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Leary v. The Queen

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LEARY v. *THE QUEEN*

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In *Leary* v. *The Queen*,[1] the Supreme Court of Canada by a six to three majority decided: (1) the law respecting the "defence" of drunkenness as laid down in *D.P.P.* v. *Beard*[2] remains essentially correct;[3] (2) crimes may be distinguished into categories of specific and general intent, the distinction between these categories being correctly defined in the earlier Supreme Court decision of *R.* v. *George*;[4] (3) drunkenness is no defence to crimes of general intent; (4) rape is a crime of general intent to which drunkenness is no defence; (5) in any event, there was no evidence that Leary was drunk to such a degree as to be incapable of forming the intent to commit rape; and (6) even if there was some evidence to this effect, there was no miscarriage of justice.

Dickson J., dissenting (with Laskin C.J.C. and Spence J. concurring), held: (1) *Beard* should no longer be recognized as good law; (2) no intelligible distinction can be drawn between crimes of "specific" and "general" intent, and the "fiction" should be discarded; (3) in any criminal charge requiring proof of *mens rea,* evidence of drunkenness is to be considered by the jury, together with all other relevant evidence, in determining whether the prosecution has proven beyond a reasonable doubt the *mens rea* required to constitute the crime; (4) the instruction to the jury that "drunkenness was not a defence to this charge [of rape]" was in error; (5) there was evidence that Leary was intoxicated; and (6) it cannot be said that a properly charged jury would have inevitably convicted, thus a new trial should be ordered.

The majority judgment finally resolved the previous conflict between the British Columbia Court of Appeal decision in *R.* v. *Boucher*[5] and the Ontario Court of Appeal decision in *R.* v. *Vandervoort;*[6] the former holding equivalent to that of *Leary,* while the latter held rape to be a crime of specific intent to which drunkenness could be a defence.

The majority judgment was much influenced by the recent decision of the House of Lords in *D.P.P.* v. *Majewski,*[7] which affirmed the traditional

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[1] *Leary* v. *The Queen,* [1978] 1 S.C.R. 29, (1977), 74 D.L.R. (3d) 103, 33 C.C.C. (2d) 473.

[2] *D.P.P.* v. *Beard,* [1920] A.C. 479, 14 Cr. App. R. 159 (H.L.).

[3] See A. Gold, *An Untrimmed Beard: The Law of Intoxication as a Defence to a Criminal Charge* (1977), 19 Crim. L.Q. 34 at 35-36.

[4] *R.* v. *George,* [1960] S.C.R. 871, 128 C.C.C. 289.

[5] *R.* v. *Boucher* (1963), 40 W.W.R. 663, [1963] 2 C.C.C. 241 (B.C.C.A.).

[6] *R.* v. *Vandervoort,* [1961] O.W.N. 141, 130 C.C.C. 158 (H.C.).

[7] *D.P.P.* v. *Majewski,* [1976] 2 W.L.R. 623, [1976] 2 All E.R. 142 (H.L.).

statement of the law according to *Beard*, notwithstanding the growing chorus of criticism of that decision.[8]

The criticism of *Majewski* (and *Beard*) was based on logical grounds, which the Law Lords felt had to give way to certain policy considerations:

> Acceptance generally of intoxication as a defence . . . would . . . undermine the criminal law . . .[9]
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> . . . .
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> One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence, where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences.[10]
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> . . . .
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> It was . . . submissions of this startling character which led my noble and learned friend, Lord Simon of Glaisdale, to comment trenchantly to appellant's counsel: 'It is all right to say "Let justice be done though the heavens fall". But you ask us to say, "Let logic be done even though public order be threatened", which is something very different.'
> Are the claims of logic, then, so compelling that a man behaving as the Crown witnesses testified the appellant did must be cleared of criminal responsibility?
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> . . . .
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> If such be the inescapable result of the strict application of logic in this branch of the law, it is indeed not surprising that illogicality has long reigned, and the prospect of its dethronement must be regarded as alarming.[11]

The logical criticism centered on the validity of the concept of "specific intent," which was thought to be central to the *Beard* rules. As one commentator put it:

> . . . the rule [to be] deduced from *Beard* . . . [is] that evidence of self-induced intoxication negativing *mens rea* is a defence to a charge of [a] crime requiring proof of a "specific intent" but not to a charge of any other crime. In the case of a crime not requiring a "specific intent" D may be convicted, if he was voluntarily intoxicated at the time of committing the offence, though he did not have the *mens rea* required for that offence in all other circumstances, and even though he was in a state of automatism at the time of doing the "act".
> . . . The House recognize[d], *as a rule of substantive law* that, where voluntary intoxication is relied on in a charge of crime not requiring a "specific intent," the prosecution need not prove any intention or foresight, whatever the definition of the crime may say . . .[12]

Another commentator's criticism of the specific-general intent distinction was even harsher:

> "Specific intent" seems to be a meaningless expression and it is a discredit to English law that it should continue to be used in determining issues so important as those dealt with in serious criminal cases. Is it too much to hope that the

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[8] Gold, *supra* note 3. See also G. Orchard, *Drunkenness as a "Defence" to Crime* (1977), 1 Crim. L.J. 59 at 132; and A. Dashwood, *Logic and the Lords in Majewski*, [1977] Crim. L. Rev. 532 at 591.

[9] *D.P.P.* v. *Majewski*, *supra* note 7, at 634 (W.L.R.), 151 (All E.R.) *per* Lord Elwyon-Jones L.C.

[10] *Id.* at 635 (W.L.R.), 152 (All E.R.) *per* Lord Simon of Glaisdale.

[11] *Id.* at 651 (W.L.R.), 168 (All E.R.) *per* Lord Edmund-Davies.

[12] J. Smith, *Case and Comment*, [1976] Crim. L. Rev. 374 at 375.

> judges in the Court of Appeal or the House of Lords will put aside the meaningless verbiage and go back to first principles?
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> . . . .
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> These principles make no distinction between offences requiring "specific intent" and offences not requiring that mysterious ingredient. It is submitted that such a distinction has no proper place in the law.[13]

The majority in *Leary*[14] take as the distinction the formulation in *R.* v. *George,* where Fauteux J. said:

> In considering the question of *mens rea,* a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

It is pointed out that in *Majewski,* "Lord Simon of Glaisdale said of . . . Fauteux J.'s judgment in *George,* that it was 'the best description of specific intent in this sense that I know.' None of the other Law Lords sitting differed."[15] Lord Simon interpreted Fauteux J.'s statement to mean: "The mens rea in a crime of specific intent requires proof of a purposive element."[16]

The *George* formulation has been criticized, however, in terms especially apposite to the *Leary* case, on the basis that it contradicts established precedent:

> There is no real purposive element in the *mens rea* of murder.
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> . . . .
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> [It] ought not to be a crime of specific intent if the purpose test were applied. On the other hand, Lord Simon holds that rape is not a crime of specific intent yet rape does require a purposive element—it is difficult to imagine a case of rape where D does not have the purpose of having intercourse with a woman (though he may be merely indifferent whether she consents or not). Taking a conveyance without the consent of the owner similarly requires an element of purpose but it is not such a crime of "specific intent." The purpose test, with respect, does not fit the established law.[17]

Attempted murder and murder are consistently characterized as specific intent offences. Another commentator points out,[18] even "though the S.C.C. has recognized reckless attempts to murder: *Lajoie* v. *The Queen,*[19] . . . it is clear on statutory construction that by no means all types of murder require specific intent to kill." Ironically, the *George* formulation of specific intent is criticized by Glanville Williams in a book cited by Pigeon J. with approval.[20]

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[13] J. Smith, *Case and Comment,* [1975] Crim. L. Rev. 155 at 157-58.

[14] *Leary* v. *The Queen, supra* note 1, at 50 (S.C.R.), 106-07 (D.L.R.), 476-77 (C.C.C.).

[15] *Id.* at 52 (S.C.R.), 108 (D.L.R.), 478 (C.C.C.).

[16] *D.P.P.* v. *Majewski, supra* note 7, at 638 (W.L.R.), 155 (All E.R.).

[17] Smith, *supra* note 12, at 377-78.

[18] D. Stuart, *Annual Survey of Canadian Law—Part 3: Criminal Law and Procedure* (1977), 9 Ottawa L. Rev. 568 at 605.

[19] *Lajoie* v. *The Queen* (1973), 10 C.C.C. (2d) 313 (S.C.C.).

[20] G. Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, The Hebrew University, 1965) at 44-47. In *Leary* v. *The Queen, supra* note 1, at 60 (S.C.R.), 113 (D.L.R.), 483 (C.C.C.), Pigeon J. cites to 47. See text accompanying notes 23 and 24, *infra.*

There is no illustration in *Leary* of the actual application of the *George* rule which might contribute to a better understanding of it. The first part of the majority judgment in *Leary* is concerned with the distinction between crimes of specific intent and general intent, and the *George* rule is discussed at length. In the next section of the judgment, in which the issue of the nature of the offence of rape is discussed, one would expect the *George* rule to be applied. Surprisingly, no attempt to analyse rape in terms of the *George* rule is made. Rather, the conclusion that rape is a crime of general intent is simply stated to be self-evident despite a review of authorities reaching different decisions on the issue.[21]

A proper analysis of the *mens rea* of rape has been suggested by various commentators.[22] As Glanville Williams puts it:[23]

> . . . it is clear on principle that if the defendant believes that he has the woman's consent, though in fact he has not, he does not have the *mens rea* required for the crime. It is equally clear on principle that drunkenness is a factor to be considered in judging whether a defence of belief in the woman's consent is to be credited. While these abstract propositions of law seem to be unassailable, certain countervailing considerations are of weight. In the first place, one finds it hard to imagine an actual situation in which a defendant is sober enough to have sexual intercourse with a struggling and protesting woman and yet too drunk to realize that she is struggling and protesting. In the second place, to leave this unreal issue to the jury in every case of drunken rape would increase the possibility of confusion and of unmeritorious acquittals. Notwithstanding these practical considerations, the theoretical legal point was accepted by the Supreme Court of Victoria. Canadian courts have not been unanimous . . .

After referring to *Boucher,* Professor Williams continues:

> *In any case, the argument advanced for the appellant could not convincingly be rejected merely by speaking of general and specific intent. The argument is related to the question of belief in consent, and should have been considered in those terms.* (Emphasis added.)

The foregoing so accurately summarizes the opposing views of logic and policy, and so clearly points out the necessity to discard the language of specific and general intent in deciding the issue, that one may well be surprised to see an apparently approving reference to this very passage in the majority judgment of Pigeon J., a reference made without further comment.[24]

One commentator said that the "inescapable conclusion" from reading *Majewski* is that "the designation of crimes as requiring, or not requiring 'specific intent' is based on no principle but on policy."[25] This conclusion applies equally to *Leary*, and the conclusion is logically inevitable; since there is no basic principle in our criminal law that could father the distinction, it must therefore necessarily be *ad hoc.* As Dickson J.'s judgment states, from general principles one would conclude that drunkenness is not affirmatively a defence in any sense of the word; rather, it is merely a kind of evidence that

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[21] *Leary* v. *The Queen, supra* note 1, at 57 (S.C.R.), 111 (D.L.R.), 481 (C.C.C.).

[22] Gold, *supra* note 3, at 70 ff.

[23] Williams, *supra* note 20, at 47-48.

[24] See note 20, *supra,* and accompanying text.

[25] Smith, *supra* note 12, at 378.

may raise a reasonable doubt in the jury upon one of the essential elements of the offence charged against the accused, the requisite mental state, thereby resulting in an acquittal of the offence charged, although not necessarily of a lesser included offence.

There is a certain irony in the conclusions reached in *Leary*, having regard to the reverence with which the *Beard* rules are treated in that case, because the conclusion in *Leary* either reduces the *Beard* judgment to mere *obiter*, forcing one to conclude that Lord Birkenhead developed his lengthy and comprehensive judgment in a case where it was unnecessary to do so, or, is contrary to *Beard* itself. Beard was charged with the murder of a young girl whom he killed in an endeavour to smother her cries while he was raping her. Since he brought about the girl's death in the course of committing a felony of violence against her, the felony-murder rule applied, and his defence that he did not intend to kill her (based on his drunkenness) was disregarded. As Lord Birkenhead pointed out, in such a case there is no question of intent to kill; the only question is whether the accused intended to rape, and on the facts Beard could not deny that he had had such an intention, whether or not he was drunk. Accordingly, his conviction for murder was sustained.

In other words, *Beard* was itself all about drunkenness negativing the intent to rape!

In Pigeon J.'s judgment in *Leary*,[26] this point is dealt with merely by quoting the following passage from Lord Russell in *Majewski*:

> In my opinion these passages do not indicate an opinion that rape is a crime of special intent. All that is meant is that conscious rape is required to supply "the felonious intent which murder involves". For the crime of murder special or particular intent is always required for the necessary malice aforethought. This may be intent to kill or intent to cause grievous bodily harm: or in a case such as *Beard* of constructive malice, this required the special intent *consciously to commit* the violent felony of rape in the course and furtherance of which the act of violence causing death took place. *Beard*, therefore, in my opinion does not suggest that rape is a crime of special or particular intent.

Lord Russell says that in *Beard's* case the "special intent" [*sic*] was "consciously to commit the violent felony of rape." However, this "does not suggest that rape is a crime of special or particular intent." With respect, it seems to suggest little else. Lord Russell seems to be saying that an "intent to rape" is a specific intent when it constitutes the only *mens rea* of murder, being constructive murder, since it is well established that murder is always a specific intent offence; but it is not so when only rape is charged. Perhaps we may be grateful that Lord Russell did not begin to contemplate the other logical possibility that some forms of murder may not require a specific intent!

In England, *Majewski* put an end to the hope that the "meaningless verbiage" of specific intent would be "put aside," to repeat the commentator's conclusion quoted earlier,[27] and "first principles" would be restored. *Leary*

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[26] *Leary* v. *The Queen*, *supra* note 1, at 55 (S.C.R.), 110 (D.L.R.), 480 (C.C.C.).

[27] See text accompanying note 13, *supra*.

repeats the process in Canada. *Leary*, like *Majewski*, represents the victory of policy over principle.

In *Majewski*, however, no one spoke on behalf of principle in the unanimous House of Lords. The difference in *Leary* is the lucid dissenting judgment of Dickson J., a judgment described by one commentator as "superb."[28] Whether this judgment ever prevails over that of the majority in *Leary*, only the future will tell. For now, the law in Canada in this area appears to be solidly based upon policy considerations.

[28] Stuart, *supra* note 18, at 606.