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# The return of the 'extreme intoxication' defence - as warned

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Judges can call it what they want, but the defence of extreme intoxication still smells like the same old patriarchy to us.

While “extreme intoxication” appears nowhere in *R v Perignon*, B.C.’s Supreme Court just released the first reported acquittal based on this defence since May 2022. That’s when the Supreme Court of Canada in *R v Brown* struck down the limits the government put on the defence as unconstitutional.

Canadians were assured when Brown was released that use of the defence would be rare and that feminists were misleading women and traumatizing survivors of male violence by warning about its gendered impact. Yet we based our prediction on the evidence: reported case law, about real women whose lives have been changed forever by violence perpetrated by extremely intoxicated men, and whose trials had been affected, in one way or another, by men’s use of the defence.

So it should surprise no one that the B.C. case involved male violence

against women, a strong pattern that emerged after the extreme intoxication defence was first developed by the Supreme Court in its 1994 decision in *R v Daviault*. The accused in the B.C. case stabbed his wife in the back with a kitchen knife. She survived his attack, but their marriage did not.

The case has also been reported in media as a case of automatism based on a sleep disorder. In fact, the “disorder” originated in Jean-Luc Perignon’s prescription drug abuse. He consumed zopiclone, a sedative hypnotic, in a dosage “well beyond the recommended range of prescription for this medication,” in combination with “a dangerously high dose of opioids” and four alcoholic drinks, according to the judge.

Justice Warren Milman implicitly acknowledged it was an “extreme intoxication” defence by stating that because of Brown, the accused’s defence of “automatism” was available. The judge also said that the revised limitations on the extreme intoxication defence, passed by Parliament soon after Brown was decided, did not apply retrospectively.

The B.C. Supreme Court in Vancouver, B.C. While “extreme intoxication” appears nowhere in *R v Perignon*, B.C.’s Supreme Court just released the first reported acquittal based on this defence since May 2022.

Not that the new law purporting to limit the extreme intoxication defence would have made any difference. We criticized the government’s approach of rushing the amendments to section 33.1 through Parliament in just six weeks — bypassing the usual process of vetting the draft through committee and hearing from expert witnesses.

As a result, Parliament did not have the benefit of hearing about the confusion generated by the new law. Certainly, it fixed the problem identified by the Supreme Court by specifying the intent necessary to convict individuals of violent crime resulting from their criminally negligent extreme intoxication.

However, the new law is unclear about how the Crown has to prove intent. If interpreted as requiring proof that a reasonable person could have anticipated a risk of violent behaviour stemming from

the drugs or alcohol, it will be impossible for courts to put any limits on the defence. This is because defence lawyers will be able to rely on experts prepared to testify that violent behaviour is not a known or significant risk of whatever the accused ingested.

A Senate Committee is currently hearing from witnesses, some of whom (including the writers) are urging it to recommend a fix to the law. Canadian women already know the criminal justice system is skewed in favour of men. The extreme intoxication defence further shifts the risks of drug and alcohol abuse by men onto the shoulders of women, who are the most likely victims of extremely intoxicated men.

The government, so far, has responded that the law is fine and the only thing left to do is to educate the public (ie women) so that they are not distracted by “misinformation.” The B.C. Supreme Court decision makes it even more urgent that the Senate live up to its name as a body of second thought and call on the government to fix this bad law.

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