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# A Shorn Beard

Tim Quigley
*University of Saskatchewan*

# Notes and Comments

Tim Quigley* A Shorn Beard**

## I. *Introduction*

One of the prominent features of the common law is the concept of *stare decisis*. As a mechanism to provide certainty and predictability in the law, it is invaluable. Nonetheless, the doctrine of binding precedent, essential though it is to the orderly development of the law, can be misused. At times, the disingenuous application of *stare decisis* can lead to severe distortion of the law from what was actually meant in the case being cited as authority. Such, I submit, is the case with the intoxication rules.

The law in Canada and England at present confines the defence of intoxication to offences carrying what is called a "specific intent" and refuses it for all other offences.[1] This article deals with the argument often advanced that the intoxication rules are well-founded on case authority. In particular, the specific-general intent dichotomy is often supported on this ground. My submission is that this argument is, at best, based upon a misunderstanding of the development of the intoxication defence and the early cases in which that development took place. At worst, the argument from authority relies upon misleading statements about those early cases.

The cases that purport to derive the authority for the split between specific and general intent from *D.P.P.* v. *Beard*[2] are so numerous that it would occupy much space merely to list them. I will, however, mention a few of the better-known ones to illustrate that the argument that the dichotomy is rooted in authority is a common one. Take *D.P.P.* v. *Majewski*[3] as one example. The judgments, both at the Court of Appeal[4] and the House of Lords[5] levels, abound with references to the entrenchment in the law of the concepts. So, too, does the Supreme Court

*Assistant Professor, College of Law, University of Saskatchewan.

**The author confesses that the play on words is derived from an earlier article by Alan D. Gold, *An Untrimmed 'Beard' — The Law of Intoxication as a Defence to a Criminal Charge* (1976), 19 Crim. L.Q. 34.

1. This was made clear in England in *D.D.P.* v. *Majewski*, [1976] 2 All E.R. 142 (H. L.) and, in Canada, in *Leary* v. *The Queen*, [1978] 1 S.C.R.29 (S.C.C.).
2. *D.P.P.* v. *Beard*, [1920] A.C. 479. (H.L.).
3. *D.P.P.* v. *Majewski*, *supra*, note 1.
4. *D.P.P.* v. *Majewski*, [1975] 3 All E.R. 296 at 304, 305, 306. (C.A.).
5. *Majewski*, *supra*, note 1 at 147-50, 154-55, 156-59, 162-65, 169-70, 171-72.

majority judgment in *Leary* v. *The Queen.*[6] Similarly, the decisions in *McAskill* v. *The King,* [7] *Latour* v. *The King,*[8] *R.* v. *George,*[9] *A. G. for Northern Ireland* v. *Gallagher,*[10] and *Bratty* v. *A. G. for Northern Ireland*[11] all derive support for the distinction from *Beard.*

A reason often given for the specific-general intent dichotomy is that it provided a way for judges to ameliorate the law's harshness while at the same time maintaining some degree of protection for the public from drunken and dangerous offenders. For instance, Lawton, L. J. in the Court of Appeal in *Majewski* had this to say:

> Counsel for the Crown pointed out that in the 19th century the judges began to relax the strict common law rule in cases such as murder and serious violent crime when the penalties were harsh (death or transportation) or where there was likely to be much sympathy for the accused (attempted suicide). Although there was much reforming zeal and activity in the 19th century Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided he stopped short of making himself insane, the better chance he had of an acquittal. Counsel for the Crown submitted that when *Beard's* case is considered against the 19th century development of the law . . . it is clear what was being decided, namely the limits of the relaxation.[12]

The above extract was quoted with approval by Lord Elwyn-Jones, L. C. in the House of Lords[13] and referred to with approval by Lord Simon of Glaisdale.[14] Lord Salmon in *Majewski* also viewed the development of the specific intent-basic intent dichotomy as a mitigation of the harshness of the law[15] and so did Lords Edmund-Davies and Russell.[16]

Interestingly, both the majority[17] and the minority[18] in *Leary* accepted that the impetus for the distinction was a desire to relax the severity of the law. This view has also been expressed by several academic writers.[19]

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6. *Leary* v. *The Queen, supra,* note 1 at 50-53. (S.C.C.).
7. *MacAskill* v. *The King,* [1931] S.C.R. 330 (S.C.C.).
8. *Latour* v. *The King,* [1951] S.C.R. 19 at 29 (S.C.C.).
9. *R.* v. *George,* [1960] S.C.R. 871 at 878, 891. (S.C.C.).
10. *A.G. for Northern Ireland* v. *Gallagher,* [1963] A.C. 349 at 381. (H.L.).
11. *Bratty* v. *A.G. for Northern Ireland,* [1963] A.C. 386 at 410. (H.L.).
12. *Majewski, supra,* note 4 at 305-06. The rule of law referred to by Lawton, L.J. is the maxim that drunkenness is no excuse for crime.
13. *Majewski, supra,* note 1 at 147-48.
14. *Id.* at 154.
15. *Id.* at 156-57.
16. *Id.* at 162, 163, 168, 169 and 171,
17. *Leary, supra,* note 1 at 53.
18. *Id.* at 40, 41.
19. *E.g.:* N.L.A. Barlow, *Drug Intoxication and the Principle of Capacitas Rationalis* (1984), 100 L.Q.R. 639 at 640-41; Stanley M. Beck and Graham E. Parker, *The Intoxicated Offender*

It is, of course, impossible to say whether judges in the nineteenth century intended to mitigate the rigours of the law that then prevailed. Accordingly, relaxation may have been among their motives in beginning to permit some form of the intoxication defence. But it need not have been the only reason for so doing.

Specific and general intent have often been seen as techniques that superseded the longstanding rule that drunkenness is no excuse for crime yet did not leave the way completely clear for intoxicated offenders to escape responsibility. It is equally plausible, however, that the rise of the drunkenness defence parallels the development of the mental element in crime. In other words, drunkenness began to be recognized as a defence when *mens rea* became an accepted part of the law. Judges realized that drunkenness to the extent of negating the mental element was incompatible with *mens rea.* Later developments, including the whole notion of specific intention and the misinterpretation of *Beard,* are based upon misconceptions about *mens rea* and about the nature of the intoxication defence.

## II. *Development of the Mental Element*

In order to examine this position more closely, it is necessary to look briefly at the history of the mental element in English law. At the outset, I disclaim any pretence of providing a complete legal history; the information set out here is derived entirely from secondary sources and is not meant as a definitive history. I wish only to present background for my statement that the present intoxication rules are based upon faulty premises insofar as they claim to be founded upon authority.

Nor do I pretend that the rise of *mens rea* is the only possible reason for the acceptance of the intoxication defence. I acknowledge that there may well have been a movement afoot amongst judges in the nineteenth century to ameliorate the law's severity. I merely suggest another reason the plausibility of which I hope to demonstrate.

Let us begin with the long-held view that drunkenness provides no excuse for crime. This is an ethical and moral stance and if what is meant by it is that impairment of faculties or lowering of inhibitions short of

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— *A Problem of Responsibility* (1966), 44 Can. Bar Rev. 563; Jerome Hall, *General Principles of Criminal Law* (2nd. ed. Indianapolis: Bobbs-Merrill Company Inc., 1960) at 529-557; Jerome Hall, *Intoxication and Criminal Responsibility* (1944), 57 Harv. L. Rev. 1045; Jerome Hall, *Law, Social Science and Criminal Theory* (Littleton, Colo.: Fred B. Rothman & Co., 1982) at 226; Gerald Orchard, *Drunkenness as a "Defence" to Crime,* [1977] 1 Crim. L. J. 59 at 61, 132. But, A.J. Ashworth, *Reason, Logic and Criminal Liability* (1975), 91 L.O.R. 102 at 113, believes, as I do, that development of the mental element led to recognition of the intoxication defence and that twentieth-century judges have limited the defence, not their nineteenth-century predecessors.

negating the mental element is no excuse, it is unimpeachable. That is to say, the mere fact of drinking to excess should have no bearing upon the question of culpability.

This view, with some modifications, has been expressed throughout English legal history. Indeed, essentially the same moral position was presented by Aristotle.[20] It was echoed by, among others, Coke,[21] Hale,[22] Hawkins[23] and Blackstone,[24] and in the cases of *Reniger* v. *Fogossa*[25] and *Beverley's Case*.[26] The same principle has been upheld today, just one example being *R.* v. *Kamipeli*.[27] For so long as the mental element of crime was non-existent or minimal, this proposition needed no explanation.

However, it is important here to note the origins of the mental element in English law. Going back to the time before the Norman conquest in 1066, it has been said that the law then required no mental element to constitute guilt, save, perhaps, in the case of accidental harms.[28] However, rather than accepting that at face value, it is necessary to look at the origins of the jury.

The jury in criminal cases dates from the thirteenth century.[29] Before that, it served as a body designed to obtain information in the manner of an inquest[30] and, as such, jurors acted as both witnesses and triers of the facts.[31] Therefore, it seems plausible to suggest that their knowledge of the facts, whether personal or from gossip, affected their decision-making. Thus, it is possible that even though a mental element was not required

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20. Aristotle, *Nichomachean Ethics*, trans. R.W. Browne, (London: George Bell & Sons, 1889) at 67 in fact would have imposed double punishment for drunken offenders, once for the offence and once for being intoxicated.

21. Vol. 2, Edward Coke, *Commentary Upon Littleton* eds. Francis Hargrave and Charles Butler, (19th. ed. London: James & Luke G. Harsard & Sons, 1832) at 247a. Coke actually wrote this in 1658-59. He agreed with the Aristotlian opinion that drunkenness aggravated crime.

22. Vol. 1 Sir Matthew Hale, *Pleas of the Crown*, 1678, 32.

23. Vol. 1, William Hawkins, *Pleas of the Crown* (London: Professional Books Ltd., 1973) at 4. Hawkins first published his work in 1716.

24. Vol. 4, Sir William Blackstone, *Commentaries on the Laws of England* (London: Garland Publishing Inc., 1978) at 25-26. This is a reprint of Blackstone's 9th ed. published in 1783.

25. *Reniger* v. *Fogossa* (1551), 75 E.R. 1 at 31.

26. *Beverley's Case* (1603), 76 E.R. 1118 at 1123.

27. *R.* v. *Kamipeli*, [1975] 2 N.Z.L.R. 610 at 614. (N.Z.C.A.), holding that drunkenness is itself not a defence but going on to outline the relevance of intoxication to the determination of the mental element.

28. Justice Owen Dixon, *The Development of the Law of Homicide* (1935), 9(supp.) A.L.J. 64 at 64-66; Francis Bowes Sayre, *Mens Rea* (1931/32), 45 Harv. L. Rev. 974 at 975-82.

29. Glanville Williams, *The Proof of Guilt* (3rd. ed. London: Stevens & Sons, 1963) at 4-5.

30. Vol. 1, Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: MacMillan & Co., 1883) at 425-26.

31. *Id.* at 426; Williams, *supra*, note 29 at 5; D. O'Connor, *The Transition from Inquisition to Accusation* (1984), 8 Crim. L.J. 351.

to be proven, the jury would take into account that an act was unintentional or accidental in arriving at its decision.

Be that as it may, both the role of the jury and the mental element changed over time. In time, witnesses began to be called to give evidence and the jurors assumed the role of being only triers of fact. It nevertheless took several centuries for trial procedure to evolve to anything like its present counterpart.

There were, at first, no rules of evidence as such[32] and witnesses under some circumstances gave depositions then introduced as evidence rather than stating their evidence under oath in the presence of the accused.[33] Moreover, the accused had no counsel,[34] the defence could not call witnesses[35] and, perhaps most crucially, the accused could not testify in her own cause.[36] The process of change took from the thirteenth until the late nineteenth century to be completed.

Meanwhile, the notion that the doing of the act alone would not suffice to found guilt gained currency. This concept had slow and halting beginnings. At first, accident and self-defence were accepted as mitigating, though not exculpating, circumstances in cases of homicide.[37]

Self-defence now amounts to a justification. Accident, however, is now seen as a negation of the mental element. In the thirteenth century, it was seen instead as a situation where the actor was morally innocent. The influence of the Church was predominant at this time in insisting that blameworthiness of the offender was necessary for guilt.[38] Thus, while there was not generally a concept of a mental element in anything like modern terms, it was being increasingly recognized that the doing of the act alone was not sufficient for culpability.

Moreover, several offences, by their very nature, required a particular intent. This was true of robbery and housebreaking for instance.[39] Both of these offences are done by design and cannot be committed through mischance.[40] Thus, even in the absence of an established mental

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32. Stephen, *Id.* at 350.
33. *Id.* at 349.
34. *Id.*
35. *Id.* at 350.
36. *Id.* at 439, 440. Also: Ralph Slovenko, *Psychiatry and the Law* (Boston: Little, Brown & Co., 1973) at 41. This was changed in England in 1898 by the *Criminal Evidence Act, 1898*, 61 762 Vict., c. 36, s. 1.
37. Dixon, *supra*, note 28 at 65; Sayre, *supra*, note 28 at 980-81. The offender received a pardon rather than an acquittal.
38. Sayre, *Id.* at 980, although Paul E. Raymond, *The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law* (1936), 15 Ore. L. Rev. 93 at 117, claimed moral liability was well-entrenched by 1100.
39. *Id.* at 981.
40. *Id.* at 989 and 1000.

requirement, there could not be an offence of either type without there having been some intent on the part of the accused.

In addition, there had already been, by the twelfth century, the application of some concept of *mens rea* to perjury,[41] apparently based on a sermon given by St. Augustine who had come to England in the fifth century A.D.[42] It is difficult to say whether the Church's concept of the mental element related more to moral guilt than to intention.

In any case, this era may have marked the beginnings of two separate streams of thought about *mens rea*: moral guilt (or various offshoots of it) and a particularized mental element for certain offences. Some explanation of these is required.

The first is much more an examination of the moral character of the accused without specific reference to the act itself. If the act was done and if the actor behaved in a morally wrong way, culpability would lie.

In contrast, for the second type, while the nature of the act was undeniably wrong in a moral, hence, criminal sense, the requirement of a particularized *mens rea* meant only that the actor must have intended (or, later, have been reckless) that the act occur. In other words, the mental element was particular to the offence charged. The moral character otherwise of the accused was irrelevant.

The latter approach was pursued by Bracton, writing in the thirteenth century. He borrowed heavily from Roman law and, while sometimes overstating the role of intention in English law, nevertheless contributed to the development of the mental element. He stated:

> . . . we must consider intention and purpose, as well as what is done or said, in order to ascertain what action follows and what punishment.
>
> For remove intention and every act will be indifferent; it is your intent which distinguishes your acts, and a crime is not committed unless an intention to injure exists; nor is theft committed without the intent to steal.[43]

Yet, two centuries later, Chief Justice Brian said that

> . . . it is common learning that the thought of a man will not be tried, for even the devil does not know the thought of man.[44]

This illustrates the uneven development of the mental element. Nonetheless, over the succeeding centuries, the mental element for

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41. L.J. Downer, trans. & ed., *Leges Henrici Primi* (Oxford: Clarendon Press, 1972) at 94-95. It was compiled about the year 1118. This may have been the first use of the maxim *reum non facit nisi mens sit rea.*

42. Sayre, *supra*, note 28 at 983-84, note 30.

43. Vol. 2, Bracton, *On the Laws and Customs of England*, trans. Samuel E. Thorne, (Cambridge, Mass.: Harvard University Press, 1968) at 290.

44. Year Book Pasch. 17 Edw. IV, f.1, pl. 2 at f. 2 quoted in Peter Stein and John Shand, *Legal Values in Western Society* (Edinburgh: University Press, 1974) at 133.

particular offences became more defined. *Animus furandi* became the mental element for theft;[45] a felonious intent to commit a felony within burgled premises was required for a burglary conviction;[46] arson required a burning *ex malitia praecogitata*;[47] and, finally, the malice aforethought needed for a murder conviction slowly evolved with its extended and artificial meanings.[48]

Likely because of the haphazard development of the mental element and, perhaps, due to the two streams of thought about what constituted *mens rea*, certain exceptions to culpability grew up as "defences" rather than being seen as negations of the elements of the offence. Some of these defences arose out of certain presumptions such as the presumption of incapacity of an infant[49] or the presumption of sanity.[50]

Others, such as mistake, took longer to be recognized as general defences and, at first, were accepted on the basis that the actor was not morally delinquent in a situation where a mistake was made. Later, however, in *Levett's Case*,[51] it was decided that a mistake negatived the intention required to make the offence complete.

Throughout this period, which ran until the nineteenth century, drunkenness continued to be denied as a defence. But, due to the way that exceptions to culpability arose as affirmative defences, the way was paved for it too to be seen in that light.

Meanwhile, the developments in the law of evidence and in criminal procedure[52] made it more possible for a court to determine the mental element. Thus, the rise of the mental element and the changes in evidence and procedure combined to set the stage for the acceptance of the intoxication "defence". But, first, let us note what had happened to the two schools of *mens rea* thought.

To do so requires a look ahead some years. The intoxication defence began to be accepted from approximately 1819 onwards.[53] It was much later in the century that the two cases that represent each of the *mens rea* concepts were decided.

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45. Bracton, *supra*, note 43 at 425.
46. Vol. 3, Edward Coke, *The Institutes of the Laws of England*, eds. David S. Berkowitz and Samuel E. Thorne, (London: Garland Publishing, Inc., 1979) at 63.
47. *Id.* at 67; Bracton *supra*, note 43 at 414.
48. Vol. 3, Stephen, *supra*, note 30 at 43, ascribes first use of the term "malice aforethought" to a decree of King Richard II in 1389: 13 Rich. II, St. II, c. l. by the mid-sixteenth century, its meaning had been extended to include, *inter alia*, felony murder.
49. Hale, *supra*, note 22 at 27-28.
50. Coke, *supra*, note 21 at 247a.
51. *Levett's Case* (1638), Cro. Car. 538. 1.
52. *Supra*, notes 32, 33, 34, 35, 36.
53. *R.* v. *Grindley, infra,* note 64 was the first known case to allow the defence.

*R.* v. *Prince*,[54] though confusing in that three majority judgments were given, probably typifies the school of thought that saw *mens rea* as connoting some form of moral guilt. In actual fact, the decision turned on whether the offence in question required *mens rea* at all but, along the way, the judges provided some insight into their views about *mens rea*. Some equated it with moral wrongdoing,[55] others with a legal, though not necessarily criminal, wrong[56] while Brett, J., in dissent, thought it meant a criminal mind.[57] Whatever the precise definition, it is clear that the judges in *Prince* saw *mens rea* in a moral light at least connoting something broader than the mental element required for the particular offence.

This view of *mens rea* was also espoused by some of the judges in *R.* v. *Tolson*[58] but the judgment which has been widely accepted ever since was given by Stephen, J.[59] Two passages of his judgment are particularly instructive:

> My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase "non est reus, nisi mens sit rea." Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a "mens rea," or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. "Mens rea" means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. . . . To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime.[60]

Later on, he gave a definition for *mens rea* which is often referred to today, as, for instance, in *Majewski:*[61]

> The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly

54. R. v. *Prince*, [1874-80] All E.R. Rep. 881.
55. *Id.* at 884, *per* Bramwell, B., with whom five others concurred.
56. *Id.* at 896, *per* Denman, J.
57. *Id.* at 891.
58. *R.* v. *Tolson* (1889), 23 Q.B.D. 168. (Crown Cases Reserved).
59. *Id.* at 184-93.
60. *Id.* at 185-86.
61. *Majewski, supra*, note 1 at 147, 150, 153, 161.

> or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime if fully defined, nothing amounts to that crime which does not satisfy that definition.[62]

It can at once be seen that the *Prince* view of *mens rea* would impose liability for a much broader range of mental states than would the *Tolson* view which restricts the concept to the particular mental state called for by the offence in question.

Let me then turn back to the early cases dealing with intoxication to examine which approach was being suggested by the judges. It must be borne in mind, however, that neither the *Prince* nor *Tolson* approaches had been expressly adopted prior to this. Authority lay on both sides, the developed mental element for robbery, theft, arson, burglary and, perhaps, murder on the *Tolson* side and such misdemeanours as trespass[63] on the other, given the moral stand against the defence that had, to this point, prevailed.

## III. *The Early Intoxication Cases*

The point I wish to make about the early intoxication cases is not that they wholeheartedly adopted the *Tolson* position long before it was decided nor even that they completely rejected the moral guilt view of *mens rea*, but simply that they were moving in the direction of *Tolson*, impelled perhaps by mitigatory impulses but just as surely by a growing recognition that proof of the mental element was required and that it varied from crime to crime. Evidence for this is found in the fact that certain offences had already particularized the mental element: robbery, theft, and burglary, for example.

Nonetheless, the moral strictures against intoxication prevented it being considered on the question of intent until *R.* v. *Grindley.*[64] By this time, some important changes had taken place in evidence and procedure which would facilitate the determination of the accused's actual mental state. Among these, the permitting of defence witnesses,[65] expert opinion evidence[66] and a defence counsel[67] were of great importance.

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62. *Tolson, supra*, note 58 at 187.
63. Sayre, *supra*, note 28 at 1003.
64. *R.* v. *Grindley*, (Worcestershire Summer Assizes), 1819 (unreported), described in Vol. 1, Sir William Russell and Charles Springel Greaves, *A Treatise on Crimes and Misdemeanours* (4th. ed. Phila.: T. & J.W. Johnson & Co., 1877) at 12. [Hereinafter cited as *Russell on Crimes*].
65. Permitted for treasons and felonies since 1702: 1702, 1 Anne 2, c. 9.
66. *Folkes* v. *Chadd et al.* (1782), 99 E.R. 589, first permitted expert opinion evidence.
67. *Prisoners Counsel Act*, 1836, 6 & 7 Will. 4, c. 114.

In addition, whatever the definition accorded *mens rea*, its place in criminal law had been assured by *Fowler* v. *Padget*[68] which, in 1798, held that an act did not become a crime unless accompanied by a guilty intent: *actus non facit reum nisi mens sit rea*.[69] This maxim, really stating two principles, that of requiring *mens rea* and contemporaneity of the *mens rea* and the *actus reus*, was so entrenched that Lord Kenyon cited no authority for it.

The nineteenth century cases on intoxication are few in number and the reports are scanty in detail. It is therefore difficult to draw any firm conclusions about the thinking of the judges involved and the resulting state of the law. Nevertheless, these cases can be summarized in the following way:

1. Drunkenness could be taken into account in deciding, on a subjective basis, whether an accused had been provoked.[70]
2. Although it was unclear whether the test was the capacity to form the requisite intent or the actual intent, evidence of drunkenness could be considered on the issue.[71]
3. Drunkenness could be considered on the question of whether an accused thought she was being attacked.[72]
4. Intoxication could result in a disease of the mind, hence, legal insanity.[73]
5. There was nowhere an articulated theory of specific intent nor any mention whatever in intoxication cases of general or basic intent.[74]
6. In only two cases[75] was there any use of terminology similar to specific intent, once being "specific"[76] and once "special".[77] Whether these were meant as terms of art will be discussed shortly.

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68. *Fowler* v. *Padget* (1798), 101 E.R. 1103.
69. *Id.* at 1106.
70. *Grindley, supra*, note 64; *Pearson's Case* (1835), 168 E.R. 1108; *R.* v. *Thomas* (1837), 173 E.R. 356, although *contra* is *R* v. *Carroll* (1835), 173 E.R. 64.
71. *R.* v. *Meakin* (1836), 173 E.R. 131; *R.* v. *Cruse* (1838), 173 E.R. 610; *R.* v. *Hayes* (1846), 10 J.P. 470; *R.* v. *Monkhouse* (1849), 4 Cox C.C. 55; *R.* v. *Bentley* (1850), 14 J.P. 671; *R.* v. *Moore* (1852), 175 E.R. 571; *R.* v. *Doody* (1854), 6 Cox C.C. 463; *R.* v. *Stopford* (1870), 11 Cox C.C. 643; *R.* v. *Doherty* (1887), 16 Cox C.C. 306.
72. *Marshall's Case* (1830), 168 E.R. 965; *Goodier's Case*, 1831 (unreported), but referred to in *Marshall*; *R.* v. *Gamlen* (1858), 175 E.R. 639.
73. *R.* v. *Davis* (1881), 14 Cox C.C. 563.
74. There can, of course, be no authority for a negative; suffice to say, I have searched long and hard for any articulation of a theory. The only mention of "general" intent that I have discovered is by Hall, 57 Harv. L. Rev., *supra*, note 18 at 1068, citing *R.* v. *Pembliton* (1874), 12 Cox C.C. 607. The reference is, however, to "general" intent to break the law, i.e. "transferred" intent and, in fact, the case nowhere mentions general intent as such.
75. *Monkhouse* and *Doherty, supra*, note 70.
76. *Monkhouse, Id.* at 56.
77. *Doherty, supra*, note 71 at 308.

The earliest of these cases, *Grindley, Pearson's Case*[78] and *Thomas*,[79] dealt with provocation. Although provocation, a defence only to murder, is not seen as a negation of *mens rea*, it is nevertheless bound up with the mental processes of the accused, albeit the volitive rather than the cognitive processes. In that sense, the consideration of intoxication on the question of provocation in these early cases might be seen as a precursor of its being considered on the question of the mental element. And, in fact, that very thing happened. *Meakin*[80] was apparently the first case which did so. In a case of stabbing with intent to murder, Alderson, B. directed the jury that

> . . . with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.[81]

This passage does not state any particular rule of law but is, instead, a common sense statement as a guide to determining whether the requisite mental state was present. It is revealing that there was no mention of specific intent nor of any restriction of the intoxication defence.

In *Cruse*,[82] a charge of inflicting injury with intent to murder, the trial judge told the jury:

> It appears that both these persons were drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering this child you may still find them guilty of an assault.[83]

At first blush, this might appear as if the trial judge was restricting the intoxication defence by charging on the included offence of assault. However, I would submit otherwise for two reasons. First, the use of the word "may" indicates that he was not completely ruling out acquittal even for assault. Second, the included offence, assault,[84] could be found

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78. *Pearson, supra*, note 70.
79. *Thomas, supra*, note 70.
80. *Meakin, supra*, note 71.
81. *Id.* at 132.
82. *Cruse, supra*, note 71.
83. *Id.* at 612.
84. *An Act to amend the Laws relating to Offences against the Person*, 1837, 1 Vict., c. 85, s. 11 made assault an included offence.

on ordinary subjective *mens rea* principles without regard to any specific-general intent distinction since there was no evidence that the male accused was unaware of what he was doing when he hit the child.

The first case to use the term "specific intention" was *Monkhouse*.[85] The accused had discharged a loaded pistol at the complainant and was charged with offences of varying intents, including the intent to murder, the intent to maim and disable and the intent to do grievous bodily harm. Coleridge, J. directed the jury as follows:

> Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a *partial answer* to a 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.*
>
> . . . You must not find him guilty of one of these intents on mere guess, but, on the other hand, I am bound to tell you that if you think one or all of them existed, there is evidence sufficient, in point of law, to justify you in saying so.[86] [emphases mine]

Again, the emphasized portions might indicate a movement towards the present law. There is nothing, however, to indicate that "specific intention" was used in any way other than as meaning "particular intention".[87]

The reference to "partial answer" likewise might be seen as indicating the present dichotomy. However, the offences charged all carried with them what is now known as an ulterior intent, for which today's law would allow the intoxication defence in each case. On today's law, there would nevertheless be a conviction for assault as an included basic intent offence. The same offence, assault, was included in *Monkhouse* by virtue of legislation.[88] Yet, the trial judge did not direct the jury to consider that offence which he surely would have had he in mind restricting the defence as a matter of law. Justice Coleridge may simply have meant that no issue of outright acquittal arose on the facts since, on ordinary subjective principles, there was no indication that the accused lacked the state of mind required for a common assault conviction.

*Doherty*[89] was the other case that arguably made reference to a particular kind of intent, in that case "special intent". The charge was one of murder by shooting where the accused conducted a conversaton with

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85. *Monkhouse, supra*, note 71 at 56.
86. *Id.*
87. This was also the opinion of Justice Dickson in dissent in *Leary, supra*, note 1 at 37.
88. *Supra*, note 84, s. 11. The charge of discharging a firearm with intent to murder is defined in s. 3 of the same *Act* and s. 11 applies to it.
89. *Doherty, supra*, note 71.

the deceased after the shooting which would seemingly have ruled out his having been in an automatous state. This is an important point to bear in mind for it might explain why no issue of outright acquittal arose in the case[90]. The trial judge, the eminent Stephen, J., whose judgment in *Tolson* demonstrates his views on *mens rea*, said:

> But it is difficult to see how a man can fire a loaded pistol at another without intending to do him grievous bodily harm, so that if you think that Doherty fired the pistol at the deceased's body, intending to hit him, but taking his chance where he hit him, that would be murder, though he did not intend to kill. If, on the other hand, you think that he fired it vaguely, without any special intent at all, and by so doing caused his death, that would be manslaughter. . . . but, although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.[91]

It is important to note that Stephen, J. went on to put both manslaughter by violence wilfully inflicted and manslaughter by negligence to the jury. Thus, it would seem that, in the case of violence wilfully inflicted, he considered that there was still some type of mental element involved, such as at least an intent to fire the pistol, though without the intents required for murder. Otherwise, had he considered manslaughter to be a basic intent offence for which drunkenness was of no avail, he would not have bothered to put manslaughter by negligence to the jury at all.

It is entirely possible that *Doherty* represents the beginning of the doctrine that intoxication negating intent could only reduce murder to manslaughter, not lead to acquittal, but it is striking that Stephen, J. nowhere states that proposition. It is plausible that subsequent cases misinterpreted what he said in *Doherty* in that regard.

Moreover, even if he did mean to lay down such a proposition, it does not necessarily follow that he meant that intoxication, in all circumstances, could be a defence only for specific intent offences. His use of the word "special" surely cannot be seen as connoting any particular significance; juxtaposed as it was by the adverb "vaguely", it meant merely that the accused lacked the particular intent for murder when he fired the pistol.

What may have led to the murder-manslaughter rule was the mental element for each of those crimes. In the case of murder, its mental element, malice aforethought, had acquired an artifical legal meaning which included not only a positive intention to kill but also the intention

90. Orchard, *supra*, note 19 at 63, also points this out.
91. *Doherty, supra*, note 71 at 308.

to cause greivous bodily harm knowing that it likely would cause death.[92] Every culpable homicide that was not murder was manslaughter which therefore covered many situations.

Among these were culpable negligence, whether or not death or bodily harm was intended, and accidental death caused by an unlawful act.[93] On those definitions, it can be seen that an intoxicated offender could be convicted of manslaughter even where she completely lacked intent. These definitions, particularly that of negligence, undoubtedly led Stephen, J. in *Doherty* to particularize the types of manslaughter that the jury should consider.

That he also put manslaughter wilfully inflicted to the jury indicates the wide scope of manslaughter. That particular species of manslaughter obviously contains, unlike the others, a mental element even though not so precisely defined as the malice aforethought for murder. The references to "special" intent and firing "vaguely" give some clue as to this mental element.

Rather than indicating a rigid rule, such as *Lipman*[94] and *Hartridge*[95] impose today, whereby intoxication negativing the mental element for murder automatically gives rise to liability for manslaughter, it is apparent that Stephen, J. wanted the jury to consider the gradations of the lesser offence. It is clear that he felt that some intent to fire the pistol was involved in the more serious type of manslaughter. But is equally clear that he did not mean that this intent was a different species of *mens rea* altogether. As I earlier stated, no issue of outright acquittal on account of automatism arose on the facts, hence, the case is not authority for the proposition later expounded in *Lipman* and *Hartridge*.

There is later authority from Stephen himself that he envisioned a mental element for the type of manslaughter categorized in *Doherty* as violence wilfully inflicted. Some years later, he stated:

> As the law now stands, if a man stabs another with intent to do him grievous bodily harm, and in fact kills him, he is guilty of murder. If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict any great harm, and happens to kill him, he is guilty of manslaughter.[96]

To summarize the views of Stephen, he saw *mens rea* as a misleading term, the mental element for crime varying with the crime. His judgment in *Doherty* was consistent with this view and with his view of the law that

92. I am leaving aside the other definitions — the felony murder principle and the resisting of lawful arrest principle — as set out by Stephen, J. See: Vol. 3, Stephen, *supra*, note 30 at 22.
93. *Id.* at 20.
94. *R.* v. *Lipman*, [1970] 1 Q.B. 152. (C.A.).
95. *R.* v. *Hartridge*, [1967] 1 C.C.C. 346. (Sask. C.A.).
96. Vol. 3, Stephen, *supra*, note 30 at 56.

manslaughter was a catch-all for homicides falling short of murder. In this view, there were types of manslaughter for which negligence provided the culpability but there were other types. Even for negligent manslaughter, he nowhere articulated the opinion that it was necessarily a lesser offence for which an offender was liable when intoxication negatived the mental element for murder. His reference to "special" intent is scant authority upon which to rest the notion of specific intent. The rule that intoxication could reduce murder to manslaughter may have arisen from his statements in *Doherty* but, even there, such a principle has weak legal underpinnings indeed.

Nonetheless, it is true that later cases began to insert the adjective "specific" when dealing with intent and it is also the case that the murder-manslaughter rule became an accepted one. The latter was, for instance, applied in *R.* v. *Meade*[97] which quoted *Doherty* as authority. Interestingly, *Meade*, while purporting to lay down a wide statement of the law of intoxication, did not try to do so by reference to the specific intent doctrine.

The situation, therefore, on the eve of *Beard* was that there was by no means an articulated theory of the intoxication defence. All that was clearly established was that a special rule had evolved whereby intoxication to the point of negating malice aforethought would reduce murder to manslaughter. The limitations of even that rule were based on tenuous analysis and meagre authority.

The submission has here been made that judges in the nineteenth century began to realize the requirement for *mens rea* and that it varied from crime to crime. Rather than limiting the intoxication defence to certain types of offences, they began to see that it must be taken into account in determining the mental element no matter the offence.

The only possible exceptions for *mens rea* offences were murder and manslaughter. If it was intended as a limitation of the intoxication defence, it arose for understandable reasons: almost anyone would recoil at the thought of a drunken killer going scot-free and Parliament had not provided any alternative. In those circumstanes, it is not at all surprising that such an exception might have arisen.

It is plausible that no case of drunken automatism arose for consideration during that period. Therefore, there was likely no opportunity and no need to devise any rule akin to that now established by *Lipman* and *Hartridge* whereby a homicidal act, even without volition or any *mens rea* whatsoever, gives rise to liabiliy for manslaughter. Certainly *Doherty* was not such a case. Indeed, that situation is quite rare

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97. *R.* v. *Meade*, [1909] 1 K.B. 895. (C.A.).

even today with the greater use of a wider variety of intoxicants; there must surely have been few such cases in those days and courts were hampered in their determination of mental states by the inability of the accused to testify and by the infant state of psychiatric knowledge. It may well be, therefore, that those few cases that seemed to devise the murder-manslaughter rule instead merely applied ordinary principles of criminal law in determining the state of mind required for the actual offence. In the case of manslaughter, "states of mind" included, but was not limited to, negligence.

I stated at the outset that, at the least, mitigation of the law's harshness was not the only possible reason for the rise of the intoxication defence. The foregoing discussion has attempted to show that the advent of the defence could be instead (or equally) predicated upon the notion of *mens rea.*

There is one final point insofar as mitigation of sentence is concerned. It is this: it was quite unnecessary for judges to devise some means of mitigating the penalties provided by the law because, throughout the same period that the intoxication defence was evolving, Parliament was acting to reduce the ambit of capital punishment and transportation.[98]

It would thus be strange if judges acted at this particular time in legal history to diminish the severity of the law when they had at no earlier time invented any similar doctrine to abate punishment and at a time when Parliament was meeting these concerns through legislative action. Surely this lends credence to the view that the intoxication defence arose more because judges realized the need for *mens rea* than because of mitigatory influences.

Indeed, as the cases subsequent to *Beard* will show, far from nineteenth century judges seeking to mitigate the stiff penalties of the day, it has been twentieth century judges who have sought to narrow the scope of the intoxication defence[99] and, in doing so, have done the precise opposite to what is alleged to have been the motivation behind the rise of the defence in the last century.

## IV. *D.P.P.* v. *Beard*

*Beard*[100] is, of course, considered the origin of the specific-general intent

98. Capital punishment was the automatic punishment for felony until well into the nineteenth century even though judges enjoyed some discretion to recommend clemency and transportation: D.A. Thomas, *Principles of Sentencing* (2nd. ed. London: Heinemann, 1979) at 6. Gradually, and especially between 1827 and 1840 and again in 1861, the scope of capital punishment was reduced and imprisonment began replacing transportation. Nonetheless, there may still have been a mitigatory impulse in relation to murder, for which capital punishment remained, hence, possibly the murder-manslaughter anomaly.

99. Ashworth, *supra*, note 19 at 113 makes this point.

100. *Beard, supra*, note 2.

dichotomy. Whether that is a warranted interpretation of the case is very doubtful indeed. Nevertheless, the orthodox interpretation is so entrenched that there is very strong resistance to considering it in any other light. I shall try to demonstrate that the view of *Beard* accepted in our law is quite wrong and, at times, an apparent refusal to accept what was actually said.

Let me begin the discussion with the question of whether Lord Birkenhead, L. C. espoused the *Tolson* or the *Prince* view of *mens rea.* Neither case is cited in *Beard* but I suggest that Lord Birkenhead, by inference, adopted the *Tolson* approach.

Lord Birkenhead began his judgment with a recital of the facts and with a history of the intoxication cases. That he had unfeigned respect for Stephen, J. is apparent by his description of him as "[t]his eminent authority on criminal law"[101] and by the extensive references to judgments of Justice Stephen, *Doherty* being the most important. He concluded his review of the cases by saying:

> . . . these decisions establish that where a *specific intent* is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. *This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commision of that crime.*[102] [emphases mine]

It is important to note the striking similarity between the second emphasized portion and the view of *mens rea* espoused by Stephen, J. in *Tolson.*[103] It might not convince one that Lord Birkenhead was embracing this concept of the mental element but it is persuasive in the sense that it ties intoxication to the question of the mental element for the particular crime.

The mention of the word "specific" no doubt weakens this argument if it can be construed as connoting a particular species of intent. But I submit that it was not intended in that way at all. Consider the last portion of the same paragraph:

> In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous

101. *Id.* at 498.
102. *Id.* at 499.
103. *Tolson, supra,* note 58 at 187.

> bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter: per Stephen, J. in *Doherty's Case.* (1) *This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself; the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.*[104] [emphasis mine]

The emphasized extract demonstrates that Lord Birkenhead accepted that murder could only be reduced to manslaughter but was unsure upon what basis this could be justified.

It seems that he misconstrued *Doherty* in that he did not state that there was a mental element for manslaughter at all. This, in turn, caused him to find the murder-manslaughter rule an anomaly for which he cited two possible explanations. Had he considered Justice Stephen's other writings about manslaughter, he might well have posited a subjective mental element for certain types of manslaughter and/or done away with the anomaly altogether. In any event, it is evident that the rule bothered him as being an exceptional one not consistent with his own thoughts on *mens rea.* Had he meant specific intent as a way of limiting the intoxication defence, he surely would have said so and, one would have thought, attempted to define it. But he did not.

If he intended any special meaning for the term, I suggest that it merely meant particularized intent, whether in a statute, such as the intent to wound, or in case law, such as malice aforethought for murder, as opposed to the mental element for those offences whose mental element was implied or had not been articulated in statute or case law. Even then, he did not seek to differentiate between the two types of intent by allowing the intoxication defence for one but not the other for, if he intended to so, he certainly might have stated so explicitly. Instead, he stated later on in the judgment, in an oft-quoted passage:

> In *Meade's Case* the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's Case*, therefore, it was essential to prove the specific intent; in Beard's case it was only necessary to prove that the

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104. *Beard, supra,* note 2 at 500.

> violent act causing death was done in furtherance of the felony of rape. I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime — e.g., wounding with intent to do grievous bodily harm or with intent to kill. *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 (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea.*[105] [emphasis mine]

A literal reading of this passage would seem to confirm that Lord Birkenhead intended no restriction of the intoxication defence. However, the passage was interpreted in *Majewski*[106] as meaning that intoxication might be a defence to any specific intent offence even where there is no lesser included general or basic intent office. There are several things wrong with the interpretation given by Lord Russell in *Majewski.*

In the first place, he cited *Moore,*[107] an attempted suicide case, as an example of a specific intent offence for which there was no lesser offence. The clear implication would seem to be that all attempts are specific intent offences. This opinion has been reiterated by certain academic writers but there is now case authority going the other way[108] and certainly there was no such case decided up to the time of *Beard.* It seems just as likely that Lord Birkenhead, like Jervis, C. J. in *Moore,* considered it patently obvious that a person ". . . so drunk as not to know what she was about"[109] could not intend to commit suicide, in other words, a straightforward negation of the mental element.

More important, Lord Russell provided no explanation whatever for the italicized sentence. The clause, ". . . a person cannot be convicted of a crime unless the mens was rea" must certainly mean what it says. Lord

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105. *Id.* at 504.
106. *Majewski, supra,* note 1 at 172, *per* Lord Russell.
107. *Moore, supra,* note 71.
108. J.C. Smith and Brian Hogan, *Criminal Law* (5th. ed. London: Butterworths, 1983) at 197, and Eric Colvin, *A Theory of the Intoxication Defence* (1981), 59 Can. Bar Rev. 750 at 757, both state that all attempts are specific intent without citing case authority. In fact, there are several cases, though none explicitly on the point at either the Supreme Court of Canada or House of Lords level, which suggest that attempts follow the completed offence: *R.* v. *Boucher,* [1963] 2 C.C.C. 241 (B.C.C.A.), approved in *Leary, supra,* note 1 at 56; *R.* v. *Bartlett* (1983), 5 C.C.C. (3d) 321 at 336. (Ont. H.C.); *R.* v. *Triller* (1980), 55 C.C.C. (2d) 411. (B.C. Co. Ct.); *R.* v. *Revelle* (1979), 48 C.C.C. (2d) 267 (Ont. C.A.). In addition, *R.* v. *Pigg,* [1982] 2 All E.R. 591. (C.A.), although not an intoxication case, discusses recklessness as a mental element for attempted rape. By the combined operation of *Majewski* and *R.* v. *Caldwell,* [1981] 1 All E.R. 961. (H.L.), all offences having recklessness as a mental element are basic intent offences for the purposes of the intoxication rules. Therefore, on this reasoning, *Pigg* might be taken as deciding that attempted rape is a basic intent offence, the same as the full offence, rape.
109. *Moore, supra,* note 71 at 571.

Russell and those judges who have adopted his interpretation[110] have consistently glossed over this portion without even attempting to explain it.

That sentence is an important clue to Lord Birkenhead's thinking on the mental element of crime. If he meant the term specific intent in any technical way at all, it was merely to illustrate the mental element for those offences for which Parliament had set out an express intent or for which case law had articulated a precise intent. But it is also clear that he did not see specific intent as a different kind of *mens rea*, as the italicized sentence indicates. The conclusion to be drawn from this is that he adhered to the *Tolson* view of *mens rea*. In other words, if Lord Russell's interpretation of this passage is wrong, the literal interpretation is the only plausible alternative.

If this is so, the quoted portion and the following passages assume a different character altogether from how they usually have been interpreted. This is what was said subsequent to the previous quote:

> . . . drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. . . . The capacity of the mind of the prisoner to form the felonious intent which murder involves is in other words to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.[111]

If Lord Birkenhead was a follower of the *Tolson* school, all this meant was that, where felony murder was charged, the requisite intent was the intent to commit the underlying felony. This was consistent with the malice aforethought that had developed for felony murder[112] and did not require the gyrations that Lord Russell went through to overcome the specific-general intent dichotomy in cases where the underlying offence is one of general intent.

Indeed, the reference to *Meade* clearly contradicts Lord Russell's statement[113] that *Beard* is authority for the proposition that murder is always a crime of specific intent. Lord Birkenhead in fact said that the specific intent to kill or do grievous bodily harm had to be proven in *Meade* but not in *Beard*. Nonetheless, he would have permitted the

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110. All the other Law Lords in *Majewski* and the majority in *Leary, supra*, note 1.

111. *Beard, supra*, note 2 at 504-05. He reiterated this at 507.

112. Vol. 3, Stephen, *supra*, note 30 at 22.

113. *Majewski, supra*, note 1 at 172. *Swietlinski* v. *The Queen* (1980), 55 C.C.C. (2d) 481 (S.C.C.), especially at 495, followed this reasoning. Both cases would allow the intoxication defence for any charge of murder including constructive or felony murder where the underlying offence was of general intent. Murder is thus always a crime of specific intent.

intoxication defence in *Beard* had the evidence shown a lack of intent to commit the underlying felony. Far from indicating that murder is always a crime of specific intent, he expressly said that felony murder was not, thus showing that he did not at all mean the term "specific" in a precise technical way.

Though later cases have wrestled to get around the plain words used by Lord Birkenhead, it is noteworthy that at least one commentator, writing immediately after *Beard,* accepted that what was said was meant. He simply disagreed with it. This was Stroud, who stated:

> The whole of these observations . . . suggest an extension of the defence of drunkenness far beyong the limits which have hitherto been assigned to it. The suggestion, put shortly, is that drunkenness may be available as a defence, upon any criminal charge, whenever it can be shown to have affected *mens rea. Not only is there no authority for this suggestion: there is abundant authority, both ancient and modern, to the contrary.*[114] [emphasis mine]

The emphasized sentence is, in fact, a gross misrepresentation of the existing law to that point for, as I have endeavoured to point out, judges in the nineteenth century did not articulate any restriction upon the intoxication defence, other than possibly in the case of murder. The reason that Stroud took such exception to the plain meaning of the passage in *Beard* was because of his own view of *mens rea.* In an earlier book, *Mens Rea,*[115] he had criticized the definition given the term by Stephen, J. in *Tolson*[116] by saying:

> Instead of saying that mens rea *means*, in the case of murder, malice aforethought, in the case of theft and intention to steal, and so forth, it would have been more correct to say that it *includes* those states of mind respectively, as being comprised in a general intention to break the laws which prohibit the criminal acts in question.[117]

This view assumes crucial importance in subsequent interpretations of *Beard* for Stroud was quoted with approval by the House of Lords in *Majewski.*[118].

Notwithstanding that several of the Lords in Majewski explicitly quoted from *Tolson,*[119] they, at the same time, adopted the other view of *mens rea* exemplified by *Prince*[120] and Stroud. It is a concept of *mens rea* quite incompatible with *Tolson mens rea* and, if I am right in asserting

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114. D.A. Stroud, *Constructive Murder and Drunkenness* (1920), 36 L.Q.R. 268 at 270.
115. Stroud, *Mens Rea* (London: Sweet & Maxwell, Ltd., 1914).
116. *Tolson, supra,* note 58 at 185-86.
117. Stroud, *Mens Rea, supra,* note 115 at 15.
118. *Majewski, supra,* note 1 at 149, 150, 151, 164, 169, 170.
119. *Id.* at 146, 147, 150, 153, 160, 161.
120. *Prince, supra,* note 54.

that Lord Birkenhead was an adherent of the latter school, with what was said in *Beard.*

Under this concept, *mens rea* is supplied by a general intention to break the law and can include a general form of recklessness, of which the act of getting inebriated can be considered an example:

> By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to *mens rea* for the purpose of all ordinary crimes . . .[121]

Obviously the above statement is not in accord with the statement by Lord Birkenhead that:

> It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analyais, 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.[122]

It can thus be seen that the judgment in *Beard* is far more in line with a particularized concept of *mens rea* and that, flowing out of that approach to the mental element, it did not seek to split intent into specific and other kinds of intent.

Further evidence for this opinion lies in the fact that there was nowhere any mention of a counterpart to specific intent. In addition, there was no attempt made to define specific intent or *mens rea*, a further indication that no restriction of the intoxication defence was intended.

Given the stress that has since been placed upon Lord Birkenhead's use of the adjective "specific", it is noteworthy that he used it only seven times[123] in the judgment. The first time was in a quote from *Monkhouse*[124] and was some eight pages into the judgment; it obviously was not meant as a term of art there. Of the remaining six, once was in a context already canvassed as pertaining to the particularity of the mental element of crime,[125] rather than as having any distinctive legal meaning.

It was also mentioned twice in the three rules that he set out in relation

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121. Stroud, *supra*, note 114 at 273. Stroud's view of *mens rea* was echoed by, *inter alia:* R.U. Singh, *History of the Defence of Drunkenness in English Criminal Law* (1933), 49 L.Q.R. 528 at 544-45; *Constructive Murder — Drunkenness in Relation to Mens Rea* (1920-21), 34 Harv. L. Rev. 78 at 80; John E. Stannard, *The demise of drunkenness* (1982), 2 L.S. 291 at 298; Courtney Stanhope Kenny, *Outlines of Criminal Law* (1st. ed. reprint. Cambridge: University Press, 1904) especially at 59-61.

122. *Beard, supra*, note 2 at 504.

123. *Id.* at 498, 499, 500, 501, and three times at 504.

124. *Monkhouse, supra*, note 71, at 56, quoted in *Beard, Id.* at 498.

125. *Beard, Id.* at 499.

to intoxication.[126] The first of these counterposed incapacity to form a specific intention with insanity caused by intoxication[127] and was meant to distinguish the situation where an accused was rendered incapable of knowing the nature and quality of the act or of knowing it was wrong (insanity) from the situation where the mental element was lacking due to intoxication. The second was in rule two[128] and again related to the term to the mental element "essential to constitute the crime . . ",[129] rather than as indicating a distinctive species of intent. This is confirmed by the last three instances of its use, all of which arose in connection with the passage he finished by stating that "a person cannot be convicted of a crime unless the mens was rea."[130]

There has been considerable support, both judicial and academic in favour of the interpretation I am seeking to place upon *Beard.* On the judicial front, Justice Dickson in *Leary*[131] expressed doubt about the conventional meaning. In *Kamipeli,*[132] the New Zealand Court of Appeal did likewise and went on to state:

> The use of this adjective [specific] has of recent years been often criticised as suggesting the existence of a distinction between the Crown's burden in those cases when the general intent involved in proof of mens rea is necessary, on the one hand, and in those when the statute prescribes a particular intent on the other. But we cannot accept that Lord Birkenhead intended any such distinction. . . . So whether it be a general or a particular intent the burden is the same; the Crown must prove the intent required by the crime alleged.[133]

The Court elsewhere went on to point out that the relevance of evidence of intoxication was to shed doubt on proof of the mental element and not to say that raising the defence exempted the Crown from its ordinary duty to prove all the elements of the offence.[134]

The High Court of Australia, in *R.* v. *O'Connor,*[135] rejected the application of *Majewski* to Australia and, in so doing, some of the judges disagreed with the orthodox interpretations of *Beard.* For example, Chief Justice Barwick interpreted the passage in *Beard* containing the phrase

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126. *Id.* at 500, 501.
127. *Id.* at 500.
128. *Id.* at 501.
129. *Id.*
130. *Id.* at 504.
131. *Leary, supra,* note 1 at 40.
132. *Kamipeli, supra,* note 27.
133. *Id.* at 614. Admittedly, the same Court, constituted differently, explicitly left open the question of whether *Majewski* would be applied in New Zealand: *R.* v. *Roulston,* [1976] 2 N.Z.L.R. 644 (N.Z.C.A.).
134. *Id.* at 616.
135. *R.* v. *O'Connor* (1980), 29 A.L.R. 449. (Aust. H.C.).

". . . a person cannot be convicted of a crime unless the mens was rea"[136] in literal fashion.[137] In support of his opinion, he gave four reasons:

> . . . first, that what was being decided was not by reason of an exceptional rule; second, that it was in line with fundamental principle, ie of the indispensable need for mens rea; third, the reference to *R.* v. *Moore* (1852) 3 Car & K 319, and, lastly, the reference to a quotation from *Meade's* case.[138]

The last reason referred to a quotation in *Beard* from *Meade*[139] which, even though Lord Birkenhead disapproved of some of the language used, nonetheless indicated an understanding that the relevance of intoxication was in connection with the general requirement of proof of the mental element. It must be remembered that *Meade* at no time made reference to any distinction between specific and any other kind of intent.

In addition, Chief Justice Barwick,[140] Justice Stephen,[141] and Justice Aickin[142] all expressly adopted the approach advocated in *Kamipeli*, namely, a literal interpretation of *Beard* so as to allow the intoxication "defence" in any case where it led to doubt that the mental element was proven.

On the academic front, several commentators have taken the same view of *Beard.* In addition to those already mentioned,[143] several of the more accepted text writers in Canada and England have disagreed with the prevailing opinion that *Beard* meant to lay down the specific-general intent dichotomy. Among these are Smith and Hogan,[144] Glanville Williams,[145] Don Stuart,[146] and Mewett and Manning.[147]

There have also been several articles written disputing the present view

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136. *Beard, supra,* note 2 at 504.
137. *O'Connor, supra,* note 135 at 463.
138. *Id.*
139. *Meade, supra,* note 97 at 899-900, quoted in *Beard, supra,* note 2 at 503.
140. *O'Connor, supra,* note 108 at 464.
141. *Id.* at 478.
142. *Id.* at 492.
143. Stroud, *supra,* note 114; Singh, *supra,* note 121; *Constructive Murder — Drunkenness in Relation to Mens Rea supra,* note 121; Stannard, *supra,* note 121; Ashworth, *supra,* note 19, Beck and Parker, *supra,* note 19; Orchard, *supra,* note 19.
144. Smith and Hogan, *supra,* note 108, 1st. ed., 1965 at 118. They repeated this view in the 3rd. ed., 1973 at 153 but, in the face of *Majewski* and *Lipman,* have backed off this position somewhat in the 4th. ed., 1978 at 186, and 5th. ed., 1983 at 192.
145. Glanville Williams, *Criminal Law The General Part* (2nd. ed. London: Stevens & Sons Limited, 1961) at 570; Glanville Williams, *Textbook of Criminal Law* (2nd. ed. London: Stevens & Sons Limited, 1983) at 471.
146. Don Stuart, *Canadian Criminal Law* (Toronto: The Carswell Company Limited, 1982) at 358-59.
147. Alan W. Mewett and Morris Manning, *Criminal Law* (2nd. ed. Toronto: Butterworths, 1985) at 207.

of *Beard*.[148] Surely the fact that respected academic writers have consistently read *Beard* in such a way as to negate any suggestion of the dichotomy demonstrates that this interpretation has cogency. If that be the case, it would seem a valid criticism to accuse those adopting the conventional view of the case of using *stare decisis* as a way of limiting the intoxication defence but by dubious means.

In conclusion, my submission is that *Beard* has been badly misinterpreted, in some cases by those wishing to find in it support for their own views of *mens rea* and, in other cases, despite their own views. The foregoing discussion has attempted to show that Lord Birkenhead was an adherent of the *Tolson* school of *mens rea*, that he therefore realized that intoxication to the point of negativing cognition was incompatible with this theory of *mens rea* and that accordingly he meant nothing in particular by the phrase "specific intent".

It must, however, be acknowledged that the judgment was not consistently a model of clarity and it is not therefore surprising that there have been conflicting opinions as to its meaning. Having conceded that there has been room for confusion does not, however, mean a concession that *Beard* represents sufficient authority for the specific and general or basic intent distinction. It must be remembered that these latter terms were never once used in the case and, consequently, the distinction was not drawn until after *Beard*.

## V. *Whence General And Basic Intent?*

As neither general or basic intent was mentioned in *Beard*, the question naturally arises as to their origins. It should first be noted that the terms are synonymous, the first being the term in general use in Canada and the latter being its English counterpart. Both are in contradistinction to specific intent and each has particular relevance to the intoxication defence. But from whence did they come?

I previously pointed out that the nineteenth century intoxication cases were few in number and scanty in detail. An examination of those cases reveals no instance whatever of the use of these terms. Indeed, the earliest example that I have been able to locate is in a work by Hall,[149] in which he suggested that the antecedents of general intent lay with the doctrine of transferred intent, a doctrine different altogether from the specific-general intent dichotomy.

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148. S.H. Berner, *The Defense of Drunkenness — A Reconsideration* (1971), 6 U.B.C. L. Rev. 309 at 331; Alan D. Gold, *An Untrimmed "Beard" — The Law of Intoxication as a Defence to a Criminal Charge* (1976), 19 Crim. L. Q. 34; Paul B. Schabas, *Intoxication and Culpability: Towards an Offence of Criminal Intoxication* (1984), 42 U. of T. Fac. L. Rev. 147.
149. Hall, 57 Harv. L. Rev., *supra*, note 19 at 1068. See also: note 74.

It is difficult in legal research to prove a negative. Thus, a search for the origins of these terms can prove both exasperating and fruitless. As near as I can determine,[150] therefore, the first use of the term "general intent" in a case was in *R.* v. *George*[151] while the first use of "basic intent" did not occur until *D. P. P.* v. *Morgan.*[152] Neither cites any authority or source for the terminology. A search through the leading texts was as rewarding: until after *Majewski* was decided, there appears to have been no mention whatever of either term.[153] It is true that many of these same text writers used the term "specific intent" but this was often done by way of direct quotes from *Beard* with no comment or amplification.[154]

One plausible explanation for its eventual appearance in the cases and in texts is simply that it was thought necessary to have a counterpart to specific intent.[155] The origins for this may have been the other view of *mens rea* exemplified in the writings of Stroud[156] and Kenny[157] and by *R.* v. *Prince.*[158]

In this view, specific intent did apparently mean something over and above "ordinary *mens rea*", hence, "ordinary *mens rea*" could be considered a rough form of general or basic intent. Thus, while *mens rea* meant simply a general intention to break the law, specific intent referred to an additional intent stipulated by the legislature or through case law. Sometimes it could be an intent ulterior to the *actus reus*, as for burglary, or merely an extended or artificial intent, as for the malice aforethought which constituted the mental element for murder.

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150. Of the many intoxication cases I have considered that have been decided since *Grindley, supra*, note 64, until *George, supra*, note 9, I found no mention of either general or basic intent. I have confined the search to Canada, England and selected Commonwealth countries. If, however, the terms were borrowed from other countries, such as, for example, from the United States, one would expect the cases using the terms to have said so. They do not. It would appear from Hall's discussion, *supra,* note 19 and from Wayne R. LaFave and Austin Scott, Jr., *Handbook in Criminal Law* (St. Paul: West Publishing Co., 1972) at 343-44, that the United States has used general intent as a term for a longer period of time than either Canada or England.

151. *George, supra*, note 9.

152. *D.P.P.* v. *Morgan,* [1975] 2 All E.R. 347. (H.L.).

153. *Inter alia,* I have looked at: Smith and Hogan, *supra*, note 108, all editions (They first use the term "basic intent" in the 4th. ed., 1978); Williams, *Textbook, supra*, note 144, both editions; Williams, *Criminal Law The General Part, supra*, note 144, 2nd. ed.; Rupert Cross and Philip Asterley Jones, *An Introduction to Criminal Law* (6th. ed. London: Butterworths, 1968); and, 8th. ed., 1976; *Russell on Crimes, supra*, note 64, 4th. ed., 1877; 8th. ed., 1923; 10th. ed., 1950; 11th. ed., 1958; 12th. ed., 1964; Kenny, *Outlines of Criminal Law, supra*, note 121, 1st ed. reprint, 1904; 7th. ed., 1915; 9th. ed., 1918; 15th. ed., 1936; (J.W. Cecil Turner, ed.) 16th. ed., 1952; 17th. ed., 1958; 19th. ed., 1966.

154. Among them were: Cross and Jones, *Id. Russell on Crimes, Id.;* and Kenny, *Id.*

155. Hall, *Law, Social Science and Criminal Theory, supra*, note 19 at 226, suggests this.

156. Stroud, *supra*, notes 114 and 115.

157. Kenny, *supra*, note 122.

158. *Prince, supra*, note 54.

Unfortunately, the judgments in *George* did not articulate such a definition for general intent[159] nor did Lord Simon's judgment in *Morgan*.[160] The position, therefore, is that both terms have rather murky and imprecise origins.

Indeed, while *George* may have seen the first use of the terminology, it is not entirely clear that the Supreme Court meant to exclude the intoxication defence for all general intent crimes. Justice Fauteux and Justice Ritchie may both have meant only that it was difficult to conceive of a case where a person applied the force constituting an assault but lacked the intent to so apply force. Both Justices seemed to think that, where an accused lacked such intent, the condition must necessarily be so severe as to approximate insanity. Justice Fauteux said this:

> Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know 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. It is certain that, on the facts found by the trial Judge, this situation did not exist in this case.[161]

Justice Ritchie said much the same:

> The decision of the learned trial judge, in my opinion, constitutes a finding that the respondent violently manhandled a man and knew that he was hitting him. Under these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault because there is no suggestion that the drink which had been consumed had produced permanent or temporary insanity and the respondent's own statement indicates that he knew that he was applying force to the person of another.[162]

These passages indicate a reluctance to permit the intoxication defence for a general intent offence but not an unqualified refusal to do so. Nonetheless, these extracts have been glossed over and the dichotomy became an accepted one. It took, however, until *Majewski* and its acceptance in Canada in *Leary* for the specific-general intent distinction to become legitimized.

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159. Justice Fauteux in *George, supra,* note 9 at 877, and Justice Ritchie, at 890, both appeared to give specific intent a purposive definition and define general intent as the intent to do the immediate act. It is not clear whether their respective definitions are different from each other but they certainly seem to be at odds with Stroud's view of *mens rea.*

160. Lord Simon likewise did not adopt the Stroud, Kenny and *Prince* theory of *mens rea.* Instead, his definition of basic intent is more like that of Justice Fauteux in *George.* In fact, he later praised that definition in his judgment in *Majewski, supra,* note 1 at 154.

161. *George, supra,* note 9 at 879.

162. *Id.* at 891.

## VI. *Conclusion*

At the outset, I pointed out that one of the arguments often made in favour of the specific intent restriction on the intoxication defence was that it rested upon entrenched authority, especially upon *Beard.* From the argument presented here, it can be seen that the nineteenth century cases do not provide sufficient authority upon which to found the restriction.

In the first place, they seldom mentioned specific intent and then not in any technical way. The most that can be said is that the rule allowing intoxication to negative the mental element for murder but leading to a conviction for manslaughter had its genesis in this period. Whether that rule was intended at all is a moot point.

Although mitigation of the law's severity may have been one of the reasons for the gradual acceptance of the intoxication defence in the last century, it was not the only reason. A more persuasive reason is that judges began to realize the incompatibility of a *mens rea* requirement with a denial of intoxication as a defence where the accused lacked the requisite *mens rea.*

*Beard* itself is generally relied upon for legitimizing the specific-general intent division. Yet, the whole tenor of Lord Birkenhead's judgment pointed in the direction of the concept of *mens rea* typified by the judgment of Justice Stephen in *Tolson,* namely, that the mental element of any offence is particular to that offence. All intents are specific in this view. Thus, while the judgment in *Beard* is a perplexing one, on balance it is more consistent with the view that no such division was intended.

I have also sought to demonstrate that it has been twentieth century judges and academic writers who have invented general and basic intent as a way of limiting the intoxication defence.

If this is so, it is apparent that those who wish to defend the existing law of Canada and England will have to marshall arguments other than that from authority. In short, there is little actual authority for the present law. None used both terms until *George* and none clearly and unmistakeably sanctioned the specific-general intent dichotomy until *Majewski.* The concepts of specific and general (or basic) intent must therefore stand or fall on their own merits. A discussion of the merits of those other arguments must, however, be postponed for another ariticle.