DRUNKENNESS AS A DEFENCE TO MURDER

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Remember those days of sitting in your criminal law class at Law School while your professor lectured you on actus reus, mens rea, specific intent crime, general intent crime and whether the defence of drunkenness or intoxication applied.


Let us go back to the basics to understand the meaning of:

(i) *actus reus* – the wrongful act or crime;
(ii) *mens rea* - guilty mind; and
(iii) *specific intent crime* – “…a distinction is to be made between
(i) intention as applied into acts considered in relation to their
purposes and (ii) intention as applied to acts considered apart
from their purposes. A general intent attending the
commission of an act is, in some cases, the only intent
required to constitute the crime while in others, there must
be, in addition to that general intent, a specific intent
attending the purpose for the commission of the act.” [See *R. v. George*, supra]

For examples of *specific intent offences* see Appendix “A”.

The most significant recent developments with respect to the affect
of drunkenness on crimes of specific intent is the decision of the
Supreme Court of Canada in *R. v. Robinson*, supra. In *Robinson*,
the accused was charged with murder. The deceased died as a
result of three stab wounds, but had also suffered severe blunt
trauma wounds to the head. The accused had been drinking and at
trial relied on the defence of intoxication. At trial the accused was
convicted. The British Columbia Court of Appeal allowed the
accused’s appeal and ordered a new trial. The appeal to the
Supreme Court of Canada was dismissed.

In writing the majority judgment, Chief Justice Lamer reviewed
the so-called “Beard” rules, versus MacAskill rules and
concluded that the rules set down in *Beard* and MacAskill are
inconsistent with the Charter. The majority judgment was that
they violated s. 7 and s. 11(d) of the Charter. Chief Justice Lamer
then posses the following question: “How then should juries be
instructed on the use they can make of intoxication? At page 116, Chief Justice Lamer states:

[48] …I am of the view that before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused's foresight of consequences sufficient to raise a reasonable doubt. Once a judge is satisfied that this threshold is met, he or she must then make it clear to the jury that the issue before them is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In the case of murder the issue is whether the accused intended to kill or cause bodily harm with the foresight that the likely consequence was death.

[49] Therefore, a Canute type charge is a useful model for trial judges to follow as it omits any reference to "capacity" or "capability" and focuses the jury on the question of "intent in fact." …For example, consider the case where an accused and another individual engage in a fight outside a bar. During the fight, the accused pins the other individual to the ground and delivers a kick to the head, which kills that person. In that type of a case, the jury will likely struggle, assuming they reject any self-defence or provocation claim, with the question of whether that accused foresaw that his or her actions would likely cause the death of the other individual. At this level of inquiry, the need for the jury to consider issues of capacity will rarely arise since a level of impairment falling short of incapacity will often be sufficient to raise a reasonable doubt on the question of foreseeability.

[50] In these types of murder prosecutions, the evidence of intoxication usually consists of witnesses testifying as to the
quantity of alcohol consumed by the accused, his or her appearance (i.e., slurred speech or bloodshot eyes), and sometimes evidence of the accused as to his or her mental state. This evidence is usually offered by the defence not in isolation, but along with other relevant evidence to be considered in relation to the question of whether the accused knew the likely consequences of his or her acts.

[51] We could simply have experts only testify about such things as the effects of alcohol on the functioning of the brain. Experts could also testify by way of a hypothetical and be asked whether in their opinion, taking into consideration all of the relevant facts, the hypothetical person would have foreseen that his or her actions would likely cause death.

[52] Indeed, in cases where the only question is whether the accused intended to kill the victim (s. 229(a)(i) of the Code), while the accused is entitled to rely on any evidence of intoxication to argue that he or she lacked the requisite intent and is entitled to receive such an instruction from the trial judge (assuming of course that there is an "air of reality" to the defence), it is my opinion that intoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors. For example, in a case where an accused points a shotgun within a few inches from someone's head and pulls the trigger, it is difficult to conceive of a successful intoxication defence unless the jury is satisfied that the accused was so drunk that he or she was not capable of forming an intent to kill….

[54] It may be of some assistance to summarize my conclusions in the following manner:
1. A *MacAskill* charge which only refers to capacity is constitutionally infirm and constitutes reversible error;

2. A *Canute*-type charge which only asks the jury to consider whether the evidence of intoxication, along with all of the other evidence in the case, impacted on whether the accused possessed the requisite specific intent is to be preferred for the reasons set out at paras. 49-51;

3. In certain cases, in light of the particular facts of the case and/or in light of the expert evidence called, it may be appropriate to charge both with regard to the capacity to form the requisite intent and with regard to the need to determine in all the circumstances whether the requisite intent was in fact formed by the accused. In these circumstances a jury might be instructed that their overall duty is to determine whether or not the accused possessed the requisite intent for the crime. If on the basis of the expert evidence the jury is left with a reasonable doubt as to whether, as a result of the consumption of alcohol, the accused had the capacity to form the requisite intent then that ends the inquiry and the accused must be acquitted of the offence and consideration must then be given to any included lesser offences. However, if the jury is not left in a reasonable doubt as a result of the expert evidence as to the capacity to form the intent then of course they must consider and take into account all the surrounding circumstances and the evidence pertaining to those circumstances in determining whether or not the accused possessed the requisite intent for the offence.
4. If a two-step charge is used with "capacity" and "capability" type language and the charge is the subject of an appeal, then a determination will have to be made by appellate courts on a case by case basis of whether there is a reasonable possibility that the jury may have been misled into believing that a determination of capacity was the only relevant inquiry. The following factors, not intended to be exhaustive, should be considered:

(a) the number of times that reference to capacity is used;

(b) the number of times that reference to the real inquiry of actual intent is used;

(c) whether there is an additional "incapacity" defence;

(d) the nature of the expert evidence;

(e) the extent of the intoxication evidence;

(f) whether the defence requested that references to "capacity" be used in the charge to the jury;

(g) whether during a two-step charge it was made clear that the primary function of the jury was to determine whether they were satisfied beyond a reasonable doubt that the accused possessed the requisite intent to commit the crime. If this is emphasized during the course of the two-step
charge, that will often be sufficient to make the charge acceptable and appropriate in this respect.

[59] I wish also to add that in this case, a charge linking the evidence of intoxication with the issue of intent in fact was particularly important since there was also some, albeit weak, evidence of provocation and self-defence. Thus, while the jury may have rejected each individual defence, they may have had a reasonable doubt about intent had they been instructed that they could still consider the evidence of intoxication, provocation and self-defence cumulatively on that issue. This is commonly known as the "rolled up" charge.

What is a Canute-type charge?

In R. v. Canute (1993), 80 C.C.C. (3d) 403 at 419, Mr. Justice Wood of the British Columbia Court of Appeal states:

Having said that, when the issue of intoxication does arise on the evidence, it would seem to me to be difficult to find a better jury instruction than that suggested by Martin J.A. at pp. 321-2 of the report in MacKinlay, with all the references to capacity and any language supporting such references removed. After making the necessary grammatical changes to give the instruction a coherent flow, it would be along the lines of the following, although I again emphasize that this should by no means be looked upon as required language:

The intoxicating effect of alcohol and drugs is well known. Intoxication which causes a person to cast off restraint and act in a manner in which he/she would not have acted if sober affords no excuse for the commission of an offence while in that state if he/she
had the intent required to constitute the offence. A drunken intent is nonetheless an intent.

The offence of [Here describe the specific intent offence charged] is not committed if the accused lacked the intent [Here describe the specific intent required to constitute the offence charged]. The Crown is required to prove that intent beyond a reasonable doubt. In considering whether the Crown has proved beyond a reasonable doubt that the accused had the required intent, you should take into account his/her consumption of alcohol or drugs along with the other facts which throw light on his/her intent at the time the offence was allegedly committed.

[Here it would, as a general rule, be desirable for the judge to refer to the evidence as to the consumption of alcohol or drugs and to the other facts which throw light on the accused's intention at the relevant time.]

If, after taking into account the evidence of the accused's consumption of alcohol or drugs, along with the other facts which throw light on the accused's intent, you are left with a reasonable doubt whether the accused had the required intent, you must acquit him/her of [Here state the specific intent offence charged] and return a verdict of guilty of [Here state the included general intent offence]. If, on the other hand, notwithstanding the evidence of his/her consumption of alcohol or drugs, you are satisfied beyond a reasonable doubt that at the time he/she [Here describe the acts of the accused which form the actus reus of the offence charged], he/she had the intent to [Here describe the
intent required to constitute the offence charged], then it is your duty to return a verdict of guilty as charged.

**R. v. Robinson, supra**, is also significant for other reasons. How does one apply the “common sense inference”? [A person intends the natural consequence of his/her act which has been held to be considered a reasonable inference of fact which may be drawn but was not required to be drawn where there is evidence that the accused may have been intoxicated.]
On this issue, Chief Justice Lamer in *Robinson, supra*, states:

A trial judge must link his or her instructions on intoxication with the instructions on the common sense inference so that the jury is specifically instructed that evidence of intoxication can rebut the inference. In both the model charges set out in *MacKinlay* and *Canute*, this approach is taken. This instruction is critical since in most cases jurors are likely to rely on the inference to find intent. Moreover, if no instruction is given, then a confused jury may see a conflict between the inference and the defence and resolve that conflict in favour of their own evaluation of common sense. Therefore an instruction which does not link the common sense inference with evidence of intoxication constitutes reversible error.

This whole issue was further discussed by the Supreme Court of Canada in *Seymour vs. The Queen*, (1996) 106 C.C.C. (3d) 520. In *Seymour, supra*, the accused was charged with murder arising from the stabbing death of his wife. The accused had been drinking heavily throughout the course of the evening and early morning hours prior to the stabbing and the only issue at trial was whether the accused was guilty of second-degree murder or manslaughter. A forensic alcohol specialist called by the defence gave evidence as to the manner in which alcohol affects the human body and the psychological effect of alcohol on the brain. The expert testified that alcohol could result in an individual being unable to foresee and evaluate the consequences of their behaviour. The accused’s defence was that, at the relevant time, he had a profound inability to function adequately and was unable to understand the consequences of his action, because of his consumption of large quantities of alcohol. Although the trial judge properly instructed the jury that they must find that the accused possessed the requisite intent, he did not refer to the
capacity of the accused to form the requisite intent. Following the judge’s charge, defence counsel specifically requested that the charge be amplified to include a reference to the accused’s capacity to form the intent. The trial judge denied this request. After deliberating at some length the jury returned with a question regarding drunkenness. The trial judge repeated his early instructions on the issue and also instructed the jury to consider the effect of intoxication along with other facts in deciding whether the accused intended to inflict an injury on the victim which he knew was likely to cause death, or whether intoxication affected his ability to foresee the consequences of his actions. Furthermore, although the trial judge instructed the jury on the common sense inference that people normally intend the natural consequences of their actions, he did not link the inference to the evidence of intoxication. The accused was convicted and he appealed this decision to the British Columbia Court of Appeal, who dismissed the appeal, and on further appeal by the accused to the Supreme Court of Canada the Court held that the appeal should be allowed and a new trial ordered.
The issues before the Supreme Court of Canada:

1. How should a trial judge charge a jury when the drunkenness of the accused must be taken into consideration?

2. Is it necessary for a trial judge to link the common sense inference that a person intends the natural and probable consequences of his/her actions to the drunkenness of the accused?

In summarizing the state of the law, Justice Cory states at page 526:

[14] In the recent trilogy of cases dealing with the effect of drunkenness upon the requisite intent to commit murder, this Court overruled the long-standing decision in *R. v. McAskill*... It was found that the decision violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* since it would allow an accused to be convicted of murder even in situations where the evidence raised a reasonable doubt as to the existence of the requisite intent necessary to commit the offence.

[15] The Chief Justice writing for the majority in *Robinson* observed that provincial courts of appeal had for some time recognized the problem posed by *Beard* and *MacAskill* and attempted to clarify and broaden the position adopted in these decisions. Unfortunately, there was a difference of opinion between the appellate courts of Ontario and British Columbia as to the method that should be followed when instructing juries as to the effect of intoxication on the requisite intent required for murder. In *MacKinlay* the Ontario Court of Appeal favoured a two-step approach. First the jury were to consider whether as a result of consuming alcohol or drugs...
the accused was capable of forming the requisite intent. If they were left in doubt that the accused had the capacity to form the intent then they were to find the accused not guilty of murder and consider the offence of manslaughter. If the jury were satisfied beyond a reasonable doubt that the accused did have the capacity to form the requisite then the jury were to proceed to the second step. Namely, having regard to all the relevant evidence including that pertaining to alcohol, they were to determine whether they were satisfied beyond a reasonable doubt that the accused actually had the requisite intent. In Canute, supra, the British Columbia Court of Appeal decided that the two-step approach was unnecessary and wrong. They determined that there was but one issue for the jury to decide and that is whether the accused had the requisite intent. On this issue it was thought to be confusing for a jury to have to consider the capacity of the accused to form the intent. Much of the reasons in Robinson are devoted to resolving the difference between these two appellate courts.

[16] The trilogy generally approved the approach recommended by the British Columbia Court of Appeal in Canute, supra, but recognized that the two-step approach put forward by the Ontario Court of Appeal in MacKinlay, supra, could also be utilized in appropriate circumstances. Canute held that in instructing a jury on the use to be made of evidence of intoxication all references to capacity should be removed. In Robinson, the Chief Justice observed that a charge given along the lines suggested by Canute is generally a useful model for trial judges to follow since the omission of any reference to "capacity" or "capability" focuses the jury on the question of "intent in fact". It was determined that, practically speaking, in cases dealing with the foreseeability aspect of s. 229(a)(ii) of the Criminal Code, a jury will rarely
have to consider the issue of capacity to form the requisite intent, since a level of impairment falling short of incapacity will often be sufficient to raise a reasonable doubt that the accused actually foresaw that his or her actions were likely to cause the death of the victim.

[17] Nonetheless, the Chief Justice pointed out that, in certain cases, because of the particular facts or the expert evidence called, it might be appropriate to charge both with regard to the capacity to form the requisite intent and with regard to the need to determine, in all the circumstances, whether the requisite intent was in fact formed by the accused. It was observed that situations where it may be appropriate for trial judges to use the two-step instructions recommended by the Ontario Court of Appeal in *MacKinlay*, *supra*, included but were not limited to:

(a) cases where the only question is whether the accused intended to kill the victim (s. 229(a)(i) of the *Code*), since the defence that the accused was too drunk to form the requisite intent will be unlikely to succeed unless the jury is satisfied that the accused was so drunk that he or she was not capable of forming an intent to kill;

(b) cases where the accused's defence is one of incapacity and therefore the accused specifically requests a "capacity" charge as part of his or her defence; and

(c) cases where an expert has testified in terms of the effect of alcohol or other intoxicants on capacity, making a two-step charge more helpful to the jury.
[18] In those cases where the two-stage process is followed, *Robinson* provides the following guidelines, at para. 54:

...a jury might be instructed that their overall duty is to determine whether or not the accused possessed the requisite intent for the crime. If on the basis of the expert evidence the jury is left with a reasonable doubt as to whether, as a result of the consumption of alcohol, the accused had the capacity to form the requisite intent then that ends the inquiry and the accused must be acquitted of the offence and consideration must then be given to any included lesser offences. However, if the jury is not left in a reasonable doubt as a result of the expert evidence as to the capacity to form the intent then of course they must consider and take into account all the surrounding circumstances and the evidence pertaining to those circumstances in determining whether or not the accused possessed the requisite intent for the offence.

[19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
[21] However, different considerations will apply where there is evidence that the accused was intoxicated at the time of the offence….It follows that the jury must be instructed to take into account the evidence of the accused's consumption of alcohol or drugs, along with all the other evidence which is relevant to the accused's intent, in determining whether, in all the circumstances, it would be appropriate to draw the permissible inference that the accused intended the natural consequences of his actions.

[22] One of the effects of severe intoxication is an inability to foresee the consequences of one's actions, much less intend them. It was for this reason that the Ontario Court of Appeal in MacKinlay, supra, at p. 322, held that the state of mind required to commit the crime described in s. 229(a)(ii) involves an ability on the part of the accused to measure or foresee the consequences of his act and that, therefore, the jury should consider whether intoxication affected his ability to have the required foresight.

[23] It is common knowledge that a significant degree of intoxication may affect a person's state of mind and thus the ability to foresee the consequences of actions. It is, therefore, essential for a trial judge to link the instructions given pertaining to intoxication to those relating to the common sense inference so that the jury is specifically instructed that evidence of intoxication may rebut that inference. See Robinson, at para. 65. A trial judge is obliged to ensure that the jury understands two important conditions: (1) the reasonable common sense inference may be drawn only after an assessment of all of the evidence, including the evidence of intoxication; and (2) the inference cannot be applied if the
jury is left with a reasonable doubt about the accused's intention.

*Instructions on the Use to be Made of the Evidence of Intoxication*

[26] …Provided that a jury is properly instructed that they must find that the accused possessed the requisite intent, then an accused who was *not capable* of forming the specific intent for the offence obviously cannot be found to have formed that intent. The former is subsumed by the latter.…

[27] … The defence called a forensic alcohol specialist to provide the jury with expert evidence as to the manner in which alcohol affects the human body and the physiological effects of alcohol on the brain. The expert testified that alcohol can interfere with information processing and the transmission of impulses in the brain. This, in turn, can cause a person to perceive a situation incorrectly. The witness testified: "At this level the individuals are *unable* to foresee and evaluate the consequences of their behaviour due to alcohol-induced disruption of the information processing in the brain." [Emphasis added.] Defence counsel continued his line of questioning by asking whether the research indicates at what range this *inability* starts. Therefore, since the expert testified in "capacity" terms, this is a case where a two-step charge would have been helpful to the jury.

[28] Another factor favouring the use of a two-step instruction is that the appellant's defence was that at the relevant time he had a profound *inability* to function adequately and that he was *unable* to understand the consequences of his actions because of his consumption of large quantities of alcohol.…
How drunk does one have to be in order to meet the air of reality test of drunkenness?

In answering this question, it is important to remember that where there is sufficient evidence to make drunkenness a viable issue, the Crown must establish beyond a reasonable doubt that the accused had the intent required for the specific intent crime with which he is charged.

The Crown bears the burden of disproving the defence of drunkenness beyond a reasonable doubt in the sense of proving beyond a reasonable doubt that the accused actually intended to commit the crime charged. Thus, a trial judge must charge a jury or himself or herself on the defence of drunkenness where the judge is satisfied that the effect of consumption of alcohol or drugs or any combination thereof is capable of raising a reasonable doubt “whether it might have impaired the accused foresight of the consequences of his/her conduct”. Thus, the consumption of alcohol or drugs, or a combination thereof, short of incapacity to intend the prohibited conduct or its consequences, must be considered together with any other factors relevant to the accused’s state of mind in determining whether or not the accused had the actual intent to commit the “specific intent” crime charged. Nonetheless, a trial judge need not put the defence of drunkenness to the jury if it lacks an “air of reality”.

In determining whether the accused has met the threshold to permit the defence being put to the jury, the judge may consider, among other factors, the accused’s “purposeful actions” both before and after the conduct given rise to the charge before the court. (See R. v. Lemky, [1996] 1 S.C.R. 757)
Generally, the consumption of alcohol and drugs may negate specific intent only if it raises to the level that the accused’s “ability to foresee the consequences of his conduct” is impaired. (See **R. v. Parkins** (2004), 62 W.C.B. (2d) 169 (Nfld and Lab. C.A.)

While drunkenness short of automatism may incapacitate an accused from forming an intent to commit a *specific intent crime*, it seems that a high degree of drunkenness or intoxication is, nevertheless required to provide a defence. (See **Northern Ireland (A.G.) v. Gallagher** (1963), A.C. 349 (H.L.) and **R. v. Wietlinski** (1978), 44 C.C.C. (2d) 267 (Ont. C.A.))

This paper only deals with drunkenness in relation to *specific intent crimes*.

**Conclusion**

A trial judge may instruct a jury that the Crown must prove beyond a reasonable doubt that an accused had the capacity to intend to commit the *specific intent crime* with which he is charged notwithstanding evidence of drunkenness. This finding constitutes step one. The second step requires the Crown to prove beyond a reasonable doubt that the accused actually had the requisite intent. In making this second finding, the jury must have regard to all the circumstances relating to the accused’s state of mind. However, it is generally preferable for the trial judge, as part of a “rolled-up direction”, only to instruct the jury that the Crown bears the burden of proving beyond a reasonable doubt that the accused “actually intended” to commit the crime charged. Thus, a trial judge must charge a jury that the consumption of alcohol or drugs or a combination must be considered together with any other factors relevant to the accused’s state of mind in determining whether or not the accused had the actual intent to commit the *specific intent*
crime charged. Notwithstanding, it may be appropriate to use the two-step test of capacity and actual intent where the accused requests that it be used, i.e., where an expert is called to testify as to the accused’s capacity to commit the crime in light of his/her consumption of alcohol.

It is important to allow the jury to focus on the ultimate question of whether a particular accused really did have the intent on the facts of the case.