

ARTICLE

ESTABLISHING BLAMEWORTHY CONSUMPTION: ADDRESSING INTOXICATED VIOLENCE WHILE IN A STATE OF AUTOMATISM

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ABSTRACT

The issue of intoxicated violence in a state of automatism poses significant legal and moral challenges in Canada's criminal justice system. In *R v Brown*, the Supreme Court of Canada invalidated section 33.1 of the *Criminal Code*, prompting legislative reform that introduced foreseeability as a requirement for culpability. This analysis examines the tracing principle, which links voluntary intoxication to criminal responsibility for subsequent involuntary acts. This paper also examines the tracing principle's implications for public safety, especially for vulnerable groups.

This analysis proposes the adoption of intoxication thresholds, modeled on impaired driving regulations, to address evidentiary challenges in the current law. Intoxication thresholds would establish clear legal standards, enhance accountability, and strengthen protections for society.

By incorporating objective intoxication limits and the tracing principle, the proposed framework seeks to balance the rights of the accused with public safety. These reforms would ensure accountability for foreseeable consequences of voluntary intoxication while addressing broader concerns about intoxicated violence in Canadian law.

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INTRODUCTION

This paper addresses how Parliament ought to regulate the public concern of intoxicated violence: the concept of self-induced extreme intoxication akin to automatism.¹ An accused may be deemed in a state of automatism where they were neither aware of nor in control of their actions at the moment of committing a prohibited offence.² Under Canadian law, the defence of extreme intoxication can be applied to any offence. However, an exception applies for general intent offences, where this defence is unavailable to those accused with lower levels of intoxication. Furthermore, the common law rule maintains that intoxication cannot serve as a defence for crimes of general intent, except in cases of extreme intoxication.³ When an accused raises the defence of extreme intoxication, they are claiming that due to their own state of extreme intoxication, they were acting involuntarily and unintentionally.⁴ As a result, the accused lacked both the necessary intent to commit the crime and the required criminal action, and are therefore entitled to an acquittal.⁵

Part I argues it is morally justifiable to hold someone responsible for intoxicated violence while they were in a state of automatism. Using the principle of tracing, Part I examines how a prior blameworthy voluntary act can be used to hold the accused criminally responsible for the involuntary act(s) that were subsequently committed. This Part will additionally consider what consequences this defence poses for public safety. The defence of extreme intoxication creates challenging and controversial policy decisions. The old version of section 33.1 of the *Criminal Code* barred the defence of self-induced intoxication for violent general intent offences. It applied if the accused was intoxicated, the intoxication was self-induced, and their actions markedly departed from reasonable care by harming or threatening another. Liability required proof of extreme intoxication causing loss of control and the violent act occurring in that state.⁶ The 2022 Supreme Court of Canada's ("SCC") decision of *R v Brown* ("*Brown*")⁷ ruled that the previous section 33.1 was unconstitutional and violated sections of the *Canadian Charter of Rights and Freedoms* ("*Charter*"),⁸ and Parliament quickly enacted a new version.⁹ Further, this Part examines the implications of this defence for those who are at a greater risk of facing violence, such as women and children.

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- 1 This paper examines the defence of extreme intoxication as it applies to 'general intent' offences, where voluntary intoxication is not a defence. Historically, common law allowed the defence of extreme intoxication only for specific intent offences, which requires intent to cause particular harm (e.g., murder). Not so for general intent offences, which require intent only to perform the criminal act itself (e.g. assault).
 - 2 *R v Brown*, 2022 SCC 18 at para 46 [*Brown*]; *R v Daviault*, 1994 CanLII 61 at 16 (SCC) [*Daviault*].
 - 3 *Brown*, *supra* note 2 at 376.
 - 4 *Ibid*.
 - 5 *Ibid* at para 56; *Daviault*, *supra* note 2 at 74–75.
 - 6 *Brown*, *supra* note 2 at paras 76–77, 81.
 - 7 *Brown*, *supra* note 2.
 - 8 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].
 - 9 *Criminal Code*, RSC 1985, c-C46, s 33.1.

Part II of this paper proposes a modification to section 33.1 of the *Criminal Code*. While Parliament has taken steps towards enacting effective policies, it would be clearer to set an intoxication limit similar to those provided for impaired driving offences. Broadly speaking, setting an intoxication limit would help the courts hold the public accountable for what an accused should have known and been aware of before they became intoxicated. Additionally, incorporating a rebuttable presumption similar to section 445.1(3) of the *Criminal Code* is proposed.¹⁰ Section 445.1(3) deals with animal cruelty offences and establishes a rebuttable presumption related to the intentional infliction of pain, suffering, or injury on animals.¹¹ Specifically, it states that if an individual is found to have injured or harmed an animal, it is presumed that they did so willfully, unless they can provide evidence to the contrary. This mechanism places the burden on the accused to prove that their actions were unintentional or lawful. This presumption would allow courts to assume that a violent act committed while the accused was above the intoxication limit was voluntary unless the accused could provide evidence to the contrary. Such evidence would need to show that a violent loss of control was unforeseeable in their specific circumstances. This would set a clear standard of responsibility and ensure that individuals are held accountable for reaching a level of intoxication where harm to others becomes foreseeable.

I. LEGAL RESPONSIBILITY AND INTOXICATION

A. History of the New Section 33.1

The history of the defence of extreme intoxication in Canada begins with the SCC decision *Leary v The Queen* (“*Leary*”).¹² From this sexual offence case stemmed the *Leary* Rule, which provided that intoxication could never be used as a defence for crimes of general intent.¹³ However, this decision was subsequently overturned in *R v Daviault* (“*Daviault*”).¹⁴ There, Mr. Daviault was convicted of sexually assaulting a 65-year-old, disabled woman but argued that his extreme intoxication rendered him incapable of forming the necessary intent for the offence. The trial court acquitted Mr. Daviault based on the *Leary* Rule. The SCC later ruled that he had been unconstitutionally denied the defence of extreme intoxication, setting a precedent for its use in general intent offences like sexual assault.¹⁵ The *Daviault* decision set out that the *Leary* Rule violated sections 7 and 11(d) of the *Charter*. The Court held that where an accused has committed a crime of general intent, there should be a defence available, such as claiming that they were intoxicated to the point of automatism so that they had the bodily control or intention to commit the crime.¹⁶ Due to the intoxication, the Crown was therefore unable to prove the necessary elements of the offence.

10 *Ibid*, s 445.1(3).

11 *Ibid*.

12 *Leary v The Queen*, 1977 CanLII 2 (SCC) [*Leary*].

13 *Daviault*, *supra* note 2 at 16.

14 *Daviault*, *supra* note 2.

15 Dennis Baker & Rainer Knopff, “*Daviault* Dialogue: The Strange Journey of Canada’s Intoxication Defence” (2014), 19 *Rev Const Stud* 35 at 4–5.

16 *Ibid*.

The *Daviault* decision was subject to negative public reactions, as it appeared that the Court was not considering public safety or the policy implications of gender-based violence. Critics argued that the defence enabled men to commit violence against women without consequence. The media further affirmed this message;¹⁷ a 1994 *Toronto Star* article headlined: “A license to rape? Women fear that a Supreme Court ruling tells men that sexual assault is okay as long as they’re drunk.”¹⁸ Facing criticism, Parliament enacted section 33.1 of the Criminal Code, which stated that the defence of extreme intoxication akin to automatism would not be available in cases where the accused voluntarily became self-intoxicated and committed an offence of violence.¹⁹ This law would last until the trilogy cases of *R v Chan* (“*Chan*”),²⁰ *R v Sullivan* (“*Sullivan*”),²¹ and *Brown*.²²

B. *R v Sullivan* and *R v Brown*

In *Sullivan*, David Sullivan, and Thomas Chan both reached a state of extreme intoxication tantamount to automatism resulting in assault with a knife. Mr. Chan voluntarily took Psilocybin mushrooms with friends in his mother’s basement. A few hours later, he broke into his father’s home. Unable to recognize his father due to extreme intoxication, he stabbed him to death and seriously injured his stepmother. In the case of Mr. Sullivan, he intended to die by suicide by overdosing on prescription drugs. As a result of ingesting the drugs, he entered an automatic state leading him to stab his mother who was in the house at the time. In *Brown*, Matthew Brown simultaneously consumed alcohol and Psilocybin mushrooms then broke into two homes, attacking a woman in the first house. Justice Kasirer, writing for a unanimous court, found that section 33.1 breached sections 7 and 11(d) of the *Charter*.²³ In his view, section 33.1 allowed the accused to be convicted without any inquiry into the blameworthiness of the accused for both committing the crime or consuming the intoxicants. Prior to the trilogy cases, section 33.1 allowed the fact that the accused became voluntarily intoxicated to be substituted for the fault element of the crime. In essence, the section set only conditions of liability, not conditions of fault sufficient to justify criminal responsibility.²⁴ After *Brown*, Parliament sought to propose a new way to balance the rights of the accused with public safety.

C. The Stand-Alone Offence

To address concerns after the trilogy, Parliament first considered creating a stand-alone offence of intoxication. Legal scholars have differing opinions about creating an offence

17 David Vienneau, “Drinking ruled a rape defence Feminists outraged at Supreme Court decision”, *Toronto Star* (1 October 1994); Stephen Bindman, “Drunk & disorder in the court: ‘License to rape’ ruling unites Canadians in outrage” *Daily News* (29 December 1994); “Drunks who rape and go free: Top court ruling means law should be changed” *Montreal Gazette* (4 October 1994).

18 Debra Black “A licence to rape? Women fear that a Supreme Court ruling tells men sexual assault is okay as long as they’re drunk”, *Toronto Star* (October 27 1994).

19 *Criminal Code*, *supra* note 9, s 33.1(2).

20 *R v Chan*, 2018 ONSC 7158 [*Chan*].

21 *R v Sullivan*, 2020 ONCA 333 [*Sullivan*].

22 *Brown*, *supra* note 2.

23 *Ibid* at para 12.

24 *Ibid* at para 79.

that would criminalize extreme intoxication.²⁵ In *Brown*, the Court appropriately determined that establishing a dangerous intoxication offence would infringe on the accused's rights as minimally as possible among the available options. However, such an offence would not offer the same level of protection for society as the negligence standard that Parliament ultimately implemented in the amended section 33.1.²⁶

Ultimately, a stand-alone intoxication offence would be inadequate.²⁷ Establishing a new provision would offer protection against intoxicated violence, but it would not meet Parliament's objectives of holding those accountable to a justifiable punishment for the acts that were committed.²⁸ Further, although an accused could be found guilty under this new offence, they would not be held accountable for the crime that was actually committed, i.e. assault or sexual assault, which possesses a greater stigma and punishment.²⁹ Speaking to the Senate on behalf of the National Association of Women and the Law, Ms. Suzanne Zaccour described this as a "drunkenness discount."³⁰ Perpetrators would not be convicted to the full extent for the violent act committed, but would instead receive a conviction for a lower offence.³¹

One way of addressing this criticism would be to set a maximum sentence for a stand-alone offence of dangerous intoxication. This would grant judges a significant amount of discretion in sentencing and allow them to impose appropriate sentences for those who commit violent acts while intoxicated. However, concern has been expressed about the effect this would have on public opinion, perceptions and attitudes surrounding intoxicated violence, despite greater flexibility in sentencing.³² Professor Kent Roach comments that creating a stand-alone offence would diminish the gravity of violence. Labeling the accused's actions as intoxicated violence instead of assault makes the crime seem less serious. To avoid the stigma of sexual assault, the accused might agree to plead to intoxicated violence, thus hiding the fact that they have committed the more serious offence. Three levels of sexual assault already exist based on severity: level 1, level 2, and level 3.³³ Level 1 (outlined in s. 271 of the *Criminal Code*) of the *Criminal Code*) involves non-consensual sexual contact without bodily harm, threats, or weapons, carrying a maximum penalty of 10 years.³⁴ Level 2 (s. 272 of the *Criminal Code*) addresses sexual assault that causes bodily harm or involves a weapon or threats to a third party, punishable by up to 14 years.³⁵ Level 3 (s. 273 of the *Criminal Code*) covers aggravated

25 Notably, when speaking at the Senate, Professor Steve Coughlan argued in favour of an intoxication offence. In contrast, Professor Kent Roach and Ms. Suzanne Zaccour (Director of Legal Affairs, National Association of Women and the Law) presented opposing perspectives. See Senate of Canada, *Self-Induced Extreme Intoxication and Section 33.1 of the Criminal Code* (April 2023) (Chair: Brent Cotter) at 27–29 [*Senate of Canada*].

26 *Brown*, *supra* note 2.

27 *Ibid* at paras 125–138.

28 *Ibid*.

29 *Ibid*.

30 *Senate of Canada*, *supra* note 25 at 28.

31 *Ibid*; *Brown*, *supra* note 2 at para 138.

32 *Senate of Canada*, *supra* note 25.

33 *Ibid* at 28.

34 *Criminal Code*, *supra* note 9, s 272.

35 *Ibid*.

sexual assault, involving wounding, maiming, disfiguring, or endangering the victim's life, with a maximum sentence of life imprisonment.³⁶ These levels help courts assess and penalize offences based on severity. In the vast majority of cases, the accused pleads to the lowest level, even when charged with a more aggravated form. Introducing a fourth, additional level of dangerous intoxication, would further devalue the seriousness of the perpetrated violence, regardless of any maximum penalty.³⁷

Ultimately, Parliament pursued rewording section 33.1 rather than introducing a separate offence. The amended section 33.1 introduces an element of foreseeability: where an accused has voluntarily become self-intoxicated, they can be found liable for the offence with which they are charged if the risk of harm to others as a result of their self-intoxication was objectively foreseeable. With the new provision, courts will be able to trace the involuntary actions back to a culpable, voluntary one. Under the amended section 33.1, an accused can be culpable where they failed to avoid a foreseeable risk of violent loss of control.

D. The Revised Section 33.1

The decision in *Brown* to revise section 33.1 left a gap in the law: individuals who intentionally committed violent assault could be acquitted of their crimes. Such individuals could still be acquitted if their actions fall within specific legal exceptions, such as extreme intoxication. The new version addresses this gap by taking a criminal negligence approach requiring foreseeability.³⁸ This means a person can be held liable if their voluntary intoxication created a foreseeable risk of loss of control leading to harm. The law holds individuals accountable if they failed to take reasonable precautions to avoid this risk. The newly amended section 33.1 ("New Section 33.1") addresses this gap by adopting a criminal negligence approach that requires foreseeability. To do so, Parliament enacted Bill C-28 with twin objectives: protecting the public, particularly women and children, from extremely intoxicated violence, as well as holding individuals accountable for the violence they inflict on others.³⁹

Future courts will have to decide whether a reasonable person should be expected to know that consuming certain quantities of intoxicants could put them in a state where they are no longer in control of their actions. The Crown must prove two things to establish such foresight: (1) before consuming the intoxicant, a reasonable person in the position of the accused could have foreseen a loss of control once the intoxicant was consumed, and (2) that loss of control could lead to violence.⁴⁰

The New Section 33.1 partially closes the gap left by *Brown*, but it still allows a defence for those that either abuse an intoxicant or negligently become intoxicated. If the defence is successful,

36 *Ibid*, s 273.

37 *Ibid*.

38 Government of Canada, "Changes to Section 33.1 of the Criminal Code on Self-Induced Intoxication" (23 June 2022), online: <justice.gc.ca/eng/csj-sjc/pl/sei-ive/index.html> [perma.cc/RW7C-KHR2].

39 Government of Canada, "Bill C-28: An Act to amend the Criminal Code (self-induced extreme intoxication)" (27 November 2023), online: <justice.gc.ca/eng/csj-sjc/pl/charter-charte/c28_1.html> [perma.cc/M3EQ-37V9].

40 *Criminal Code*, *supra* note 9, s 33.1(2).

the accused will be acquitted. The law in its present state fails to protect the public to its fullest capacity. Instead, it allows perpetrators of violent assaults to raise a defence, burdening the Crown with proving that violence was a foreseeable consequence of intoxication.

E. Proving Foreseeability of Harm

Prior to the enactment of the new provision, parliamentary committees discussed reconstructing section 33.1 without subsection 2, which includes the element of foreseeability. Incorporating the element of foreseeability ensures that the accused is linked back to an element of fault.⁴¹ This ensures that criminal liability is not imposed solely based on the act of becoming intoxicated, but rather on the reasonable foreseeability that such intoxication could lead to a loss of control and potentially violent behavior. The old version was unconstitutional as it permitted convictions based solely on interference with another's bodily integrity, violating sections 7 and 11(d) of the *Charter*. It eliminated the need for the Crown to prove a blameworthy state of mind or fault element for the offence.⁴²

Scholars have argued that the element of foreseeable violence would be nearly impossible to prove, as it would place a high burden on the Crown.⁴³ Professor Isabel Grant suggested to the Senate that a reasonable alternative might be to only require proof of foreseeable loss of control rather than foreseeable harm.⁴⁴ Professor Roach believed that courts would not have difficulty in determining whether a reasonable person could foresee harm due to extreme intoxication, suggesting “courts are likely to require the reasonable person to be cautious, especially when combining drugs.”⁴⁵

The first requirement focuses on whether the accused could have reasonably anticipated losing control due to intoxication. The second requirement—that this loss of control could lead to violence—adds an additional layer of complexity, making it more difficult to secure a conviction, as violence is not always a foreseeable consequence of intoxication. However, this challenge could be addressed by establishing intoxication thresholds, akin to those employed in impaired driving laws, and by instituting a rebuttable presumption akin to the one outlined in section 445.1(3) of the *Criminal Code*.⁴⁶ Section 445.1(3) presumes that harm caused to an animal was intentional unless proven otherwise. Applying a similar presumption in cases of extreme intoxication akin to automatism would mean that if an accused exceeds a set intoxication threshold, their violent actions would be presumed intentional unless rebutted with evidence. This threshold would serve to inform and alert individuals that attaining a particular level of intoxication might increase the likelihood of posing harm to others.

41 *Brown*, *supra* note 2 at 25–26.

42 *Ibid.*

43 Notably, Professor Emerita Elizabeth Sheehy and Professor Isabel Grant expressed at a House of Commons committee meeting that the second standard will be impossible for the Crown to prove. See House of Commons, *The Defence of Extreme Intoxication Akin to Automatism: A Study to the Legislative Response to the Supreme Court of Canada Decision R. v. Brown* (December 2022) (Chair: Sarai Randeep) at 23–24.

44 *Brown*, *supra* note 2 at 28.

45 *Ibid* at 26.

46 *Criminal Code*, *supra* note 9, s 445.1(3).

II. PROPOSAL FOR REFORM

A. Implementing a Rebuttable Presumption

Proving foreseeable violence would place an unduly high burden on the Crown.⁴⁷ Even still, Parliament should consider amending section 33.1 to align more closely with the approach outlined in section 445.1(3) of the *Criminal Code*. Section 445.1(3) creates a presumption that allows a court to infer the guilty mind of the offence from proof that animals have been unreasonably neglected. Its purpose is to assist the Crown in prosecuting animal welfare cases by requiring individuals to exercise reasonable care when tending to animals, with willful neglect constituting an offence. The presumption in section 445.1(3) will not be applied if the accused provides evidence that they did not act negligently. Essentially, if there is proof that proper steps were taken to exercise reasonable care, and despite the provision of proper efforts made, the animals still faced pain and suffering, then the accused could not be found guilty. The provision holds individuals to a certain standard of care and level of responsibility when caring for animals. Making this alteration to the provision and establishing an intoxication limit would relieve the Crown of the high burden in proving foreseeable violence.

Section 445.1(3) reflects policy considerations that contribute to a more compassionate society that protects the lives and wellbeing of animals. A similar alteration can be made to the New Section 33.1 which would establish a standard for what a reasonable person is expected to know regarding the risk of losing control and engaging in violent behavior when consuming intoxicants. The New Section 33.1 could be modified to incorporate a presumption that if a prohibited act did occur, it would be presumed to be voluntary in the absence of evidence to the contrary. In other words, if a violent act was committed while the accused was above the intoxication limit, they would be assumed to have acted voluntarily unless there was leading evidence that a violent loss of control was unforeseeable.

B. Involuntary Act and the Use of the Tracing Principle

People should reasonably be expected to accept responsibility for becoming voluntarily intoxicated. Ultimately, it comes down to choice: people make the decision to become intoxicated by continuing their consumption of alcohol one drink at a time, so if there is a voluntary choice being made, they should be held responsible for their actions. Justice Healy, now serving on the Quebec Court of Appeal,⁴⁸ wrote after *Daviault*:

If there is proven harm done by a person, but no proof of a voluntary act or fault in the ordinary sense, does it follow that there is nothing but innocence in such conduct? Perhaps. But might there not be some notion of moral guilt in such conduct that is relevant to the concept of criminal responsibility? Perhaps.⁴⁹

⁴⁷ *Brown*, *supra* note 2 at 26.

⁴⁸ When the article was published, Justice Healy was part of the Quebec Bar and affiliated with McGill University, Faculty of Law.

⁴⁹ Patrick Healy, "Another Round on Intoxication" part of the "Criminal Reports Forum on *Daviault*: Extreme Intoxication Akin to Automatism Defence to Sexual Assault" (1995) 33 CR (4th) 269.

The passage questions whether legal innocence always implies moral innocence in cases where harm occurs without proof of a voluntary act or fault. While the absence of these elements may suggest no criminal liability, the author raises the possibility that moral guilt could still exist. Even if someone is not legally at fault, their actions might carry moral significance, particularly if harm resulted from recklessness or negligence. This challenges the strict legal view of responsibility and suggests that moral culpability could still be relevant in assessing criminal liability.

Professor Michelle Lawrence expresses similar principles, despite addressing the old section 33.1.⁵⁰ She explains that extreme intoxication is inherently dangerous and produces physical states that the reasonable person should know to avoid.⁵¹ It is not unexpected that others can be at risk when one is not in control of their actions, and that risk can translate into a threat to interfere with the bodily integrity of another when someone has reached that level of intoxication.⁵² With this understanding of choice, the accused's involuntary actions can still be culpable. Liability arises if they stem from a voluntary act with a foreseeable risk of violent loss of control. At the heart of the intuition that a person who becomes voluntarily intoxicated is criminally responsible for the foreseeable consequences of that intoxication is the view that involuntary conduct can sometimes be traced back to voluntary culpable conduct. A core principle of criminal law is that no one can be convicted for conduct that is not voluntary; if they were not in control of their actions at the time of the offence, they cannot be found guilty.⁵³ This principle was central to the Court's reasoning in *The Queen v King*.⁵⁴ In this case the plaintiff, Mr. King, drove his car while under the influence of sodium pentothal, a sedative administered during a dental procedure. He argued that the drug impaired his ability to voluntarily control his actions, leading to a collision with a parked car. The Court avoided the complex distinction between general and specific intent and focused instead on voluntariness as a foundational element of criminal liability, emphasizing the need for both a willing mind and free will. The Court ruled that Mr. King had not committed a voluntary act when driving and rejected the Crown's argument that his earlier decision to take the drug was enough to establish a guilty mind.⁵⁵

Voluntariness as a cornerstone of criminal liability is significant; however, the bright-line rule should be adjusted to account for situations where an individual's initial decisions could reasonably be expected to result in impaired control. The tracing principle provides a useful framework for considering whether an accused's prior actions make them sufficiently blameworthy to justify punishment. For example, courts could examine whether the accused took reasonable precautions or acted recklessly before the crime occurred. Rather than

50 Michelle Lawrence, "Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code" (2017) 40:3 Man LJ 391.

51 *Ibid* at 421.

52 *Ibid*.

53 *R v Stone*, 1999 CanLII 688 at para 37 (SCC) [*Stone*]; *R v Luedecke*, 2008 ONCA 716 at para 53 [*Luedecke*]; *Daviault*, *supra* note 2 at 73–76; *Brown*, *supra* note 2.

54 *The Queen v King*, 1962 CanLII 16 (SCC) [*King*].

55 See also Frances E Chapman, "Sullivan. Specific and General Intent be Damned: Volition Missing and Mens Rea Incomplete" (2020) 63 CR (7th) 164 at 4.

focusing solely on voluntariness at the moment of the offence, a broader interpretation allows for an inquiry into the accused's pre-crime conduct, enabling a more nuanced and just assessment of culpability.

Investigating the blameworthiness of the voluntary acts prior to the crime could justify whether the accused's involuntary actions are worthy of criminal punishment. An accused as a reasonable person could be found criminally liable if they either consumed an intoxicant knowing they could lose violent control and consumed it anyways; or similarly, if they did not think that intoxication could lead to a loss of violent control. Case law has recognized the relevance of the accused's prior conduct in assessing whether their crimes were truly involuntary. In *R v Jiang*,⁵⁶ a driver fell asleep at the wheel of her vehicle and hit two children, killing one and seriously injuring the other. An expert testified that an undiagnosed disorder caused the sleep episode which caused the collision. The driver was acquitted because her actions were involuntary and unforeseeable at the time the offence was committed. However, the Court acknowledged that while Ms. Jiang's actions were involuntary, the outcome would have been different had there been evidence that she knew of the risks created by the sleep disorder.⁵⁷ If there was foreseeable risk of danger, the accused nevertheless chose to operate a vehicle, and their involuntary actions caused harm, they would be held accountable.

Similar reasoning was applied in the Scottish case of *Finegan v Heywood*.⁵⁸ There, the defendant was charged with impaired driving and appealed under the defence of automatism, claiming he was sleepwalking. The appeal was dismissed because the defendant knew from previous experience that his sleepwalking was induced by consuming alcohol. In those circumstances, automatism was a foreseeable consequence of intoxication. There are many other ways of proving that the accused knew that consuming an intoxicant could have criminal consequences. For instance, courts could consider the individual's previous history of offences and personal experience with intoxication. One compelling example would be where the accused had a history of convictions relating to intoxication that should have made them aware of the link between their intoxication and criminal behaviour.⁵⁹

Defence counsel often provides evidence of a "Jekyll and Hyde change in behaviour" from accuseds who have consumed dangerous drugs.⁶⁰ Consequently, courts may have recourse to the accused's record to evaluate how foreseeable it was that this particular individual would act in a violent way if they became extremely intoxicated.⁶¹ Taking these factors into consideration, this could prove that the accused was aware of the potential risks of extreme intoxication and the resulting harm to others. The results from extreme intoxication would therefore be foreseeable, holding the accused culpable for the involuntary action of the offence.

56 *R v Jiang*, 2007 BCCA 270 [Jiang].

57 *Ibid* at para 17.

58 *Finegan v Heywood*, 2000 HCJT 444.

59 House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 35 (31 October 2022) at 11:31 (Michele Jules).

60 *Ibid* at 11:32.

61 *Ibid*.

However, it is crucial to approach a history of convictions related to intoxication with care. Past offences may stem from underlying addictions which are recognized as complex health conditions rather than solely matters of personal choice. Courts should ensure that reliance on past convictions does not unfairly prejudice the accused or reinforce stereotypes about addiction. Instead, the focus should remain on whether the accused's prior experiences provided them with sufficient awareness of the potential link between intoxication and criminal behaviour, without penalizing them simply for their history.

If there was no known risk or previous relevant history of culpable actions, then the accused should not be found guilty. To facilitate tracing involuntary acts back to voluntary culpable acts, Parliament could establish an intoxication limit. Establishing such a limit would inform the public that ingesting an intoxicant could lead to a loss of control, which could potentially lead to actions that could harm others. The limit would make it clear that beyond a certain level of intoxication, it would be reasonably foreseeable that a person could lose control and become violent.

C. Intoxication and Violence

Much research and literature has studied the correlation between alcohol and illicit drug use and violent behaviour.⁶² The literature demonstrates a link between intoxication and heightened levels of violence such as assaults, sexual assaults, and domestic violence. Internationally, substance use and violence has revealed a similar pattern. The United Kingdom reported that two-thirds of domestic assault incidents that were reported to law enforcement involved people under the influence of alcohol.⁶³ In the United States, forty percent of all reported incidents of domestic violence involved the presence of alcohol in the accused's system prior to the offence.⁶⁴ In Australia, domestic violence was reported to be two times more likely to involve physical violence when alcohol was present.⁶⁵ Furthermore, studies have shown that the combination of multiple intoxicants may increase the incidence of violence in comparison to the use of alcohol alone.⁶⁶ A study examining intoxication and combined substances found a significantly stronger relationship between violence and the use of multiple substances.⁶⁷

The effects of alcohol on the body have also been thoroughly studied. Alcohol's effect of promoting or influencing a person to engage in certain actions or behaviours that the individual would not normally participate in while sober, is well-known. Even moderate levels of alcohol consumption are known to cause motor, verbal, perceptual, and cognitive impairments, which could lead to violence.⁶⁸ Some immediate effects of substance use can include altered consciousness, impaired memory, disinhibition, euphoria, inattention,

62 Aaron A Duke et al, "Alcohol, Drugs, and Violence: A Meta-Meta Analysis" (2018) 8:2 *Psychology of Violence* at 238.

63 Kajol Sontate et al, "Alcohol, Aggression, and Violence: From Public Health to Neuroscience" (2021) 12 *Frontiers in Psychology* at 2.

64 *Ibid.*

65 *Ibid.*

66 Duke et al, *supra* note 62 at 243.

67 *Ibid* at 238.

68 Sontate et al, *supra* note 63 at 3.

and altered judgement.⁶⁹ These symptoms appear in leading criminal cases involving the accused being charged with offences of violence who have raised the defence of automatism.⁷⁰

While not everyone will experience the same type of effects when consuming alcohol or taking drugs, there is nevertheless strong evidence supporting a link between intoxication and violence. Therefore, it is reasonable to conclude that becoming intoxicated could potentially make substance users unpredictable and dangerous. Canadian laws relating to impaired driving are premised on public knowledge about the link between alcohol and motor vehicle accidents. Similarly, Parliament should set intoxication limits based on published research and educate the public on the risks that intoxication can lead to foreseeable violence.

D. Alcohol and Drug Limits and the Public's Knowledge of Impaired Driving

Parliament's approach to regulating impaired driving provides a suitable model for addressing self-induced intoxication leading to extreme violence. For impaired driving, Parliament has established a national standard or limit of blood alcohol concentration (BAC) for individuals who plan to drink alcohol and then drive.⁷¹ If an individual caught driving any type of motor vehicle has a BAC of 80 mg of alcohol per 100 mL of blood or more, criminal charges can be laid.⁷² Parliament has also established blood drug concentrations (BDC) to regulate psychoactive substances use as it relates to impaired driving.⁷³ The federal and provincial governments along with organizations such as Mothers Against Drunk Driving (MADD) have done an effective and efficient job of educating the public about the dangers of alcohol and drug use while driving.

MADD reached millions of Canadians through public service announcements (PSAs) aired from 2021 to 2022, and broadcasters aired national public television campaigns more than 109,000 times.⁷⁴ MADD also initiated programs to educate students from grades four to twelve about the danger and effects of mixing alcohol, cannabis, and other substances.⁷⁵ Additionally, MADD completed national surveys on the behaviours of driving after alcohol, cannabis, and illicit drug consumption.⁷⁶ With these education programs and PSAs reaching millions of people across the country, any reasonable person would be aware of and understand the potential risks of impaired driving. A survey of nearly 9,500 students who participated in

69 Sarah Hardey et al, "How Do Drugs and Alcohol Affect the Brain and Central Nervous System?" (7 February 2024), online: <americanaddictioncenters.org/health-complications-addiction/central-nervous-system> [perma.cc/9F7T-9TTK].

70 See *R v Bouchard-Lebrun* 2011 SCC 58 [Bouchard]; Brown, *supra* note 2; Sullivan, *supra* note 21; Chan, *supra* note 20; Daviault, *supra* note 2.

71 MADD Canada, "Impaired Driving Laws" (2018), online: <madd.ca/pages/impaired-driving/stopping-impaired-driving/impaired-driving-laws/> [perma.cc/5UCH-VQLW].

72 Government of Canada, "Impaired Driving Laws" (3 March 2022), online: <justice.gc.ca/eng/cj-jp/sidl-rlcfa/> [perma.cc/C662-MFL5].

73 *Ibid.*

74 MADD Canada, "MADD Canada – Annual Report 2021-2022" (2023), online (pdf): <madd.ca/pages/wp-content/uploads/2023/05/MADD-Canada_Annual-Report-2021_2022.pdf> [perma.cc/NT9W-CSF4] at 11.

75 *Ibid* at 8.

76 *Ibid* at 5.

the 2020-2021 School Program highlights its impact: 83% and 81% said they were not at all likely to ride with someone who had used cannabis or alcohol within two hours of driving, while 83% were very likely to plan a safe way home, and 95% were likely or very likely to step in to prevent impaired driving.⁷⁷ These results demonstrate how MADD Canada's initiatives are empowering young people to make safer choices and take action to keep roads safe.

The same reasoning can be applied to automatism and the foreseeability of harm. If Parliament set limits for intoxicants, along with including awareness campaigns to combat violence, the general public would become aware of the correlation between intoxication and violence, similar to that of impaired driving. Limits could also be set for mixing intoxicants. After all, if consumption of one intoxicant can put a person at risk of losing control and becoming violent, it is reasonable to assume that combining substances could potentiate the effects of the intoxicant. The old version of section 33.1 recognized this: using and mixing intoxicants can lead to automatism and violence.⁷⁸ Under the New Section 33.1, the law requires individuals to recognize that consuming an intoxicant may lead to violence. Setting an intoxication limit would put a reasonable person on notice of this possibility and spread awareness that would make it easier for the Crown to prove that consuming an intoxicant could reasonably lead to violence. In setting legal limits, as well as implementing comprehensive educational campaigns and prevention programs, this approach aims to inform individuals about the risks associated with intoxication. By increasing public understanding of the connection between intoxication and violence, these measures would reinforce the legal framework and assist the Crown in proving that a reasonable person could foresee violent consequences from consuming intoxicants.

E. The Limits Surrounding Cannabis

Among the drugs that are regulated under impaired driving laws, cannabis was one of the only substances listed as having a more lenient limit.⁷⁹ This refers to higher allowable BDCs for tetrahydrocannabinol ("THC")—the principal psychoactive chemical in cannabis—before impairment is presumed, and range within which impairment must be proven. This is reflective of how socially acceptable the drug has become since it was legalized in 2018. Cannabis is a commonly used substance, both medically and recreationally, with over 200 million people consuming it annually worldwide.⁸⁰ With cannabis becoming legalized in many countries, the harmful effects of cannabis primarily focus on the health effects of the user. The issue of individual behavioral changes resulting in violence and harm to others does not receive the same attention.

77 MADD Canada, "MADD Canada – Youth Education Program Report 2020-2021" (2021), online (pdf): <madd.ca/pages/wp-content/uploads/2021/01/MADD-Canada-Youth-Education-Impact-Report-2019_2020.pdf> [perma.cc/VSD3-8YZA].

78 *Brown*, *supra* note 2 at para 148.

79 *Blood Drug Concentration Regulations*, SOR/2018-148, online: <gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/sor-dors148-eng.html> [perma.cc/7XKS-R4G9].

80 Laura Dellazizzo et al, "Violence and Cannabis Use: A Focused Review of a Forgotten Aspect in the Era of Liberalizing Cannabis" (2020) 11 *Frontiers in Psychiatry* at 2.

This is concerning as global studies show that there is a 45 percent increase in the risk of domestic violence when using cannabis.⁸¹ Animal studies have also found that THC produces complex effects on aggression.⁸² Animal studies using smaller doses of THC have reported less emergence of aggression, whereas studies using higher doses and more chronic exposure have led to increased aggressiveness.⁸³ Additionally, an American survey found that cannabis use was associated with a doubling of domestic violence in the United States.⁸⁴ Extrapolating these results suggests a relationship between cannabis use and aggressive behavior.

The effects of THC can include a sense of euphoria, heightened sensory perception and increased appetite. These pleasant sensations, however, are not universal. Some people will experience anxiety, fear, distrust, or panic.⁸⁵ When taking a large dose, the individual may also experience psychosis which can include dissociation and hallucinations.⁸⁶ In some cases, this leads the person who has consumed the drug to reach a state of automatism.

Briefly, in *R v Bouchard-Lebrun*, the SCC held that psychosis induced solely by voluntary intoxication does not meet the criteria for the defence of not criminally responsible by reason of mental disorder under section 16 of the *Criminal Code*.⁸⁷ The Court distinguished between mental disorders arising from internal factors, like psychiatric conditions, and temporary states caused by external factors, such as drug use. The Court ruled that substance-induced psychosis does not meet the criteria for a mental disorder. Emphasizing accountability, the Court found that individuals must bear responsibility for the foreseeable consequences of their voluntary actions, including consuming substances that impair judgment. The Court maintained that voluntary intoxication does not absolve accountability, while recognizing that psychosis diminishes rational capacity. This reflects the broader legal and moral expectation that individuals exercise self-control and avoid creating risks that could lead to harm to others.⁸⁸

Furthermore, Parliament has established a blood drug concentration (“BDC”) that sets a standard for impaired driving. Criminal charges can be laid if someone’s BDC is 5 nanograms of THC per ml of blood.⁸⁹ While it is difficult to establish a set intoxication limit leading to violence, the impaired driving limits tells us that it becomes a more serious offence if THC BDC is above 5 nanograms per ml of blood. The implication is that it intensifies the effects and can lead to a greater loss of control. With studies consistently showing a link between

81 *Ibid* at 3.

82 *Ibid* at 4.

83 *Ibid* at 5.

84 Alex Berenson “Marijuana is More Dangerous Than You Think” (2019) 116:2 Missouri Medicine 88 at 89.

85 National Institute on Drug Abuse, “Cannabis (Marijuana)” (July 2020), online: <nida.nih.gov/publications/research-reports/marijuana/what-are-marijuana-effects> [perma.cc/AL8Y-3H7W].

86 *Ibid*.

87 *Bouchard*, *supra* note 70; *Criminal Code*, *supra* note 9, s 16.

88 See Michelle Lawrence & Simon N Verdun-Jones, “Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to Have Committed Criminal Acts While in States of Substance-associated Psychosis, Where Intoxication was Involuntary” (2016) 93:3 Can B Rev 571.

89 *Blood Drug Concentration Regulations*, *supra* note 79.

cannabis use and heightened levels of violence with increasing amounts consumed, Parliament should establish a BDC limit where possible loss of control could result in harming others.

F. Varying Effects of Intoxication on Individuals

The effects of intoxication vary greatly from individual to individual depending on the person's age, weight, and gender. BAC can be estimated by measuring an individual's weight in relation to the amount of alcohol they have consumed. For instance, generally, two to three "standard" drinks will result in a BAC range of 0.01 percent to 0.07 percent.⁹⁰ Someone who weighs 100 pounds and has two "standard" drinks will have an estimated BAC of 0.06 percent, whereas someone who weighs 190 pounds after two "standard" drinks will have an estimated BAC of 0.04 percent, both experiencing the effects of being relaxed and having lowered inhibitions.⁹¹

Using BAC levels, Parliament established intoxication limits for impaired driving to promote public safety, provide knowledge and guidelines to the public, create a deterrence for individuals, and enforce responsibility. Establishing these legal limits reinforces the very important ideas of legal and social responsibility. Therefore, it would be prudent for Parliament to create an intoxication limit and release guidelines for alcohol and specific drugs based on consumption and bodily effects.

G. Establishing an Intoxication Limit for Automatism

Given the effects of intoxication and the warnings and regulations established for impaired driving, Parliament should establish intoxication limits for automatism when one commits violence. With established limits, Parliament would create measures to guide laws and ultimately further educate the general public about safe behaviour when using intoxicants. In cases involving automatism, the Crown would consider whether someone should have understood that they might reach a level of intoxication resulting in automatism before ingesting substances. They would also consider if the accused took reasonable precautions in order to avoid potential harm to others.

In line with the regulatory provisions for impaired driving, one option for Parliament is limiting the availability of the defence of automatism to people whose consumption of intoxicants is below a certain limit. If the level of intoxication of those involved in violent acts is measured, this evidence could be used in court for cases involving automatism. This approach would be similar to the identified blood concentrations to regulate alcohol and psychoactive substances with impaired driving. This baseline could then be used as part of an individual's defence or prosecution in cases involving voluntary intoxication.

Several institutions have outlined similar BAC levels with corresponding predictable

90 Hayley Hudson, "Blood Alcohol Content" (5 November 2024), online: <alcoholrehabguide.org/alcohol/blood-alcohol-content/> [perma.cc/BWA2-FL6V].

91 *Ibid.*

behaviours and effects on the body.⁹² Reaching a BAC of 0.25 percent can produce some of the effects that are seen when someone has reached a state of automatism. At 0.25 percent an individual is in a stupor and is severely impaired in all psychological, sensory, and mental functions; the individual will have little comprehension of the self and their environment, and are at a high risk of losing consciousness.⁹³

Therefore, Parliament should adopt corresponding intoxication levels for psychoactive substances, like those for impaired driving laws. The regulations of impaired driving identify ten specific drugs of concern,⁹⁴ including commonly abused substances that are prevalent and linked to impairment.⁹⁵ Parliament's approach to impaired driving regulations provides a solid foundation for narrowing the challenging landscape of drug and alcohol combinations. By prioritizing the regulation of these substances, Parliament already acknowledged their significant impact on public safety in impaired driving cases. Researchers and policymakers can use this list as a practical baseline for further analysis, such as understanding the pharmacological interactions of these drugs with alcohol. This can illuminate critical patterns of impairment.

There is an increased risk of harm when an individual is in a state of automatism, so Parliament should set strict blood concentration limits in an effort to mitigate this harm. Such a law would recognize the importance of public safety and condemn actions that interfere with individuals' ability to feel secure. Consequently, if driving under the influence of these drugs is illegal, committing violence in a state of automatism should also be illegal. Establishing an intoxication limit for reaching a state of automatism would provide clarity for the courts on what a reasonable person should be expected to know before becoming intoxicated. Ultimately, considering the connection between intoxication and harm to others, the risk of violence is possible and therefore, foreseeable. This foreseeability of risk raises significant questions about the reasoning and treatment of intoxication in relation to legal responsibility, particularly in violent offences.

H. Challenging the Court's Distinction of Responsibility in Violent Offences

The Court in *Brown* distinguishes extreme intoxication from impaired driving offences by arguing that intoxication is central to the wrongful act in impaired driving, but merely

92 Various institutions have outlined blood alcohol concentration (BAC) levels with corresponding effects on the body. This includes the including the University of Notre Dame, the University of Wisconsin and Drug and Alcohol Services South Australia. See University of Notre Dame, "Blood Alcohol Concentration" (2024), online: <mcwell.nd.edu/your-well-being/physical-well-being/alcohol/blood-alcohol-concentration/> [perma.cc/5MWH-S866]; University of Wisconsin – Eau Claire, "Blood and Alcohol Content Predictable Effects" (2024), online (pdf): <publicwebuploads.uewec.edu/documents/BAC-chart-in-table-format.pdf> [perma.cc/2GVA-F7BX]; Government of South Australia, "Blood and Alcohol Concentration" (2014), online: <sahealth.sa.gov.au/wps/wcm/connect/Public%20Content/SA%20Health%20Internet/Conditions/Alcohol/Blood%20Alcohol%20Concentration%20BAC%20and%20the%20effects%20of%20alcohol> [perma.cc/7UCK-ZT5V].

93 *Ibid.*

94 *Blood Drug Concentration Regulations*, *supra* note 79.

95 See Hardey et al, *supra* note 69.

incidental in violent offences like assault.⁹⁶ In impaired driving offences, intoxication is integral because it transforms lawful and benign conduct, such as driving, into a criminal act by impairing the ability to drive safely.

By contrast, in violent offences like assault, the Court held that intoxication is not a core component of the offence. The key wrongful act of assault lies in the intentional application of force or threats against another person. This remains true regardless of whether the accused is intoxicated. In this context, intoxication is considered incidental; it may provide context for why the offence occurred but is not necessary to establish the elements of the crime. However, this distinction can be challenged by focusing on the foreseeable consequences of voluntary intoxication, rather than its role as a formal element of the offence. The key issue becomes not whether intoxication is central to the legal definition of the offence, but whether it significantly contributes to the resulting harm.

Though discussing the old version of section 33.1, Professors Plaxton and Mathen discuss that traditional legal principles require voluntariness and fault for an offence to exist, and in the absence of these elements, the defendant's behavior cannot be understood as a conventional prohibited act.⁹⁷ They suggest that the prohibited act in such cases is not the conduct itself but rather its consequences.⁹⁸ Moreover, the prohibited act is not entirely erased - it is instead treated as a "simulacrum" of a crime, meaning it would have been criminal if committed by a voluntary actor with the requisite fault.⁹⁹ This reasoning reinforces the argument that liability should not be abandoned in cases of automatism, but should instead be traced back to an earlier fault: the defendant's voluntary decision to consume intoxicants to a dangerous degree. By shifting the focus to the foreseeability of harm resulting from reckless intoxication, the law can maintain a coherent framework for liability while preserving the fundamental principle that fault must underlie criminal responsibility.

I. Awareness of Intoxication Leading to Violence

One criticism of the New Section 33.1 is that it will be difficult to prove that a reasonable person would have known that consuming an intoxicant could lead to loss of self-control and violence. Moreover, even if there is some awareness among ordinary people that there may be a correlation between intoxication and heightened levels of violence, they may be unaware that reaching a particular level of intoxication could lead to harm to others. The research that supports such a link shows there is still a gap in the public's general awareness that intoxication can possibly lead to violence. In these circumstances, Parliament must step in to educate the public. Parliament has already taken some steps toward educating the public about concerns surrounding intoxication; for instance, the Public Awareness of Alcohol-Related Harms Survey outlines the harms that could be caused by intoxication, but only focuses on the harms

96 *Brown*, *supra* note 2 at para 78.

97 Michael Plaxton & Carissima Mathen, "What's Right with Section 33.1" (2021) 25:3 Can Crim L Rev 255.

98 *Ibid* at 271.

99 *Ibid*.

related to one's own health.¹⁰⁰ On the other hand, the Canadian Centre for Substance Use and Abuse issued a recent report outlining the health concerns of intoxication as well as the social impacts of intoxication leading to violence.¹⁰¹ Additionally, the National Anti-Drug Strategy, launched in 2007, aims to reduce drug-related harm and promote safer communities through prevention, treatment, enforcement, and public awareness.¹⁰² Ultimately, Parliament needs to address the harms of intoxicated automatism, and one way to do this is to establish public guidelines.

J. Addressing One Argument Against Setting an Intoxication Limit

The biggest difference and most significant argument against setting limits for intoxicants that lead to violence, as compared to alcohol consumption, is that most impaired driving offences occur when drivers are caught in that very moment and tested on the spot. In comparison with instances involving violence, time can pass after an act of violence before the accused is detained by police and their intoxication level is tested. The longer the delay in testing alcohol and drug concentration levels, the harder it will be to get an accurate measurement of how intoxicated the accused was when they committed the crime.

Despite this, there could nevertheless be enough evidence to formulate a reasonable measurement. When called to investigate violence, police should always collect evidence about how much of an intoxicant the accused has consumed. They can also gather evidence relevant to the accused's level of intoxication, such as their weight, behaviour, and history of intoxication. This was precisely what occurred in *Daviault*: the evidence demonstrated that the accused had consumed 7 or 8 bottles of beer and 35 ounces of brandy before sexually assaulting the victim.¹⁰³ The evidence gathered by police can be paired with an expert opinion interpreting the significance of that evidence. In *Daviault*, a pharmacologist testified that a man of Mr. Daviault's age, weight and height who had consumed that much alcohol would have put Mr. Daviault's blood alcohol level between 400 and 600 milligrams per 100 milliliters of blood.¹⁰⁴ The expert asserted that an individual with that level of intoxication in the blood stream could suffer "l'amnésie-automatisme," also known as a "blackout."¹⁰⁵ Someone in this state is not aware of their actions as they can lose contact with reality and normal functioning.¹⁰⁶ Therefore, even if the investigation of violent offences occurs at a different time than the investigation of impaired driving, evidence about the quantity of an intoxicant that the accused has consumed could provide evidence for a reasonable estimate of BAC.

100 Government of Canada, "Public Awareness of Alcohol-related Harms Survey 2023" (19 January 2024), online: <health-infobase.canada.ca/alcohol-related-harms-survey/> [perma.cc/844W-496D].

101 Canadian Centre on Substance Use and Addiction, "Canada's Guidance on Alcohol and Health: Final Report" (January 2023), online (pdf): <ccsa.ca/sites/default/files/2023-01/CCSA_Canadas_Guidance_on_Alcohol_and_Health_Final_Report_en.pdf> [perma.cc/H7KN-28UE].

102 Government of Canada, "Evaluation of the National Anti-Drug Strategy" (13 May 2022), online: <justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2018/nads-sna/eilp-epji.html> [perma.cc/MY35-L2ZN].

103 *Daviault*, *supra* note 2 at 105.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

A similar approach could be adopted with cases involving intoxicated violence. It may be difficult to determine an appropriate scope for this, such as how expert evidence would approach backtracking the time between the report made to police and the violent incident itself. However, it is worth Parliament considering similar guidelines for instances of intoxicated violence. Making this a reality could help ensure that more calls are being made to the police, contributing to fewer cases of assault, or other violent acts going unreported. However, it would also place a responsibility on the police to promptly test the accused's level of intoxication. It may be beneficial to adopt an approach similar to procedures used in domestic violence cases under section 320.31(4) which deals with impaired driving offences and timely testing of intoxication levels.¹⁰⁷ Introducing similar measures could strengthen how intoxication-related violence is addressed.

K. Domestic Violence

Establishing legal limits for dangerous levels of intoxication will not, in itself, eliminate the complex issue of intoxication-related domestic violence. However, it could serve as a valuable tool alongside other preventative measures, such as public awareness campaigns, educational programs, and community support initiatives aimed at reducing the incidence of domestic violence. These combined efforts could help challenge societal norms that tolerate or excuse violent behavior when intoxication is involved, promote a culture of accountability, and encourage both victims and bystanders to report incidents.

Despite these potential benefits, challenges would remain, particularly regarding the timely reporting of domestic violence incidents involving intoxication. Setting clear legal intoxication limits could help shift societal perceptions by emphasizing the seriousness of intoxicated violence and reinforcing the idea that intoxication is not an acceptable excuse for violent behavior. This shift in perception could, over time, encourage more immediate reporting and a stronger legal response.

A particularly effective legal measure could be the adoption of a backtracking mechanism similar to section 320.31(4) of the *Criminal Code*, which is currently used in impaired driving cases. This provision allows law enforcement to estimate a person's BAC at the time of an alleged offence, even if the testing occurs hours later. By applying this approach to domestic violence cases, authorities could still hold perpetrators accountable even if there is a delay in reporting or testing. This is especially important in domestic violence situations, where immediate reporting is often not possible due to the dynamics of abuse and control within the household.

Incorporating such a mechanism into domestic violence law could strengthen prosecutions by providing objective evidence of intoxication at the time of the offence. Furthermore, when combined with an examination of the accused's voluntary actions leading up to the crime, including any prior history of domestic violence, previous offences, and personal experiences with intoxication, this approach could paint a comprehensive picture of culpability. Courts could assess whether the individual knowingly engaged in risky behaviors, such as excessive intoxication, that contributed to the violent incident, thereby reinforcing personal accountability.

107 *Criminal Code*, *supra* note 9, s 320.31(4).

Additionally, setting a defined BAC limit for dangerous intoxication in the context of domestic violence would emphasize the critical importance of prompt reporting. It would also create an expectation for law enforcement to prioritize testing the accused's intoxication level as quickly as possible to preserve vital evidence.

L. The Operation of Testing Intoxication Limits

Setting an intoxication limit would necessitate that the accused undergo a sobriety test to objectively measure their level of impairment at the time of the alleged offence. This process ensures that any claims of intoxication can be substantiated with concrete evidence. To effectively implement such a system, intoxication levels should be tested under specific conditions: (1) when there is credible evidence suggesting that intoxicants—such as alcohol, prescription drugs, or illicit substances—played a role in the violent behavior or (2) when there is observable evidence of automatism, which refers to actions performed without conscious control upon the arrival of law enforcement at the crime scene. In both scenarios, timely police intervention is crucial to accurately assess the state of the accused.

Police can gather evidence of intoxication through several methods. First, officers can assess the accused's visible physical and cognitive state at the scene, such as slurred speech, unsteady movement, or erratic behavior. Second, the presence of intoxicating substances at the scene can support the claim of intoxication, such as open containers of alcohol, drug paraphernalia, or prescription medications. Third, establishing the quantity of substances consumed can provide a more precise understanding of the accused's level of impairment. This might involve gathering witness statements, surveillance footage, or receipts from establishments where the accused may have consumed intoxicants.

In situations where there is a delay in reporting the crime or when law enforcement arrives significantly after the incident, determining the exact level of intoxication becomes more challenging. The accused's body may have metabolized some of the substances, making immediate sobriety tests less accurate. However, while difficult, it is not impossible to establish the accused's intoxication level. In these cases, evidence regarding the quantity and type of substances consumed becomes particularly important. Additionally, expert testimony may reconstruct probable BAC and BDC levels at the time of the crime based on consumption patterns and timing.

Further, the investigation can be supplemented by examining the accused's history and behavioral patterns, particularly any documented tendencies or prior incidents involving intoxication. This background information, if known to the police, can assist in constructing a narrative of foreseeable intoxication, suggesting that the accused either knew or should have known that consuming certain substances would lead to a loss of control or violent behavior.

CONCLUSION: THE NEED TO REFORM THE NEW SECTION 33.1

The law governing intoxicated violence in a state of automatism must be overhauled. As seen in *Brown*, those accused can be absolved of criminal responsibility when they have voluntarily intoxicated themselves and subsequently engage in involuntary violent acts. A future challenge to the constitutionality of the New Section 33.1 could potentially infringe sections 7 and 11(d) of the *Charter*. Despite potential *Charter* infringements, these can

likely be justified under section 1, as Justice Kasirer suggested in *Brown*. The New Section 33.1 effectively balances public safety with the accused's rights by requiring foreseeability and narrowing liability to individuals who anticipated the risks of extreme intoxication leading to violence. This approach protects section 7 and section 11(d) rights by convicting only those who negligently self-intoxicate, while preserving a defence for unforeseeable reactions. By integrating the proposed approach of setting permissible levels of intoxicants and incorporating a presumption modeled on section 445.1(3) of the *Criminal Code*, the law can effectively provide accountability for irresponsible consumption of intoxicants and regulate intoxicated violence. Like impaired driving, intoxicated violence poses a threat to public safety that warrants considerable attention. The foreseeable risk of harm, in both impaired driving and intoxicated violence, is regulated in an attempt to mitigate damage and impose criminal consequences for those who voluntarily enter a state of automatism. Although not every instance of surpassing intoxication levels will lead to motor vehicle accidents causing injury to others, the implementation of regulations will result in an increased level of safety for all.

Not every instance of intoxication leads to violence but there is a distinct correlation between the two. Government intervention, as demonstrated in the regulations surrounding impaired driving, is justified when the foreseeable risk of harm materializes into a societal concern. The more intoxicated one becomes, the greater the loss of control and unpredictability of one's actions, potentially leading to violence. Thus, Parliament should establish limits for a certain level of intoxication leading to a foreseeable risk of loss of control and a resulting harm to others. However, if the accused's reactions were unforeseeable, they may be able to use a limited defence. Ultimately, it is essential to consider blameworthiness and criminal responsibility in addressing both intoxicated driving and intoxicated violence. An intoxication limit would do this by holding individuals accountable for their actions when they knowingly engage in irresponsible consumption of intoxicants. It would ensure accountability for individuals' reckless actions when they should have been aware and considered the risks.

Therefore, using both the concept of tracing and establishing an intoxication limit, it is morally justifiable to hold someone responsible for the violent act that results from an accused acting in a state of automatism. If an individual's acts of violence can be traced back to blameworthy, voluntary consumption of an intoxicant, they should be held criminally responsible for their subsequent involuntary actions. The establishment of intoxication limits would aid courts in deciding whether the voluntary intoxication warrants criminal punishment. With clear limits, courts could hold individuals accountable for their actions as the consequence of intoxication was foreseeable. Thus, it becomes reasonable to expect individuals to have known better before voluntarily self-intoxicating. If someone willingly becomes intoxicated and it was foreseeable that reaching a certain limit could alter their behaviour and consciousness, which could result in harm to others, they should be found guilty.

The New Section 33.1 should be modified to better address intoxicated violence. The defence of extreme intoxication akin to automatism should only be available if the level of intoxicants of the accused's blood is below a statutory limit. If a violent act was committed when the accused's intoxication level was above the established limit, the accused's action would be presumed to be voluntary, unless evidence suggests otherwise. The accused would be acquitted if they could prove that they were too intoxicated to control their actions, and a violent reaction at that intoxication level was an unforeseeable consequence. This modification to section 33.1, accompanied by

a public education campaign, should improve the public's awareness of intoxicated violence. Extensive public awareness and the addition of clearly set intoxication laws in place, would foster a deeper understanding of the dangers associated with intoxication, and subsequently cultivate safer behavior surrounding the ingestion of intoxicants.

Such reform is urgently needed. The recent change to section 33.1 requires that the Crown must prove the foreseeability of violence as a result of intoxication to benefit from the presumption of voluntariness. Consequently, in contrast to the previous provision, Parliament has essentially broadened the availability of the defence of extreme intoxication at the expense of public safety. Further, it has potentially rendered it more difficult for the Crown to benefit from the presumption of voluntariness by requiring it to prove foreseeable loss of control and violence. Setting permissible levels of intoxicants combined with a presumption modeled on section 445.1(3) will alleviate these difficulties.

Finally, through the principle of tracing, courts could assess how blameworthy the accused's prior voluntary actions were. With the addition of established intoxication limits, the accused could not be held as blameless, as they would have committed a violent action while voluntarily exceeding the threshold of intoxication. Willingly placing oneself into a foreseeable, uncontrollable state of automatism and disregarding the potential risk of harm to others by reaching a certain level of intoxication is a blameworthy act that warrants criminal responsibility.