

Learning Network

Mobilizing knowledge to end gender-based violence

Brief 41 | September 2022

UNDERSTANDING THE EXTREME INTOXICATION DEFENCE: A BRIEF BY ELIZABETH SHEEHY

Introduction

Extreme intoxication can be a defence when an individual is in a state akin to automatism where they are said to not have conscious control over their actions due to self-intoxication. The extreme intoxication defence can be used by an accused to be acquitted of the crime and thereby avoid all criminal responsibility.

The Learning Network has received many questions about the extreme intoxication defence and its implications for the gender-based violence (GBV) sector since the Supreme Court of Canada's *R v Brown* decision on May 13, 2022 and the June 23, 2022 amendments to the *Criminal Code*. We responded to this demand for more information by holding a [Learning Network and Knowledge Hub Webinar](#) on this topic featuring experts Jacqueline Benn-John and Elizabeth Sheehy. To build on the informative Webinar, we invited feminist lawyer Elizabeth Sheehy to respond to some of the most frequently asked questions on the extreme intoxication defence. Her responses help to clarify this complex issue; highlight implications for women, women's rights, and GBV service providers; and suggest actions to assist in legal reform.

Authored by: Elizabeth Sheehy, Lawyer.

Elizabeth, F.R.S.C., O. Ont., recipient of the Ramon Hnatyshyn Justice Award and the Governor General's Persons Award, is Professor Emerita at the University of Ottawa Faculty of Law. Her research includes a special issue of the *Journal of Social Welfare and Family Law* "Family Violence and Parental Alienation"; *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*; and *Defending Battered Women on Trial: Lessons from the Transcripts*, which was awarded the David Walter Mundell Medal 2014 for fine legal writing. Elizabeth's research has contributed to criminal law reform and feminist litigation regarding violence against women.

Suggested Citation: Sheehy, Elizabeth. (2022). *Understanding the Extreme Intoxication Defence: A Brief by Elizabeth Sheehy*. London, Ontario: Learning Network, Centre for Research and Education on Violence Against Women and Children. www.vawlearningnetwork.ca

The opinions expressed here are those of the author and do not necessarily reflect the views of the Government of Ontario or the Centre for Research & Education on Violence Against Women & Children. While all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

TIMELINE OF THE EXTREME INTOXICATION DEFENCE

Sept 1995

Response from Parliament amending the *Criminal Code* with section 33.1 to bar the extreme intoxication defence for crimes of violence or threat of violence against another person

May 2022

R v Brown Supreme Court of Canada decision found s 33.1 unconstitutional and opened the possibility of the extreme intoxication defence again

Sept 1994

R v Daviault Supreme Court of Canada decision first introducing the extreme intoxication defence

**Sept 1995 —
May 2022**

Extreme intoxication defence is barred

June 2022

Response from Parliament with Bill C-28 which amended and re-enacted s 33.1 with the defence available to only those who can prove beyond a reasonable doubt that a reasonable person could not foresee their loss of control and serious harm to another due to self-intoxication

FREQUENTLY ASKED QUESTIONS

Click to find the answer to the relevant questions

Is the extreme intoxication defence a gendered issue and if so, why?

Some legal experts and women’s advocates have framed the extreme intoxication defence as a human rights issue. Do you agree and if so, why?

What crimes does the extreme intoxication defence apply to?

Could any substance (e.g. alcohol, prescribed medication, street drugs) potentially lead to a condition of extreme intoxication?

Who ultimately determines extreme intoxication? What criteria do they use?

Are there instances where the defence cannot be used?

Could most people reasonably foresee that an intoxicant will lead to a loss of conscious or voluntary control over one’s actions?

If the accused has a history of violence while intoxicated, can this be used to argue against the extreme intoxication defence?

People who commit serious crimes can use the extreme intoxication defence but those who drive drunk and cause serious harm to others cannot invoke this defence because they made the decision to drink alcohol before driving. So why is there unfair application of the law when it comes physical assault or sexual assault?

If the extreme intoxication defence is successful, could it ever be argued a second time for the same person related to a subsequent event?

If this defence is used successfully, are there no consequences (e.g. mandatory treatment, probation) for the accused?

There are conditions for individuals deemed not criminally responsible by mental illness or developmental disability. From a legal perspective, what is the difference between those situations and extreme intoxication?

In the case of an individual harming another while sober or minimally intoxicated, could the individual not then consume a massive amount of alcohol quickly to “prove” that they were extremely intoxicated during the time of as a cover for their intentions/actions?

Can the victim/survivor be questioned in court regarding the accused’s intoxication?

Can women’s groups bring a class action on the basis that women’s rights are not being considered in determining the extreme intoxication defence?

What can activists be doing to try and challenge this ruling?

What can activists do to further legal reform?

PROFESSOR SHEEHY'S ANSWERS TO FREQUENTLY ASKED QUESTIONS

Is the extreme intoxication defence a gendered issue and if so, why?

Yes, the extreme intoxication defence is a gendered issue. Consider the following:

1. Those who attempt to invoke this defence are overwhelmingly men, not women.
2. The vast majority of victims in these cases are women and often involve what we understand to be crimes of violence against women—sexual assault, intimate partner assault, and attacks on women in the sex trade.

In the one-year period (1994-1995) when the extreme intoxication defence was available, 12/30 reported cases where the defence was raised involved violence against women; 4/6 acquittals that resulted were intimate partner assaults.

In a more recent study (1995-2021), there were 86 cases where the then s 33.1 bar on the extreme intoxication defence was used to dismiss an intoxication defence. During this period, 40 cases involved violence against women, and another 23 included female victims.

Thus, women were victimized in 63/86 cases.

Beyond this data, women's advocates note how the message of the extreme intoxication defence colludes with abusers, reinforcing their beliefs that they are "morally innocent" and not at fault for their acts of violence against women while extremely intoxicated.



Some legal experts and women’s advocates have framed the extreme intoxication defence as a human rights issue. Do you agree and if so, why?

Yes. From the statistics noted above, there is undoubtedly a discriminatory impact on women when men are absolved of all criminal responsibility for their acts of violence against women while extremely intoxicated. The defence adds to the relative impunity men already enjoy for crimes of violence against.

What crimes does the extreme intoxication defence apply to?

The extreme intoxication defence is available for any crime that is classified as a “general intent” offence. General intent offences are those crimes where the Crown only has to prove a basic intent to commit the act, such as the intent to apply force without consent (assault, sexual assault) or the intent to commit an unlawful act that causes death (manslaughter).

Could any substance (e.g. alcohol, prescribed medication, street drugs) potentially lead to a condition of extreme intoxication?

Yes—any substance or combination of substances can ground an extreme intoxication defence. Although the Supreme Court in *Brown* noted that some experts assert that the state of “extreme intoxication” cannot be caused by alcohol alone, it deliberately left this issue open, to be determined on the facts in future cases.

Who ultimately determines extreme intoxication? What criteria do they use?

The success or failure of the defence is determined by the trier of fact: in most cases this will be a judge who is sitting alone, but if it is a jury trial, then if there is some evidence to support the elements of the defence, the jury will determine whether it succeeds.

The accused bears the burden of proving this defence (like the defence of mental disorder, for example) on the balance of probabilities—i.e., more likely than not. The accused must prove that they consumed the drugs or alcohol; that the drugs or alcohol caused them to enter a state akin to automatism, whereby they were not in control of their bodily movements; and they must offer expert evidence in support of their claim.

Are there instances where the defence cannot be used?

1. The defence is unlikely to be available for impaired driving offences in part because these offences include consumption of intoxicants as an element of the offence itself. Further, the available evidence shows the relationship between blood alcohol content and reduced reaction time when driving, whereas we do not have this kind of evidence showing a causal effect between consumption of intoxicants and violence. However, the courts have not yet ruled on this precise issue and so it is possible that extreme intoxication could be available as a defence to even impaired driving offences.
2. If mental illness or mental impairment played a role in the state the accused experienced, it is possible that they may instead be forced to rely on the mental disorder defence. The courts have not yet resolved the issue of whether such a person should get the benefit of one defence or the other.
3. Under the new limitations on the extreme intoxication defence in the amended s 33.1, the accused will be denied the defence if a reasonable person could have foreseen both the loss of control caused by the intoxicants and the risk of harm that is neither trivial nor transitory to another person. However, the Crown will have to prove both these aspects of the foreseeability test beyond a reasonable doubt, which will be nearly impossible with respect to the foreseeability of the loss of self-control leading to the harming of another person.

Could most people reasonably foresee that an intoxicant will lead to a loss of conscious or voluntary control over one's actions?

This question is highly fact-dependent: Which intoxicant? What quantity? Over what period of time? Under what conditions (i.e. on an empty stomach, when fatigued, or after illness)? The expert for the accused will be in a somewhat tricky position because their evidence will need to show that the intoxicants caused the state of automatism whereby the accused acted unconsciously, but that the state was unforeseeable to the reasonable person. However, this is easier for the defence expert to do when the drug at issue cannot be assessed for its potency (for example street drugs and magic mushrooms) because no samples are available, and the accused does not know the exact quantities consumed. For example, in *Brown*, where the accused had ingested 14-17 drinks and several portions of mushrooms (neither the number of portions nor the size of each could be ascertained with certainty), the Supreme Court said: "While Mr. Brown ingested an illicit drug, the trial judge found, based on expert evidence, that his reaction to the drug was not reasonably foreseeable."

If the accused has a history of violence while intoxicated, can this be used to argue against the extreme intoxication defence?

Yes. This evidence, if proven beyond a reasonable doubt by the Crown, could negate an extreme intoxication defence under the new s 33.1.

People who commit serious crimes can use the extreme intoxication defence but those who drive drunk and cause serious harm to others cannot invoke this defence because they made the decision to drink alcohol before driving. So why is there unfair application of the law when it comes physical assault or sexual assault?

As mentioned above, the courts have yet to rule definitively on whether the defence can be used for impaired driving offences. However, the exclusion of the defence for such offences has very strong evidence in support: there is scientific evidence, for example, regarding the impact of alcohol consumption on reaction time for drivers. In contrast, currently there is little if any scientific evidence associating various intoxicants with a risk of violence—for example most people can consume alcohol without hurting other people.

If the extreme intoxication defence is successful, could it ever be argued a second time for the same person related to a subsequent event?

The key issues under s 33.1 in barring the defence are the foreseeability of loss of voluntary control and foreseeability of causing serious harm to another. Thus, if it's the same intoxicant that caused both episodes of extreme intoxication leading to violence, then the defence would likely be barred under s 33.1, although of course that might depend on quantities and conditions of consumption on both occasions. If it is a different intoxicant, then it is possible that the defence could be available a second time.

If this defence is used successfully, are there no consequences (e.g. mandatory treatment, probation) for the accused?

Correct. The result of a successful extreme intoxication defence is an acquittal, which leaves no jurisdiction to the judge to impose any sort of order or consequences on the accused.

There are conditions for individuals deemed not criminally responsible by mental illness or developmental disability. From a legal perspective, what is the difference between those situations and extreme intoxication?

The mental disorder defence under s 16 of the *Criminal Code*, like extreme intoxication, also has to be proven by the accused on a balance of probabilities. The accused must prove that at the time of the offence they were suffering from a mental disorder that prevented them from appreciating the nature and quality of the act or of knowing that it was wrong. A person found not criminally responsible on account of mental disorder is then relegated to assessment by the Review Board, which determines whether the person continues to present a risk to themselves or others and can then impose treatment orders that may include confinement in an institution. In contrast, someone acquitted on the basis of extreme intoxication cannot be ordered into treatment or confined.

In the case of an individual harming another while sober or minimally intoxicated, could the individual not then consume a massive amount of alcohol quickly to “prove” that they were extremely intoxicated during the time of as a cover for their intentions/actions?

Yes, that scenario is possible. The question of whether the accused would be able to prove the defence would remain. For example, the victim of the crime may have evidence that would assist the Crown in challenging the extreme intoxication defence as deliberately fabricated by the accused.

Can the victim/survivor be questioned in court regarding the accused’s intoxication?

Yes. The victim/survivor may provide evidence that helps the accused (for example if she testifies that he was glassy-eyed, ranting, or seemingly dazed) or that hurts the defence (for example, if he taunted her that his consumption would protect him from criminal responsibility, or if she testifies about his past violence while under the influence).

Can women’s groups bring a class action on the basis that women’s rights are not being considered in determining the extreme intoxication defence?

No. The only legal challenge to the new extreme intoxication defence that might be possible would be a discrimination claim before the International Committee on Human Rights. All other forms of challenge have been foreclosed by the Supreme Court’s decision in *Brown* to the effect that women’s constitutional rights are not directly implicated by the extreme intoxication defence.

What can activists be doing to try and challenge this ruling?

Parliament has rushed through the passage of the amendment to s 33.1, which adds limitations on the defence of extreme intoxication that are unlikely to prevent successful use of the defence. In consequence, we have lost the opportunity to challenge this defence through new legislation. We can prepare briefs for the March 2023 committee hearings on the law, although these hearings are being held after the law has been passed so there is little chance of change to the law.

What can activists do to further legal reform?

We can organize and prepare on a long-term basis to argue for further law reform in the future. Actions that could assist with this longer-term goal might include:

- liaising with like-minded women's groups that have opposed the amendments to s 33.1, including the [National Association of Women and the Law](#);
- documenting and sharing any cases that come to our attention via media or otherwise where extreme intoxication is being argued; and
- documenting and sharing the concerns of women and the impacts we observe as a result of the extreme intoxication defence.



SUPPORTS AND RESOURCES

We acknowledge that this content was heavy and potentially triggering. Please reach out to [these services](#) if you need support.



Links to resources providing additional information on this important topic:

- [May 13, 2022 Supreme Court Decision on the Extreme Intoxication Defence](#)
- [Bill C-28: An Act to Amend the Criminal Code \(Self-Induced Extreme Intoxication\)](#)
- [Learning Network and Knowledge Hub Webinar](#) – The Supreme Court of Canada’s Extreme Intoxication Decisions: Why We Should Care presented by Jacqueline Benn-John and Elizabeth Sheehy
- [Paper by Elizabeth Sheehy and Kerri Froc](#) – Last Among Equals: Section 28, Women’s Equality, Extreme Intoxication and Violence Against Women
- [National Association of Women and the Law Press Release](#) – Bill C-28 Falls Short in Protecting Women
- [Opinion Piece by Elizabeth Sheehy and Daniel Brown](#) – The Saturday Debate: Should Extremely Intoxicated People be Legally Responsible for their Actions?
- [Ontario Coalition of Rape Crisis Centres \(OCRCC\) Press Release](#) – Supreme Court Rules Extreme Intoxication Defence Available for Violent Crimes: OCRCC responds

