over one's actions and, ultimately, the presumption of innocence.

The matter of who gets caught in the golden web of criminal law is important as the criminal justice system impacts a person's life, changing it in a way that cannot be defined or quantified. As the Law Reform Commission of Canada described in its Report: Our Criminal Law of 1976, the criminal law is a blunt instrument "because it cannot have the human sensitivity of institutions like family, the school, the church or the community" (at 27). The law and its institutions cannot substitute for the human touch, the concession to human frailty that is so needed when we are faced with addiction and mental health issues.

Section 33.1 and the case law on its constitutionality misses this human touch. There is no responsibility taken for the societal need to protect the vulnerable in our society. The accused person who drinks to such an extent that they can no longer make choices may do so because of childhood abuse, socio-economic pressures, or mental health challenges that can only be relieved by the consumption of alcohol. If we are prepared to use voluntary consumption of intoxicants as a substitute for fault, which then provides the basis for moral blameworthiness, then we must be open to giving legal relief to those who voluntarily consume intoxicants because their will is overcome by years of substance abuse. In asking who is responsible for extreme intoxication, we must include the possibility that no individual is responsible; rather, society may be.

Final Thoughts

Ultimately, the question for the Supreme Court of Canada will be whether public policy considerations can be the sole initiator of such a foundational change to traditional criminal law principles. This discussion will no doubt include the role of the lawmakers to enable public policy through law and the role of the courts to uphold only those laws that are consistent with the *Charter*. This discussion has already started in the Supreme Court in a different context (see *Toronto (City)* v *Ontario (Attorney-General*), 2021 SCC 34 (CanLII)), where the slim majority found unwritten constitutional principles, untethered by the *Charter*, did not have the independent and free-standing power to invalidate a law.

Of course, with s 33.1, the violation engages s 7 of the *Charter*, which requires laws to conform with unwritten principles of fundamental justice. Importantly, these unwritten principles do not provide the background or context. Rather, they animate the permissible limitations to the deprivation of life, liberty and security of the person. Even so, principles of fundamental justice, although legal rules, originated through societal consensus. Public policy permeates the criminal law, providing the primordial normative basis for our principles of fundamental justice. It will remain to be seen how far that public policy reach is when it comes to our long-held fundamental criminal law principles. Hopefully, the Supreme Court will give us clear direction on who is responsible for the extreme intoxication.

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