

**A SUBJUNCTIVE STANDARD FOR *MENS REA***

by

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## ABSTRACT

A fundamental distinction in criminal law is the distinction between *actus reus* and *mens rea*, the criminal act and the criminal intent. Two distinct standards have arisen for deciding *mens rea*: an objective standard and a subjective standard. The purpose of this thesis is to develop a three-step rule that will make it easier to decide whether to apply the objective or subjective standard in cases involving intoxication. Since this rule introduces a subjunctive approach to interpreting *mens rea*, I call this standard the subjunctive standard of *mens rea*.

The subjunctive standard of *mens rea* is based primarily on a decision about whether an accused would have had the *mens rea* required to commit a prohibited act in the absence of alcohol. Thus, the subjunctive standard of *mens rea* should be used only when the accused is believed to have committed a prohibited act while intoxicated. The test for deciding whether an accused would have had the *mens rea* required to commit a criminal act is based largely but not exclusively on the accused's credibility at trial.

This thesis in effect gives judges and lawyers a new tool. It introduces a new rule that can be used to decide which standard of *mens rea* best suits a given case. This three-step rule is a rule free from ambiguity and restraint and yet fully consistent with *Charter* values, something that is important for prosecutors and defendants alike.

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## **DEDICATION**

To My Grandmother

# 1 INTRODUCTION

A fundamental distinction in criminal law is the distinction between *actus reus* and *mens rea*, the criminal act and the criminal intent. Two distinct standards have arisen for deciding *mens rea*: an objective standard and a subjective standard. The purpose of this thesis is to develop a three-step rule that will make it easier to decide whether to apply the objective or subjective standard in cases involving intoxication. Since this rule introduces a subjective approach to interpreting *mens rea*, I call it the subjective standard of *mens rea*.

*Mens rea*, or the fault element, is best described as the criminal intent behind a criminal act (Roach, 158). Whether it involves premeditation or merely willful blindness, *mens rea* is the mental element behind committing a prohibited act. Without this mental element, a person accused of committing a crime generally may not be charged with that crime.

The relationship that exists between the *actus reus* and the *mens rea* becomes evident when determining whether an accused has committed a crime. In Canada, the *actus reus*, or prohibited act, is a “matter of statutory interpretation” (Roach, 74). If a person violates any valid statute or regulation, he commits the *actus reus*. In a criminal trial, the accused can be convicted of committing the *actus reus* if the Crown can prove beyond a reasonable doubt that he committed it (Roach, 73). If there is reasonable doubt whether the accused is guilty of committing the *actus reus*, the question of *mens rea* often does not rise (Pickard, Goldman, Cairns-Way, and Mohr, 258). A case in which the

question of *mens rea* would still arise is that of an attempted crime. This is because a person who attempts a crime is guilty solely as a result of his criminal intentions.

When the Crown fails to prove that the accused has the required *mens rea* to commit a crime, this also does not imply that he has not committed the *actus reus*. An *actus reus* may occur because the accused has committed it involuntarily. In such cases, the accused may even have lacked the mental ability to form the intentions required to commit the crime. Thus, showing that the accused lacks the mental capacity to commit a crime is not a sufficient defence against his having committed the *actus reus*.

Although there is often a relationship between the *mens rea* and the *actus reus* of a particular crime, one also need not necessarily cause the other. A person may *intend to* commit prohibited acts but fail to commit them. For example, a person may attempt to discharge a gun with the *mens rea* of hitting and killing someone with a bullet. The gun may fail to discharge and, thus, the person would not carry out the *actus reus* of killing. Here, the *mens rea* does not lead to the *actus reus* because of some accident, namely the gun failing. However, there are less obvious situations where the *mens rea* need not necessarily lead to the intended *actus reus*. For example, a person may intend to rob a neighbourhood bank and intend to use a gun to intimidate the bank's employees. As he holds the gun in front of the employees, one of them fights back and he pulls the trigger out of nervousness. In this case the robber intends only to rob the bank but in the end commits the *actus reus* of manslaughter. It is not obvious that the intention to rob the bank fails to lead to committing the *actus reus* because the two are correlated. Nevertheless, they are not directly related. It is not always obvious whether having the



*mens rea* required to commit a certain crime is the reason why a person commits related crimes.

It is particularly hard to determine what the relationship is between the *mens rea* and the *actus reus* when the accused is said to have been severely intoxicated. The problem exists primarily because a person who is severely intoxicated can have difficulty forming any kind of intentions at all and, yet, he potentially can commit prohibited acts. An intoxicated person exhibits differences in his behaviour and in his psyche. How a person acts and thinks depends on the degree of his intoxication and on how well he tolerates the intoxicant. Some people are so tolerant of alcohol that their bodies metabolize it at a faster rate than normal and, thus, not even a breathalyzer test can show their degree of intoxication (Bloom, and Butler, 70). Not knowing how intoxicated an accused was at the time he is said to have committed a crime makes it difficult to know whether he could have been affected psychologically. It is difficult to know whether he could have lacked the ability to form the intentions required to commit the crime. If he was unable to form any intentions at all, he could not have had the appropriate *mens rea*. In such a case, the Crown cannot effectively prove that the accused had the *mens rea* required to commit the crime. Thus, the *mens rea* should not be considered to have any real correlation with the *actus reus*. If John breaks a shop window while intoxicated solely because he becomes unruly when he drinks, he commits the *actus reus* without there being an intention. However, with variances in body types and personalities, it is not easy to know when a particular person has reached the degree of intoxication that disables him from forming intentions. Instead of trying to understand the biological and psychological factors of every mind – something that is not yet possible – there are other

ways to determine whether the *mens rea* leads to committing the *actus reus*. One such way is to interpret and understand the *mens rea* required to commit a particular crime subjectively.

The doctrine of subjective *mens rea* aids in interpreting the *mens rea* of an intoxicated person. This doctrine “prevents the conviction of an accused who [...] does not have the knowledge and foresight that a reasonable person would have” and thus does not necessarily intend to commit a crime (Roach, 46). The morally innocent thus can be viewed subjectively, or from their own point of view, and factors such as ignorance of the law or insanity become relevant in a defence. Under this approach, an accused could potentially convince the judge and jury that the *actus reus* he committed should not be associated with a corresponding *mens rea* because he was intoxicated at the time of the crime. It is important to note that while taking the subjective approach, one should not confuse a defence of intoxication with an excuse. Using intoxication as a defence of one’s inability to form the intentions required to commit a crime is only allowable when the degree of intoxication is high enough to impede significantly one’s mental capacities. When one has only ingested a minor amount of intoxicants or is highly tolerant of them, using intoxication to defend one’s actions is reduced to nothing more than making excuses for committing those actions. In addition, intoxication cannot be a defence when it is used to sedate one’s nervousness before committing a crime one already intends to commit.

Since the subjective approach allows us to view the accused as a unique individual, it also allows that individuals might have various forms of a guilty mind that do not always include having an intention to commit an *actus reus*. There are four

different forms of subjective *mens rea* that describe the various forms of a guilty mind. These forms come in degrees of importance and are, in order of greatest to least importance, as follows:

- (1) the *intent* to commit the *actus reus*,
- (2) *knowledge* of the consequences of committing the *actus reus*,
- (3) *willful blindness* that the act is prohibited, and
- (4) *recklessness* or being “aware of the risk of prohibited conduct” (Roach, 162).

When the Crown can show beyond a reasonable doubt that an accused had the *intent* to commit a crime, this is most indicative of the accused having a guilty mind. Alternatively, if the accused commits a crime without intending to commit it, he could still be found to have a guilty mind because he had knowledge of the consequences of committing the crime (Roach, 154). Finally if the accused does not intend to commit a crime and is unaware of the consequences of committing the crime, he still can be found to have a guilty mind merely because he was willfully blind to the law or to the consequences of his actions, or because he was being reckless. Under the subjective approach, the Crown can prove beyond a reasonable doubt that the accused may have had any one of these forms of *mens rea* and thereby succeed in proving that the accused had the required *mens rea* to commit the crime.

Though beneficial in many contexts, the subjective approach to interpreting *mens rea* can be problematic when intoxication is used as a defence. When judges use the

subjective approach, they can no longer rely on the standard of the reasonable man, since this standard is not subjective. Thus, judges are often forced to do more guesswork when it comes to understanding what the accused was thinking when he acted while intoxicated. Some of that guesswork can lead to judgments that are open to criticism. An example is the case of *Regina v. Dominic*, in which Mr. Dominic, while in a state of advanced intoxication, killed a neighbour's dog.

In this case, Mr. Dominic claimed he ingested two beers and three coffee mug-sized Coolers with 7% alcohol content (*Regina v. Dominic*, 2009 BCPC 0145, para. 23). He also mentioned quite often during the trial that he consumed all the alcohol in one to two hours. Mr. Dominic testified that after consuming the alcohol, he napped for about two hours (*Regina v. Dominic*, 2009 BCPC 0145, para. 24). Some time later that night, Mr. Dominic was found to have killed a dog that he claims he had no recollection of killing. In theory, a non-tolerant person would metabolize one beer or cooler in an hour (Bloom, and Butler, 71). If his reports are accurate, Mr. Dominic had more than twice the amount of alcohol in his body that could have been metabolized by the end of the drinking session. Furthermore, his Blood Alcohol Level should theoretically have peaked right around the time he had woken up (two to three hours after rapid ingestion) if he was not tolerant of alcohol (Butler, and Bloom, 71). An important fact for this case would be that even if a person does not show any overt behavioural changes when intoxicated, there might still be significant cognitive changes (Butler, and Bloom, 70). If all his testimony is correct, these factors seem to lead to the fact that Mr. Dominic was severely intoxicated when he allegedly killed the dog. The judge, T.S. Woods, however, based his judgments of Mr. Dominic's testimony and his decision about Mr. Dominic's *mens rea*

on what he believed was a good subjective interpretation of them. Knowledge about Mr. Dominic's ability to tolerate alcohol is crucial to making such judgments. Without this knowledge, a subjective interpretation of Mr. Dominic's *mens rea* could easily be mistaken. Justice Woods assumed that Mr. Dominic had a high alcohol tolerance. He believed that Mr. Dominic's evidence was inconsistent and showed that the amount of alcohol he consumed would not have impeded his ability to form the intent to kill the dog (*Regina v. Dominic*, 2009 BCPC 0145, para. 31). He further questioned Mr. Dominic's credibility based on this subjective belief. The disadvantage of using the subjective approach to interpret Mr. Dominic's *mens rea* is that it must be based on a generic belief of alcohol tolerance. How different bodies metabolize alcohol differently is not yet fully understood. In this case, Mr. Dominic's defence that he lacked the intent to commit the crime fails when it is not scientifically obvious that it should. Other problems associated with the subjective approach also arise. I will say more about these kinds of cases in the following chapters.

The main alternative approach to interpreting *mens rea* is an objective one. The objective standard of *mens rea* does not allow the accused to use factors such as ignorance or insanity as a defence. According to this standard, the act alone is to be used to interpret the *mens rea*. In Canada, one can be judged objectively to have had the *mens rea* to commit crimes that do not require premeditation, such as manslaughter (Roach, 165). Although this approach eliminates the guesswork required to determine the intent of the accused, it too is not free from controversy. As seen in *Regina v. Bernard*, convicting an intoxicated individual merely because he is intoxicated has been found to violate section 7 of the *Charter of Rights and Freedoms of Canada*. In this case, Nelson

Pierre Bernard, was charged with the general intent offence of sexual assault causing bodily harm (*Regina v. Bernard*, [1988] 2 S.C.R. para. 2). A general intent crime occurs when a person commits a criminal act but has no ulterior motive for committing it (*Regina v. Bernard*, [1988] 2 S.C.R. 833, per headnote). In some cases use of the subjective approach has resulted in less serious convictions than otherwise might have been the case. However, a person who commits a general intent crime does not require motive and thus he should not receive a lesser conviction. In this case, Mr. Bernard's *mens rea* was interpreted in accordance with objective standards.

In *Regina v. Bernard* it was found that Mr. Bernard had returned home after a night of drinking. Once there, he sexually assaulted an eighteen-year-old woman. His friends and the woman described Mr. Bernard as being intoxicated but alert enough to walk, to talk clearly, and to put albums on the record player (*Regina v. Bernard*, [1988] 2 S.C.R. para. 7). Nevertheless, he tried to defend his actions by claiming he was intoxicated. At the time, Justice Dubin did not allow the jury to consider Mr. Bernard's intoxication as a defence to the charge, or as a cause of his inability to form the intent to sexually assault the woman (*Regina v. Bernard*, [1988] 2 S.C.R. para. 9). He was blamed, objectively, for being intoxicated that night, not for the crime he allegedly committed. The Supreme Court appeal held that "legislation which imposes the sanction of imprisonment without proof of a blameworthy state of mind violates the guarantee of fundamental justice contained in s. 7 of the *Charter*" (*Regina v. Bernard*, [1988] 2 S.C.R. para 31). Though Mr. Bernard was blamed for being intoxicated, he was not shown to have had the *mens rea* required to commit the sexual assault. In this case, using the

objective approach to interpret Mr. Bernard's *mens rea* could have wrongly convicted him.

The objective approach can also be problematic for cases where intoxication is a possible defence to a specific intent crime. A specific intent crime occurs when a person commits a crime with some ulterior motive behind his actions (*Regina v. Bernard*, [1988] 2 S.C.R. 833, per headnote). In these cases the objective approach generally makes it more difficult for the accused to be convicted of a lesser crime. However, when severely intoxicated, a person may not be able to form the intention required to willfully commit most serious crimes.

To establish a rule that prevents the above shortcomings, it is necessary to provide an analysis of the above two cases and show why the decision to use subjective or objective *mens rea* may result in less-than-ideal judgments. In keeping with the rights outlined in the *Charter*, I will propose a three-step rule to help decide when to use a subjective or an objective standard for interpreting *mens rea*. An analysis of *Regina v. Dominic* and *Regina v. Bernard* shows that both approaches to interpreting *mens rea* have their limitations. What is evident in these and other cases is that if the accused has committed a specific intent offence while in a severely intoxicated state, judges unanimously agree to take the subjective approach. Committing a specific intent offence requires having the ability to form intentions and thus, the accused is to be judged according to that ability. A severely intoxicated individual would not have the mental capacity to form the specific intent to commit a crime and, in this case, the subjective approach would be more sympathetic towards using intoxication as a defence.

However, if the accused commits a general intent offence, these cases only show that the objective approach should not be used because it would violate the accused's *Charter* rights. Is it then clear that we should take the subjective approach? Consider a severely intoxicated individual who kills a person he knows on the street by getting into a brawl with him. During the brawl, he drunkenly belches out threats directed at his acquaintance. His only weapon is a broken beer bottle. Presumably, the brawl starts simply because the effects of alcohol on the individual generally result in anger. This is not an unfamiliar sight. Nevertheless, in this particular case, the man happens to kill his acquaintance. Due to the lack of premeditation, the crime is at most one of manslaughter. This is classified as a general intent crime. If one interprets his *mens rea* subjectively, it would not be obvious that he should be convicted or acquitted of manslaughter. It is true that he was not in any state to form a clear thought. However, the threats he called out in that state may or may not be indications of his intentions. They may either be side effects of the alcohol or of some deeply rooted anger he has always felt towards his acquaintance. To take the subjective approach and to claim he was heavily intoxicated could prevent the conviction of a man who truly wanted to kill his acquaintance. Such a case requires guesswork.

The three-step rule given below sets out to eliminate this kind of guesswork. The accused would be viewed in two respects. In one respect, the intentions he had while being intoxicated should be viewed subjectively. In another respect, we should consider, *subjunctively*, the intentions he would have had if he was not drunk and put in a similar situation. For instance, would he go so far as to kill his acquaintance in the street fight if he was not intoxicated? During the course of a trial, the judge learns a lot about the



credibility of the accused. The credibility of the accused can show the judge whether or not he has the personal restraint and the mental capacity to refrain from committing a crime when alcohol is not a factor. I believe the subjective approach is a completely different approach. As stated in the appeal for *Regina v. Bernard*, intoxication cannot be used as a tool to “gain the courage to commit a crime” and then be used as a defence of that very crime (*Regina v. Bernard*, [1988] 2 S.C.R. 833, per headnote). In order to avoid this, judges must consider the credibility of the accused in order to benefit from taking the subjective approach to interpreting *mens rea* in general intent offences.

The three-step rule I will argue for in the following pages helps us decide between using the subjective or objective approach when the accused uses intoxication as a defence of his actions. The rule is as follows:

- 1) Has the accused committed a general intent or a specific intent offence?
- 2) If the accused committed a specific intent offence, then we are required to use the subjective approach. If the accused has committed a general intent offence, then we are required to consider his credibility.
- 3) If his credibility reasonably leads one to believe that he would not commit the crime in the absence of alcohol, then we are required to use the subjective approach. Otherwise, we are required to use the objective approach.

The objective approach, in this latter case, would not violate an accused’s *Charter* rights. Once the judge questions the credibility of the accused and deems his character a threat even in the absence of alcohol, the objective standard becomes appropriate. Thus,

the three-step rule above becomes an appropriate tool to decide between using a subjective or objective standard without violating the accused's rights.

## 2 TERMINOLOGY

In this chapter, I provide definitions of the legal terms used throughout this thesis. I begin by defining the *actus reus* and the *mens rea* of a crime. I also describe the nature of *mens rea* in relation to the *actus reus*. I define subjective *mens rea* and introduce some of its drawbacks when used in a criminal case. I then do the same for objective *mens rea*. Finally, I distinguish between specific intent crimes and general intent crimes and show how each type of crime relates to our interpretation of *mens rea*.

### 2.1 The *Actus Reus* of a Crime, Defined

When a person commits a crime, there are a multiple elements that make up the offence. Perhaps the most obvious element is the prohibited act itself. The prohibited act is one of the physical elements of a crime. When a person robs a bank, what is most evident is that the bank was robbed. By definition, the *actus reus* element of a crime is the prohibited act of that crime. In Canada, only an act that is prohibited by a “valid statute or regulation” can be the *actus reus* of a crime (Roach, 74). Almost all crimes in Canada are outlined in the *Criminal Code* (Roach, 72). Ideally, a person can only be accused of committing an act if the law prohibits it. Hence, a person cannot be accused of committing an *actus reus* if he breaks the lock on his own home because he left his keys inside by mistake. The law does not prohibit this act and thus, there is no *actus reus* to be committed. In theory, when one does not commit a prohibited act, one cannot commit an *actus reus*. However, when one commits an *actus reus*, he must have also committed a prohibited act.

In the Canadian trial process, the Crown must prove that the accused has committed the *actus reus* beyond a reasonable doubt (Roach, 73). Since such a proof can be cumbersome, Canadian law has taken measures to disambiguate the term 'prohibited act'. A prohibited act must be an act defined as an offence in the *Criminal Code* and an act

- 1) of commission, or,
- 2) in certain cases only, of omission,
- 3) by a human being,
- 4) that is voluntary, and,
- 5) if consequences are part of the definition, have caused those consequences.

[Stuart, 82]

Should any one of the above five elements fail to be true of an act, the accused must be acquitted based on the fact that he has failed to commit a prohibited act (Stuart, 82).

According to the above definition, a person who commits a murder commits a prohibited act in the same way as does a person who hears that a murder is about to happen and omits informing the police. The definition also implies that an animal cannot commit a prohibited act. Most relevant to this thesis is the fact that involuntary commissions of prohibited actions are not incriminating in the same way that voluntary commissions of prohibited actions are.

Consider a case in which a criminal holds a person's child at gunpoint and threatens to pull the trigger unless the person robs a bank and brings him the money. To save his

child, the person might rob a bank, but in such circumstances neither the choice nor the act is voluntary. According to the above definition, Canadian law does not consider this case of robbing a bank to be a prohibited act in the criminal sense. A more controversial example of involuntarily committing a prohibited act is that of involuntary intoxication. I will return to this issue.

To prove that the accused has committed the *actus reus* of the crime, the Crown also normally needs to prove that the prohibited actions have caused prohibited consequences (Roach, 93). The *actus reus* of a crime has certain prohibited consequences of which the actor is generally aware. Robbing a bank leads to robbing numerous people and businesses of their savings. It destroys the people's trust in the bank to keep their savings secure. It creates disorder and fear while often putting clients and employees in the line of fire. All such consequences result from one prohibited action. The number and severity of the consequences associated with a prohibited act are good indications of the impact of the crime. Showing that the prohibited consequences have occurred is often sufficient to show that the prohibited act has occurred.

## **2.2 The *Mens Rea* of a Crime, Defined**

Another crucial element of a crime is the fault element, or *mens rea*. The *mens rea* is the mental element of a crime. It is also known to be the criminal or guilty intention a person requires to commit a crime. When a person robs a bank and is aware that he commits a prohibited act, he feels guilty. If he did not know the act was prohibited, he would have no reason to feel guilty. His guilty mind, then, results from having knowledge that the act

he commits is prohibited. It also results from having the intention to commit that act. The bank robber will know that it is illegal to aim a gun at a bank employee and demand the money in the vault. This knowledge might be all he needs to feel guilty. However, if he also intended to commit the robbery, if he had it all planned out when he knew it was prohibited, his guilt would be greater. Thus, the extent of his guilty mind after he commits a prohibited act typically depends on how much criminal premeditation he engages in before he commits the act. In effect, criminal premeditation constitutes (in most situations) the *mens rea*. There is normally a certain amount of premeditation required to commit a crime. The amount required depends on the nature of the specific crime.

In Canadian criminal law, there are four main types of criminal premeditation that constitute the *mens rea*. They are intention, knowledge, willful blindness, and recklessness. Showing that a person engages in one of these four types of criminal premeditation can be sufficient to prove that he has the *mens rea* required to commit the crime. Two of the four types, intention and knowledge, are touched on above. I explain them here in more detail. Showing that a person has the “intention or purpose to achieve the prohibited result, or to willfully pursue such a result” (Roach, 155) is the strongest proof that he has the *mens rea* required to commit the crime. Here, the term ‘intention’ is not to be confused with ‘motive’. When someone intends to commit a prohibited act, he exercises free will to desire to commit that act and does what he can to produce its consequences (Roach, 158). For example, when a person intends to rob a bank, he first freely chooses to commit the action and thus, desires to commit it. Then, he makes a plan, buys a gun, covers his face, and enters the bank pointing a gun at the employees. Every

action is committed to achieve the prohibited consequences. What is key is that intention provokes action. Motive, in turn, provokes one to have the intention to commit an act. When someone is motivated to commit a prohibited act, he is merely provoked to consider exercising his free will to commit that act (Roach, 158). He does not necessarily exercise his free will and thus, he might not even engage in criminal thought. If a person walks by a bank and notices that this particular bank looks easy to steal from, he might be motivated to rob it. Nevertheless, the mere thought that the bank could easily be a target for robbery does not entail that the person intends to commit this crime or even wants to.

A second possibility is for the Crown to show that the accused knows of the prohibited consequences of committing a prohibited act. This is moderate proof that the accused has the *mens rea* required to commit the crime. It is important to note that such a proof is considered to be weaker than the proof of intention. If it were not possible to show that a person intends to commit a crime, the next best proof would be to show that he at least knows that the consequences are prohibited (Roach, 160). If the bank robber's peers pressured him into robbing the bank, he might not intend to commit the crime at all. Nevertheless, he might still be aware of its prohibited consequences. He still engages in criminal premeditation. Without being forced into committing the crime, he might voluntarily rob the bank because he would want social acceptance amongst the gang members. Thus, his mind is still guilty. There is no reason why he should not be considered to have the *mens rea* required to commit the crime. Hence, proof that he has this *mens rea* rests on the fact that he has knowledge of the prohibited consequences.

A third option is for the Crown to show that the accused deliberately suppresses the knowledge that the act he commits is prohibited. This is also moderate proof that the

accused has the *mens rea* required to commit that crime (Stuart, 228), proof of willful blindness. Proof that a person willfully avoids having knowledge of the prohibited act is as good a proof as showing that he has knowledge of that act. This proof, however, is still weaker than the proof of intention. Consider the situation in which the bank robber does not intend to rob the bank because he is pressured into doing so. He could easily suppress knowledge of the fact that robbing a bank has many prohibited consequences because he would not want to know how bad the crime he is pressured into committing really is. Nevertheless, he voluntarily robs the bank to gain social acceptance amongst his gang members. His willingness to be deliberately ignorant is again sufficient indication that he has engaged in criminal premeditation. Thus, showing that he is willfully blind towards the prohibited consequences of his act should be enough to show that he has the *mens rea* required to commit that crime.

Finally, the Crown may show that the accused is merely aware of the risks associated with a prohibited act. This is a weaker form of proof that the accused has the *mens rea* required to commit the crime (Roach, 162). It is proof of being reckless. When a person recklessly commits a crime, he is at most aware that the crime has risks associated with it. The bank robber recklessly robs a bank if he knows the risk associated with aiming a gun at the bank employees and taking money from the vault that is not his. Showing that an accused committed a prohibited act recklessly is the weakest way to prove that he had the *mens rea* required to commit that crime (Roach, 162). Imagine a member of some gang who hires a person to rob a bank. This person may agree to rob the bank without ever forming the intention to do so. His intention is simply to complete any job for the money. Furthermore, the hired robber might not have any criminal experience



and thus not be aware of the consequences of robbing a bank. He might believe that the worst consequence that would result would be the bank losing money. Nevertheless, the robber will still be guilty of committing the crime and he would have engaged in some minor criminal premeditation. This minor criminal premeditation includes his awareness that robbing the bank has some associated risks. Thus, he should be considered to be capable of having the *mens rea* required to commit the crime.

A person's *mens rea* is generally related to the consequences of the *actus reus* he commits. When a person has the criminal intention to commit a prohibited act, he is generally aware of some of its prohibited consequences. The common law presumption of *mens rea* is that a person's *mens rea* should be established in relation to all aspects of the *actus reus* (Roach, 148). Thus, when the *actus reus* of a crime has multiple elements, the Crown must show that the accused has the *mens rea* required to bring about all those elements. Imagine again a bank robbery. The act itself has many elements. For example, the robber must threaten the bank employees with a gun and take the money out of the bank. It is presumed that the robber engages in some sort of criminal premeditation with regard to all such elements of the robbery. He might intend to take the money. He might also be aware that threatening bank employees can be risky. The Crown must prove that the accused has this *mens rea* in relation to all the elements of the *actus reus*.

### **2.3 The Nature of *Mens Rea* and its Relation to the *Actus Reus***

There are three terms that best describe the nature of *mens rea*. The first is *uniqueness*.

This means that *mens rea* varies from crime to crime (Stuart, 154). In other words, each

crime has a unique *mens rea* required to commit it. For example, consider the difference between murder and manslaughter. If Smith intends to take Jones' life, making himself the heir to Jones' great fortune, his *mens rea* will be different than if he wants to take Jones' life only because he hates Jones. In the first scenario, Smith kills Jones with the intention of becoming rich. In the second scenario, Smith kills Jones simply with the intention of ending Jones' life. Notice that the crimes that Smith would commit also need not be the same. In the former, the crime would be murder (killing by premeditation); in the latter, the crime would often be manslaughter (killing without premeditation). What does not vary is the prohibited act that Smith would commit. In other words, the *actus reus* remains constant. In either case, Jones would die by the hands of Smith. Thus, the *actus reus* of a crime need not be unique to the *mens rea* required to commit it. As we see here, there is more than one possible *mens rea* a person can have in relation to the prohibited act of killing a person. The prohibited act stays the same even when the *mens rea* is different.

The second term that describes the nature of *mens rea* is *independence*. This means that the *mens rea* required to commit a particular crime need not always cause the *actus reus*. *Independence* can be a misleading term. The phrase "having the *mens rea* required to commit a crime" implies that the *mens rea* must be a necessary component of the crime because, without it, the crime cannot exist. From this phrase alone, it might seem that having the *mens rea* to commit a particular crime must *cause* the criminal to commit that *actus reus*, but this is not true. In the second of the two cases above, Smith's *mens rea* and the *actus reus* do not appear to occur independently of one another: Smith intends to kill Jones and the intention leads him to do so. However, this is a

misconception. It is entirely possible for a person to have the *mens rea* required to commit a particular crime and fail to commit it. Smith might have intended to kill Jones to make himself the heir to his fortune but Jones may have died of natural causes earlier that same day. It is always possible to fail to carry out one's intention. In fact, the best counterexample to the notion that the *mens rea* must cause the *actus reus* lies in the concept of *mens rea* for attempted crimes. This means that a person has the *mens rea* required to commit a crime but he only attempts the crime and fails to achieve the related *actus reus*. In a criminal attempt, "the *mens rea* is of primary importance" and the *actus reus* no longer needs to be an element of the crime (Roach, 113). Thus, there is no necessary causation relation between the *mens rea* and the *actus reus*.

As a side note, it is interesting to see that the independence condition describes the nature of both the *mens rea* and the *actus reus*. Committing the *actus reus* of a crime is not a necessary indication that one has the required *mens rea* to commit it. This concept will underlie most of this thesis. It is possible that a person involuntarily commits a crime because he is either intoxicated or forced to commit it. It is also possible that a person intends to commit a specific *actus reus* but accidentally commits a different one. Smith may only intend to commit murder and yet he only gets as far as attempted murder. In most criminal cases, one cannot deduce, by simply analyzing the *actus reus* alone, that the accused has the *mens rea* required for committing the crime with which he is charged. Traditionally, the criminal law made this notion clear because keeping the *actus reus* and the *mens rea* distinct does not create a practical problem (Roach, 104). A prohibited act may be committed while a person is sleep walking or involuntarily intoxicated by some narcotic. When establishing that a person has the *mens rea* required to commit the *actus*

*reus* he is charged with, the Crown must mostly focus more on the accused's mind and less on his actions.

The third and perhaps most controversial term that describes the nature of *mens rea* is *simultaneity*. A traditional principle of criminal law is that the accused "must commit the criminal act at the same time that he or she has the fault element required for the particular crime" (Roach, 91). In essence, this principle claims that if a criminal act is committed while the intention to commit that act is absent, the accused will not have the *mens rea* required to be convicted of the crime. To be convicted of murder, Smith must kill Jones while still having the intention to kill him. If Smith had this intention when he was awake and is now sleep walking, he could not be convicted of murder should he kill Jones in his current state. Another example would be that of an intoxicated person committing a prohibited act that does not require his *mens rea* to occur at the same time as the *actus reus*. A severely intoxicated person might form the intention to become verbally abusive towards a person but end up assaulting him instead. He might do this because he lacks the capacity to control his anger when he is intoxicated. Hence, the *mens rea* (the intention to verbally abuse the person) need not be the intention behind the *actus reus* of the assault. Furthermore, the *mens rea* required to commit the assault does not occur at the same time as the *actus reus*, the assault itself. The only *mens rea* the accused has at the time of committing the *actus reus* is that of becoming verbally abusive towards a person. Thus, the accused must not be convicted of assault. As I will explain later, the accused may be convicted solely on the basis that his fault lies in the intention to become intoxicated (Roach, 93). This is because even though the accused may be incapable of thinking reasonably while intoxicated and, hence, he is incapable of

reasonably intending to assault the victim. From here, the accused either can be acquitted because he did not intend to inflict harm or he can be convicted because he intended to put himself in a position to inflict harm by becoming drunk. This issue demonstrates the essential difference between subjective and objective *mens rea* that I will explain in the next section.

The *simultaneity* condition also explains why an attempted crime does not carry the same weight as a completed one. Since a person has the *mens rea* to commit a crime and fails to carry it out, his *mens rea* does not occur at the same time as the *actus reus* (of which there is none). Thus, according to *simultaneity*, he cannot be convicted of that particular crime. In effect, the Crown cannot prove that the *actus reus*, one of the elements of the crime, occurred beyond a reasonable doubt. This is not to say that the accused can get away with attempting murder. He is acquitted only of the murder charge, not the attempted murder charge. In the case of attempted murder, the Crown need only prove beyond a reasonable doubt that the accused had the *mens rea* required for committing murder. This new charge would be for a less serious crime since the *actus reus* is not completed (Roach 112).

## **2.4 Intoxication and its Effects on *Mens Rea***

There is a unique effect on a person's *mens rea* when he commits a prohibited act while severely intoxicated. According to the *independence* condition, the accused may commit an *actus reus* without having a corresponding *mens rea*. This is because *independence* implies that having the *mens rea* required to commit a crime does not necessarily lead to

committing it and vice versa. However, the *simultaneity* condition implies that the accused cannot be convicted of a crime if he does not have the *mens rea* required to commit it. Hence, it appears that a person who cannot form the intention to commit a prohibited act will not be convicted of a criminal act. Severely intoxicated individuals often cannot form intentions. Should such individuals have criminal intentions when sober, they are more prone to committing prohibited acts when they are intoxicated. Thus, it seems inappropriate to allow such individuals to escape conviction. In order to prevent this from happening, the accused's *mens rea* must be viewed in a different way.

Let us first consider the facts. An intoxicated person experiences and exhibits both behavioral and psychological differences. How great the differences are between his sober self and his intoxicated self depends on how intoxicated he is. In terms of alcohol intoxication, the different degrees of intoxication are described by a person's BAL (or blood alcohol levels). Each different degree of intoxication is also associated with some behavioural change. People who cannot tolerate alcohol experience the following behavioural changes at the following BAL levels (where mg% is the unit of measurement for the amount of milligrams of alcohol in 100ml of blood):

30mg% – motor skills begin to be impaired

50mg% – lifting of external inhibitions and reduction in anxiety

80mg% – legally impaired for the purpose of driving a motor vehicle

100mg% – disinhibited, altered speech pattern, motor impairment

200mg% – coordination problem, slowed reflexes, impaired judgment, slurred speech, rambling speech

300mg% – sedated, somnolent, approaching coma

400mg % – severe coma and death [Bloom, and Butler, 70].

We can see that a non-tolerant person will have impaired judgment after consuming enough alcohol to produce 200mg%. To put this in perspective, having a BAL of 200mg% and having impaired judgment requires one to drink half the amount of alcohol compared to that of a person in a coma. One glass of wine raises the BAL by 15-25 mg per 100 ml (Bloom, and Butler, 71). Thus, it takes about ten drinks to get from a state of impaired judgment to a state of coma. It would also take about ten drinks to get to a state of impaired judgment from being completely sober. When one's judgment is impaired, the ability to reason well is lost. This is the state in which one is most likely to lose the ability to form intentions because one needs to be able to reason well in order to form reasonable intentions. Intentions formed in this state are generally delusions. A severely intoxicated Smith might form the idea that he should kill Jones while not intending to actually do so if he were sober. This data seems to indicate that a person who is heavily drinking and severely intoxicated can reach the state in which he would lose the ability to form intentions. Nevertheless, the numbers are merely one indication.

There are a several facts that the Crown needs to prove to establish that the accused was intoxicated when he committed the *actus reus*. Proving these facts provides a better understanding of the accused's degree of intoxication and thus, his ability to form intentions. The type of evidence that shows the accused was intoxicated at the time of the crime is for the most part physical. The BAL reading on a breathalyser test reveals the amount of alcohol in the accused's blood at the time of the crime (Bloom, and Butler,

75). Blood and urine tests can also be used to extrapolate probable alcohol levels (Bloom, and Butler, 75). This would be a more accurate test of how much alcohol is in the blood. Liver function testing can also reveal heavy alcohol consumption (Bloom, and Butler, 75). Perhaps the most important piece of evidence consists of expert testimony regarding how alcohol is metabolized. This information allows the Crown to show whether the amount of alcohol in the accused's blood is a good indication of his degree of intoxication. If the accused were an alcoholic who was highly tolerant of alcohol and thus someone who metabolized it quickly, he might not show many behavioural changes under severe intoxication (Bloom, and Butler, 70). Thus, his intoxication and his cognitive capacities should not be judged according to the non-tolerant model. Such high tolerance is called *pharmacological tolerance*.

Pharmacological tolerance can create problems for measuring the accused's degree of intoxication at the time he committed the *actus reus*. Pharmacological tolerance is defined to be "the acquired ability to metabolize alcohol at a more rapid rate" than general (Bloom, and Butler, 70). If a person were pharmacologically tolerant of alcohol, his BAL would be lower than that of another person who consumes the same amount of alcohol but is not tolerant in this way. Pharmacological tolerance has the potential to create inconsistent evidence about a person's degree of intoxication. When a pharmacologically tolerant person is given a breathalyser test, his BAL would read lower than his true degree of intoxication. Even a blood or urine test would reveal lower levels of alcohol than expected. Nevertheless, his cognitive capacities might still be impaired as a result of the amount of alcohol he consumed (Bloom, and Butler, 70). Thus, a



pharmacologically tolerant person might not have the capacity to form intentions when he drinks heavily, even though he appears to function normally.

To illustrate how inconsistent evidence can become when an accused is pharmacologically tolerant, imagine a case in which an intoxicated man kills a person in front of witnesses. Let us assume that he had consumed enough alcohol to make a non-tolerant person's BAL reach 200mg%, even though the breathalyser test reveals his alcohol levels to be less than 200mg%. Also assume that all the other numerical evidence implies that his blood alcohol level was not high enough for him to have impaired judgment. From this, the Crown and the jury might believe that the accused had the ability to form the intentions required to commit a murder. However, to his misfortune, the accused is an avid drinker and has gained a pharmacological tolerance towards alcohol. His cognitive faculties can be impaired regardless of his low toxicity levels as shown by the physical evidence. The fact that he has a pharmacological tolerance towards alcohol might not be something he is aware of himself. The prosecutors would never know this either, unless they have other methods for measuring his degree of intoxication. They might believe that questioning the witnesses about the accused's behaviour would provide the jury with conclusive evidence that he was not severely intoxicated. However, this method would fail to reveal the accused's true degree of intoxication. Since his pharmacological tolerance affects his behaviour as well. An examination of his behaviour at the time of the act provides more (misleading) evidence that he had the capacity to form the intention to commit murder. A dangerous false conviction is highly likely in such cases.

It thus seems that a simple consideration of the accused's *mens rea* can lead to false convictions in cases where he is charged with committing a crime while severely intoxicated. Simply marshalling the above kind of evidence should not be enough reason to claim that he had the *mens rea* required to commit the crime. One way to understand the accused's *mens rea* if he was intoxicated at the time of the crime is to interpret it subjectively. In this his way, one might hope to better understand the accused's own psyche.

## **2.5 Subjective *Mens Rea* and the Specific Intent Offence**

### **2.5.1 Subjective *Mens Rea*, Defined**

In cases where the subjective approach is adopted, conviction means that the Crown has proved beyond a reasonable doubt that the accused, as viewed subjectively, had the *mens rea* required to commit the *actus reus*. For example, Stevens might kill Johnson by being involved in some horrible accident. Imagine Johnson is driving in the dark of the night when a deer dashes across the highway. In order to avoid it, Stevens swerves and hits Johnson's car coming in the opposite direction. Johnson dies instantly even though Stevens did not intend to kill him. If the Crown were to interpret Stevens' *mens rea* subjectively, he would have to consider Stevens' intentions to swerve and to avoid hitting the deer. It would also have to consider who Stevens is and what was going on in his psyche. Was he angry when he was driving? Was he fatigued? Did he know and dislike Johnson? These subjective considerations could establish whether Stevens had the

intention to avoid killing the deer or to cause the death of Johnson. Subjective considerations can also be used to understand whether Stevens had the ability to form intentions at all. He may have been severely fatigued during the drive. In any case, subjective considerations can only exist in a trial where his *mens rea* is interpreted subjectively.

The use of subjective *mens rea* is valuable since it often “prevents the conviction of the morally innocent” (Roach, 145). In a trial, the subjective approach to interpreting *mens rea* is the accused’s only hope for acquittal if he does “not understand or intend the consequences of [his] actions” (Roach, 145). Under this approach, if the accused lacks the capacity that a reasonable person would have to know the consequences to his actions, he has a defence. He can defend himself by revealing that he did not have the required *mens rea* to commit the crime he is charged with. Thus, this defence includes demonstrating a lack of intention to commit the crime. The *Canadian Charter of Rights and Freedoms* allows for a defence of this nature. Section 7 of the *Charter* states that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. As generally interpreted, principles of fundamental justice require the presence of the fault element as a necessary condition for incarceration. (For example, see *Reference Re: Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR. 486, in which the majority found that absolute liability offences – in which no *mens rea* is required to be established – have the potential to violate s. 7.) Thus, the morally innocent should be able to defend themselves against conviction whenever they have not engaged in criminal premeditation.

When using the subjective approach to interpret *mens rea*, the accused's intentions are examined carefully. Such examinations might reveal that the accused did not have criminal intentions at all and is, therefore, morally innocent. In this case, the subjective approach allows the jury to consider him legally innocent as well. This is in keeping with his *Charter* rights. Nevertheless, there are cases in which the subjective approach fails. Determining who is morally innocent can be a difficult task. This is especially true if the accused is intoxicated at the time of the crime and believes that he is morally innocent despite his own intention to become intoxicated. Consider the case of Smith and Jones, where Smith's intoxication led to his killing Jones. Recall that in one scenario, Smith wanted to kill Jones merely because he hated him. There may be many reasons why Smith became intoxicated before killing Jones. One explanation is that Smith intended to kill Jones but found the idea of committing murder emotionally unbearable. Thus, he turned to alcohol to relieve his inhibitions and allowed the intoxication to provide him with a false sense of bravery. In this case, intending to become intoxicated and intending to kill Jones makes Smith anything but a morally innocent person. Should Smith be put on trial and should the Crown interpret his *mens rea* subjectively, he might try to defend his actions. He might try and claim that he was severely intoxicated when he killed Jones. He might claim that the killing was an accident because the effects of the alcohol deprived him of the ability to form any criminal intentions at all.

In such a case, it is necessary for the Crown to establish that Smith is not morally innocent, but this is a difficult task. The task includes proving beyond a reasonable doubt that Smith engaged in criminal premeditation (i.e. that he had the *mens rea* required to

commit the murder) and establishing that his defence is fraudulent. The difficulty lies in accomplishing the latter. There are no rules telling the judge how far to take the subjective approach when interpreting Smith's *mens rea*. He might not take it too far or far enough. For example, physical evidence might show that Smith was severely intoxicated at the time of the crime, but he might also be behaviourally tolerant of alcohol. Behavioural tolerance occurs when a person exhibits less of an "overt behavioural change than non-tolerant individuals" (Bloom, and Butler, 70). Thus, Smith (besides committing murder) might not appear as a hostile person at all. But in fact, in this case, Smith drank the alcohol to settle his nerves. He might also appear to be a credible person in court because of how he handles himself when sober. Thus, the judge might not doubt his testimony. The criminal law system generally approaches adjudication objectively and it is likely that judges have an objective point of view by default. They might stop further examination into Smith's psyche once they establish that he is credible. Furthermore, Smith has *Charter* rights. No matter how effective the Crown's argument, Smith would not be convicted unless his defence fails or there are rules the judge can follow to fully understand Smith's psyche subjectively. Smith's defence might easily be accepted because it is quite difficult to show that Smith actually intended to commit murder if there is no physical evidence pointing to the time before he became intoxicated. The judge and jury might never know that Smith actually had intentions behind his drinking. They might conclude that the alcohol could have impaired Smith's ability to form intentions. Smith would be viewed as morally innocent even though he is not, and so he might be judged legally innocent. Thus, the use of the subjective approach in this case would lead to a miscarriage of justice. It sets out to

protect the morally innocent and yet is unable to distinguish between the morally innocent and morally blameworthy. In the case above, the use of the subjective approach is so vague that Smith's immorality need not be revealed. If there is no physical evidence or witness testimony that Smith had secret intentions to kill Jones, Smith's immorality will not be revealed. The subjective approach sets out to protect the morally innocent from conviction but leads to a true criminal's acquittal.

On the subjective approach, the Crown need not prove that the accused *intended* to commit a crime (Roach, 155). This is because there are degrees of subjective *mens rea*. As mentioned, there are four main forms of criminal premeditation that constitute *mens rea*. Recall that the forms are, from strongest to weakest, intention, knowledge, willful blindness, and recklessness. Thus, there are degrees of proof for *mens rea*. An accused might commit an *actus reus* without intending to do so. A person who commits a crime while severely intoxicated might not intend to commit the crime but might simply be reckless. Should the Crown interpret this person's *mens rea* subjectively, he would have to prove recklessness to prove that he had the *mens rea* required to commit the crime. Thus, there are times when the Crown's subjective interpretation must rely on difficult grounds of proof of *mens rea*. For instance, Smith might have been hired to kill Jones. Say that they both attended a party and became lightly intoxicated. Smith might not have intended to kill Jones but he did want the financial gain for doing the deed. Smith might have known that killing Jones would bring about prohibited consequences and he willfully ignored his conscience and killed Jones. The Crown must now prove beyond a reasonable doubt that Smith had the *mens rea* required to commit murder even though he was intoxicated at the time. To prove this, the Crown decides to interpret Smith's *mens*

*rea* subjectively because he was intoxicated at the time and he uses that intoxication to defend his actions. If intention was the only proof of *mens rea*, the Crown might fail at establishing that Smith had the *mens rea* required to commit murder. On the subjective approach, there might even be more reason to acquit Smith because he was indeed intoxicated when he committed the crime. However, the Crown can instead establish that Smith had knowledge of the prohibited consequences and that he was willfully blind towards them. This is a lower degree of proof but it prevents Smith's wrongful acquittal.

The subjective approach also allows the judge to grant that the accused may not have had the ability to form intentions. In these cases it is enough for the crown to show that the accused had knowledge of the consequences of his actions or that he was being reckless. This recklessness can be enough to convict him. However, section 7 of the *Charter* can shield him from conviction if he is morally innocent and if his recklessness does not interfere with that innocence.

Since the subjective approach to interpreting *mens rea* requires a judge to view the accused's mental condition subjectively, it encourages a lot of guesswork that ideally might be eliminated. As we have seen in the previous example, the judge might assume that the accused's good behaviour reveals his credibility. In the next chapter, I will present a case in which the subjective approach to the accused's *mens rea* leads to his conviction, perhaps rightly, although this remains controversial.

### 2.5.2 Specific Intent Crimes, Defined

When a person commits a specific intent crime, he intends to commit more than just the *actus reus* of that crime (*R. v. Bernard*, [1988] 2 S.C.R. 833). He intends the act to be a means for an ulterior end. For example, Roxanne might murder her rich husband in order to receive his fortune. The murder is the means to attain the end, namely her husband's fortune. Essentially, a criminal who commits a specific intent crime forms (and therefore, must have the ability to form) the specific intent to commit the crime. Hence, it is generally believed that a severely intoxicated individual may be incapable of committing crimes of specific intent unless he had formed the intent prior to becoming intoxicated. It thus seems appropriate to use the subjective approach to interpret the *mens rea* of an individual accused of committing a specific intent crime while intoxicated. But as established, the subjective approach allows the accused to use the fact that he was intoxicated in his defence. He should not be convicted of a crime that requires him to have the ability to form a specific intent if he was unable to form any intent at the time. In what follows I will distinguish between these kinds of specific intent crimes and more general intent crimes.



## 2.6 Objective *Mens Rea* and the General Intent Offence

### 2.6.1 Objective *Mens Rea*, Defined

The objective approach to interpreting *mens rea* allows judges to judge the accused in accordance with the standard of the reasonable man. This approach does not allow the accused to use his mental incapacities as a defence. Instead, the test becomes that of what a reasonable man would be required to do (Roach, 165). Continuing with the above example, the Crown could decide to interpret Smith's *mens rea* objectively. In this case, the court would not allow Smith to use a shortfall in his mental capacities as a defence to the murder. Smith would be viewed as a reasonable man, one who commits the murder with a reasonable and unaltered mind, regardless of the effect of the alcohol. Controversy arises because objective standards cannot apply to those, such as the mentally ill, who cannot "reasonably be held responsible for satisfying [those] standard[s]" (Roach, 165). The problem is that this approach does not allow an accused to claim that his ability to form the *mens rea* required to commit a crime was impaired because he was intoxicated at the time. If an accused makes such a claim, judges, using the objective approach, have a rule to follow. The Leary rule was introduced in *Regina v. Leary* (*Regina v. Leary*, (1977) 33 C.C.C. (2d) 473 (S.C.C.)). Allan H.P. Leary was said to have "forced [a girl] at knife point to submit to coition and other acts of sexual humiliation" while intoxicated (*Leary v. The Queen*, [1978] 1 S.C.R. 29). This was the first case in Canada in which specific intent offences were distinguished from general intent offences. In this case "it was determined that becoming intoxicated could supply the *mens rea* for general intent

offences” and this became known as the Leary rule (Roach, 222). In other words, if an accused has committed a general intent offence while intoxicated, judges can convict him based on his intention to become intoxicated, as opposed to the intention actually to commit the prohibited act. Indeed, the accused would be held responsible for becoming intoxicated even if he had not committed the crime in question. Most people would likely agree that there seems to be an inherent mistake in the objective approach if it allows judges to see fault with the intoxication of the accused and not with the criminal activity he engages in. In the next chapter, I will examine a case in which this occurs.

The Supreme Court of Canada has claimed that the use of objective *mens rea* is sufficient in the case of unlawful acts such as manslaughter and several other criminal offences less serious than murder (Roach, 165). This means that when a person commits a more serious crime, his *mens rea* is generally interpreted subjectively. There are, however, less serious crimes such as sexual assault for which the objective approach is usually used. Controversy arises when the accused becomes intoxicated and commits sexual assault. Although the Crown would attempt to use the objective approach to interpret the accused’s *mens rea*, some believe the subjective approach would produce better results. The accused might not have had any intention to commit sexual assault and the only reason he committed it was due to the effects of the alcohol. The subjective approach would recognize this. In the next chapter, I will also examine a case in which this controversy is present.

### 2.6.2 General Intent Offence, Defined

When a person commits a general intent crime, he need have no greater intent than to commit the *actus reus* itself (*R. v. Bernard*, [1988] 2 S.C.R. 833). For the most part, general intent crimes are less serious than specific intent crimes because they need not be premeditated. For example, Nick might strike his wife repeatedly because he is angry with her and because he is an abusive husband. To commit assault, Nick does not need to form an intention greater than that of hitting his wife. Thus, if Nick was intoxicated when he committed the assault, he has no defence. Nick's intoxication might lower his level of mental functioning but he does not require much mental functioning to commit assault (or any general intent crime for that matter). It is thus appropriate to use the objective approach to interpret the *mens rea* of an individual accused of committing a general intent crime while intoxicated. Using this approach, the accused cannot use the fact that he was intoxicated while committing the crime in his defence. At the same time, he cannot use such a defence because he is said to have committed a general intent crime.

## 2.7 The Best Fit

There has been and still is uncertainty about how and when objective *mens rea* should be used in criminal prosecution (Roach, 165). The same is true of subjective *mens rea*. In effect, one reason why the criminal courts are reluctant to be specific about when and how to use either approach is because sometimes one approach collapses into another. For example, it seems that if there were a rule that would help eliminate the judge's

guesswork when using subjective *mens rea*, judges would be forced to view the accused's mental condition objectively, defeating the purpose of the subjective approach. The issue here is not that there needs to be a rule for how far to take the subjective standard or the objective standard. The issue is that there needs to be a rule that tells judges, juries, and lawyers which standard best suits the criminal case at hand. If the approach suits the case, there is less controversy over how far the approach should be taken.

Recall the example in which a person commits sexual assault while intoxicated. This is not an uncommon occurrence and yet in such cases the criminal law system would generally use the objective approach to interpret the accused's *mens rea*. Controversy arises over how far this approach should be taken when the accused has been severely intoxicated and should at least be judged subjectively when he presents an intoxication defence. A rule of best fit can eliminate this and other problems in criminal judgment that are currently leading to poor judgments and appeals in higher courts. I will present a three-step rule of best fit in the final chapter of this thesis.

### 3 CASE ANALYSIS

In this chapter, I will present two criminal cases in which the defendants use an intoxication defence. The first case, *Regina v. Dominic*, went to trial in the Provincial Court of British Columbia on March 31, 2008. In it, judgment was based on a subjective standard of *mens rea*, something that could result in the defendant appealing the judgment. In the next chapter I will examine whether use of the objective standard of *mens rea* could prevent such an appeal. The second case I present is that of *Regina v. Bernard*. This case was appealed to the Supreme Court of Canada on December 15, 1988. In this case the appeal was made based on an objective standard of *mens rea*. In the next chapter I will examine whether the subjective standard of *mens rea* could have prevented such an appeal.

#### 3.1 *Regina v. Dominic*

##### 3.1.1 Trial Facts

In *Regina v. Dominic*, Mr. Dominic was charged with “willfully and without lawful excuse killing a dog kept for a lawful purpose” on May 28, 2007 (*Regina v. Dominic*, 2009 BCPC 0145, para. 1). At trial, it was noted that this offence was outlined in the *Criminal Code of Canada* under s. 445(a) (now numbered s. 445(1)(a)). This sections states:

Every one who willfully and without lawful excuse (a) kills ... dogs ... that ... are kept for a lawful purpose is guilty of an offence punishable on summary conviction. [*Regina v. Dominic*, 2009 BCPC 0145, para. 3]

Section 429(1) of the *Criminal Code* states:

Every one who causes the occurrence of an event by doing an act ... knowing that the act ... will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, willfully to have caused the occurrence of the event. [R.S., 1985, c. C-46].

In essence, section 429(1) prevents Mr. Dominic's acquittal in the case that he lacked the intention to kill the dog, but was being reckless with regard to the risks of committing the prohibited act. The section allows the Crown to show that Mr. Dominic had the *mens rea* required to commit the crime simply by being reckless.

Justice T.S. Woods begins his judgment for this case by highlighting that the fact that Mr. Dominic killed the dog was not seriously in dispute (*Regina v. Dominic*, 2009 BCPC 0145, para. 4). The real dispute was whether Mr. Dominic could use his alcohol consumption that day to defend his actions and to deny his having any memory of committing the prohibited act (*Regina v. Dominic*, 2009 BCPC 0145, para. 4).

Furthermore, Mr. Dominic claimed that his alcohol consumption led to his inability to recall having any intention of killing the dog. The issues raised in this trial surrounded the "availability of intoxication as a defence" (*Regina v. Dominic*, 2009 BCPC 0145, para.

4). According to the definition of subjective *mens rea*, it is evident that the judge and the Crown in this case both use the subjective standard to interpret Mr. Dominic's *mens rea*. This is evident because Justice Woods allowed Mr. Dominic to use his intoxication in his defence.

The events on the day in question, according to Mr. Dominic, were as follows. He left his home for his foster brother's, Will Macnamara's, house at 4:30pm on the day of the killing (*Regina v. Dominic*, 2009 BCPC 0145, para. 23). There he encountered five other people, besides his foster brother, who were all drinking heavily (*Regina v. Dominic*, 2009 BCPC 0145, para. 23). The owner of the deceased dog, Ms. Pete, was one of the five people consuming alcohol that night. The alcohol available to Mr. Dominic included a dozen cans of beer and six, two-litre containers of Cooler containing 7% alcohol content (*Regina v. Dominic*, 2009 BCPC 0145, para. 23). First, Mr. Dominic had two beers and about four to six mugs of Cooler. He then stayed at Mr. Macnamara's house to sleep while his friends went in search of more alcohol. Mr. Dominic claimed to have drunk the alcohol in an hour or two (*Regina v. Dominic*, 2009 BCPC 0145, para. 24). He then slept until 9:00pm that night. After awaking, he realized he needed to hurry if he was going to return home by 10:00pm. At the time, Mr. Dominic had a court-imposed curfew from another incident (*Regina v. Dominic*, 2009 BCPC 0145, para. 25).

Mr. Dominic claimed in court that his recollection of events that followed the drinking session was "poor or altogether absent" (*Regina v. Dominic*, 2009 BCPC 0145, para. 27). All he claimed to remember was that he was on his way home, walking along Highway 16 on the outskirts of Smithers, when the police tried to pursue him. He remembered that he jumped into a bush to escape them and recalled nothing more except

that he woke up the next day, “naked and bleeding, in cells at the Smithers detachment of the RCMP” (*Regina v. Dominic*, 2009 BCPC 0145, para. 27). Some time between his walk along the Highway and his detainment, Mr. Dominic was found to have killed the dog he claims to have no recollection of killing. This gap in evidence is closed by witness testimony.

The Crown’s main witness, Mr. Crocker, lived in unit #1 of Mr. Macnamara’s fourplex. He was Ms. Pete’s neighbour. Ms. Pete lived in unit #2. The events Mr. Crocker presented in his testimony occurred when Mr. Dominic was in Mr. Macnamara’s fourplex and consuming alcohol. Mr. Crocker testified that Mr. Dominic stepped down hard on Ms. Pete’s small dog twice (*Regina v. Dominic*, 2009 BCPC 0145, para. 13). At the time, the dog was on the top step of a staircase leading to unit #2 in the fourplex where Mr. Dominic was said to have killed the dog. Mr. Crocker claimed that he witnessed Mr. Dominic pick up the small dog and throw it to the bottom of that staircase (*Regina v. Dominic*, 2009 BCPC 0145, para. 13). By then, the dog was bloodied. It died at the bottom of the stairs. Justice Woods noted that there was enough evidence to show that Mr. Dominic had fled the fourplex and passed in front of unit #2 after the dog was killed (*Regina v. Dominic*, 2009 BCPC 0145, para. 17). Mr. Dominic himself denied that he intended to kill the dog and used intoxication in his defence. He emphasized that he had no “recollection of being at unit #2” or encountering the small dog at all due to the amount of alcohol he consumed that night (*Regina v. Dominic*, 2009 BCPC 0145, para. 15). Although he denied having any memory of his encounter with the dog, Mr. Dominic admitted to being acquainted with Ms. Pete and to consuming alcohol with her on the day in question (*Regina v. Dominic*, 2009 BCPC 0145, para. 15).



In order to determine whether Mr. Dominic committed the crime, Justice Woods first examined whether he committed the *actus reus*. According to Justice Woods there was enough evidence to show someone did kill the dog (*Regina v. Dominic*, 2009 BCPC 0145, para. 10). All that was left was to show that Mr. Dominic was this person. Justice Woods examined the evidence Mr. Crocker provided along with Mr. Dominic's own admittance that he "could have been at the scene of the incident and that he could have subjected the dog to violent treatment" (*Regina v. Dominic*, 2009 BCPC 0145, para. 18). Justice Woods took both the evidence and the statement to imply that Mr. Dominic committed the crime (*Regina v. Dominic*, 2009 BCPC 0145, para. 18). Mr. Dominic was called to give evidence but was unable to do so (*Regina v. Dominic*, 2009 BCPC 0145, para. 19). Justice Woods concluded he was persuaded beyond a reasonable doubt that Mr. Dominic was at unit #2 of the fourplex in which Ms. Pete lived and that he killed her dog by "stomping forcefully on its body twice, and then picking it up and throwing it to the ground" (*Regina v. Dominic*, 2009 BCPC 0145, para. 20). However, all Justice Woods had shown at this point in the trial was that Mr. Dominic had committed the *actus reus* required to commit the prohibited act. I will focus the rest of my attention on how Justice Woods showed that Mr. Dominic also had the *mens rea* to commit the prohibited act.

Mr. Dominic and his attorney argued that the amount of alcohol Mr. Dominic consumed impaired his ability to function mentally "to a point where there [was] reasonable doubt that he possessed the necessary *mens rea*" to kill the dog (*Regina v. Dominic*, 2009 BCPC 0145, para. 23). However, Justice Woods questioned this argument. He claimed that since Mr. Dominic used his intoxication to defend his actions, it was important to understand the "quantity of alcohol that Mr. Dominic consumed, at

the rate at which he consumed it” (*Regina v. Dominic*, 2009 BCPC 0145, para. 22). As explained in the previous chapter, it takes ten drinks for a non-tolerant person to get from a sober state to a state of impaired judgment. Thus, the amount of alcohol Mr. Dominic consumed was considered to be indicative of his mental state that night. Also indicative of his mental state was the rate at which he consumed the alcohol. Consuming alcohol at a faster rate would have put Mr. Dominic in an intoxicated state earlier in the night. Thus, he would also have lost control of his judgment earlier in the night. A non-tolerant person metabolizes one alcoholic drink (one beer, one glass of wine, one ounce of liquor) per hour (Bloom, and Butler, 71). Hence, the rate at which one metabolizes alcohol is 15-20mg/100ml/per hour (Bloom, and Butler, 71). In other words, if Mr. Dominic was non-tolerant of alcohol, the six to eight drinks he consumed in an hour or two were not all metabolized and could have affected his mental functioning. At most, two of the eight drinks could have been metabolized unless he was somehow tolerant of the alcohol.

After rapid ingestion, however, the BAL peaks one-half to three hours later (Bloom, and Butler, 71). This means that a person consuming alcohol rapidly does not exhibit the affects of all the alcohol he consumes until one-half to three hours after he consumes it. In keeping with his own testimony, Mr. Dominic could have exhibited the affects of the alcohol he consumed any time from 6:00pm to after he awoke from his nap, if he were non-tolerant. This span of time takes into account the fact that he would not have finished all six to eight drinks before 6:00 (half-way through a possible two hour drinking session). Thus, he would have been fully affected from 5:30pm (roughly half an hour after he starts drinking). It also takes into account that he could have drunk most of the alcohol at the end of the two hours and, thus, felt its affects after he awoke from his

nap. In sum, the rate at which Mr. Dominic consumed the alcohol is indicative of the time at which he may have been in a state of severe intoxication.

The fact that Mr. Dominic was non-tolerant is not clear. He claimed that he had been trying to “curtail his drinking at this time in his life” and yet would drink on alternate weekends, drinking a case of beer in one night (*Regina v. Dominic*, 2009 BCPC 0145, para. 30). This fact alone implies that Mr. Dominic had been a heavy drinker, at the very least. Generally, a heavy drinker has a higher tolerance than a non-tolerant person. Mr. Dominic further testified that Coolers and liquor caused him temporary memory loss but beer did not affect him in this way (*Regina v. Dominic*, 2009 BCPC 0145, para. 30). Mr. Dominic then asserted that due to the effects of Coolers and liquor on his mental functioning, he had been avoiding drinking them until that night (*Regina v. Dominic*, 2009 BCPC 0145, para. 30). In effect, according to his own testimony, Mr. Dominic should have been more tolerant of alcohol than a non-tolerant person, but he could have been less tolerant of Coolers and liquor.

Justice Woods claimed that he was not given reason to believe that Mr. Dominic presented consistent evidence regarding the amount of time he spent drinking (*Regina v. Dominic*, 2009 BCPC 0145, para. 24). As a result, Justice Woods took this inconsistency in Mr. Dominic’s evidence to be indicative of his credibility (*Regina v. Dominic*, 2009 BCPC 0145, para. 31). Justice Woods thought that Mr. Dominic should have been able to remember the route he took to Highway 16 if he could remember, quite vividly, the events before and after his walk (*Regina v. Dominic*, 2009 BCPC 0145, para. 31). In addition, Justice Woods believed Mr. Dominic’s ability to remember his curfew time should have meant that he was also able to remember the route he took back (*Regina v.*

*Dominic*, 2009 BCPC 0145, para. 32). Most importantly for the case, Justice Woods pointed out that Mr. Dominic recalled the amount of time he waited before he left the fourplex but he claimed to have forgotten stopping at Ms. Pete's unit to kill the dog (*Regina v. Dominic*, 2009 BCPC 0145, para. 32). In sum, the inconsistency in Mr. Dominic's memory of that night led Justice Woods to believe that Mr. Dominic's testimony was not credible.

### 3.1.2 Decision on the Type of Offence

In making his judgment, Justice Woods had to decide whether the crime Mr. Dominic was charged with was a specific or general intent offence. Determining what type of offence Mr. Dominic should be charged with allowed Justice Woods to decide on a proper sentence. Furthermore, it allowed him to decide what standard to use when making his judgment. As described in the previous chapter, judges normally try to use the subjective approach to interpret the accused's *mens rea* if the accused is charged with a specific intent crime. Recall that the subjective approach gives the accused the chance to defend his actions by citing some sort of mental incapacity that makes it impossible to form the intentions required to commit the *actus reus*. An accused might lack the mental capacity to form the specific intent required to commit a specific intent offence. If he is also charged with such an offence, he should be given a chance to defend himself. As I have also described in the previous chapter, judges try to use the objective approach to interpret the accused's *mens rea* if the accused is charged with a general intent offence. Recall that the objective approach *does not* give the accused the chance to defend his

actions by citing any kind of mental incapacity to form the intentions required to commit the *actus reus*. Since committing a general intent offence does not require the accused to have formed any intentions, the objective approach is used. Assigning the right approach to the right type of offence thus is an important task. A poor decision can result in an unfair interpretation of the accused's *mens rea* and unfair treatment of the accused.

Justice Woods decided that Mr. Dominic committed a general intent offence due to the nature of his offence (*Regina v. Dominic*, 2009 BCPC 0145, para. 64). He claimed that the evidence showed Mr. Dominic “willfully caused the death of Ms. Pete’s dog” (*Regina v. Dominic*, 2009 BCPC 0145, para. 63). Justice Woods believed this to be true because the dog’s death followed from Mr. Dominic’s voluntary act of stepping forcefully on the dog and throwing it to the ground (*Regina v. Dominic*, 2009 BCPC 0145, para. 63). Though Mr. Dominic willfully killed the dog, this does not mean that he required a specific intent to commit this *actus reus*. Mr. Dominic may have willfully killed the dog because he chose to inflict harm on it, but without premeditation. In fact, Justice Woods cites a previous case to support his decision why killing the dog was a general intent offence. In *Regina v. H.S.*, the accused had consumed between fourteen and twenty-one beers over five and one-half hours (*Regina v. Dominic*, 2009 BCPC 0145, para. 64). The accused then also killed a dog. He was not found to have been in an extreme state of intoxication, although he had consumed a lot of alcohol. The judge in that case decided that both offences were of general intent and, thus, declared the intoxication defence to be useless (*Regina v. Dominic*, 2009 BCPC 0145, para. 64). Justice Woods considered this judgment for Mr. Dominic’s case. Deciding that Mr. Dominic’s alleged offence was one of general intent, Justice Woods dismissed his

intoxication defence. What is confusing in this case is that, Justice Woods did not actually use the objective approach to interpret Mr. Dominic's *mens rea*. Though he dismissed the intoxication defence at the end of the trial, Justice Woods allowed Mr. Dominic to use the intoxication defence throughout the trial. Justice Woods did not believe Mr. Dominic was in such an extreme state of intoxication that this would affect his mental functioning (*Regina v. Dominic*, 2009 BCPC 0145, para. 76). In the end, it was Mr. Dominic's ability to form intentions and his voluntary actions that led Justice Woods to convict him (*Regina v. Dominic*, 2009 BCPC 0145, para. 76).

### **3.1.3 Evidence of Subjective *Mens Rea* Used**

There is a good amount of evidence showing that Justice Woods' judgment was based on a subjective standard of *mens rea*. It is important to note that using the subjective approach to interpreting Mr. Dominic's *mens rea* could have saved him from conviction. For this to have occurred, he would have needed to show that he lacked the mental capacity to form the intention to kill the dog. Justice Woods evaluated Mr. Dominic's defence carefully. First, he examined the evidence to find some indication of Mr. Dominic's mental functioning. He did this to decide whether or not Mr. Dominic's intoxication defence was a truthful defence, whether he was so intoxicated that he lacked the ability to form intentions. On its own, the fact that Justice Woods tried to interpret Mr. Dominic's mental functioning in this way implies that he used the subjective approach to interpret his *mens rea*. The main reason Mr. Dominic was not acquitted was that he was unable to show that his intoxication affected his mental functioning. Hence,

one can conclude that Justice Woods allowed Mr. Dominic to try and use the intoxication defence, but he simply was not intoxicated enough for this type of defence to succeed. It was not the defence that Justice Woods questioned, rather the intoxication. Questioning the intoxication is more evidence that Justice Woods used the subjective approach.

When trying to interpret Mr. Dominic's *mens rea*, Justice Woods subjectively analyzed Mr. Dominic's drinking session. Justice Woods examined Mr. Dominic's own drinking experience on the night of the crime and judged that he could not have drunk as much Cooler as his testimony suggested (*Regina v. Dominic*, 2009 BCPC 0145, para. 40). Mr. Dominic testified that he had twice as much Cooler as the five others and that he had four to six mugs, leaving five or six mugs of Cooler in total for the others (*Regina v. Dominic*, 2009 BCPC 0145, para. 40). Justice Woods further examined Mr. Dominic's drinking experiences and declared him unlikely to have consumed so much Cooler based on his own claim that Coolers have a negative affect on him (*Regina v. Dominic*, 2009 BCPC 0145, para. 40). Thus, Justice Woods concluded that Mr. Dominic had exaggerated his alcohol consumption (*Regina v. Dominic*, 2009 BCPC 0145, para. 40). This exaggeration led Justice Woods to interpret Mr. Dominic's *mens rea* with caution. Justice Woods went on to conclude that Mr. Dominic must have drunk one drink every ten minutes to match the number of drinks he claimed to have drunk (*Regina v. Dominic*, 2009 BCPC 0145, para. 41). This finding made Justice Woods skeptical of Mr. Dominic's credibility because he did not believe it was possible to drink as fast and as much as Mr. Dominic claimed he did (*Regina v. Dominic*, 2009 BCPC 0145, para. 42). Furthermore, while Justice Woods acknowledged that Mr. Dominic may have been heavily intoxicated, he did not believe the alcohol "grossly impaired" him to the point of

being an automaton (*Regina v. Dominic*, 2009 BCPC 0145, para. 45). In the judge's words, "The overall picture of Mr. Dominic's functioning that was revealed in his evidence bespeaks presence of mind, planned and purposeful behaviour and a much greater command of his faculties overall than he admitted to having on the stand" (*Regina v. Dominic*, 2009 BCPC 0145, para. 45). Hence, the subjective examination of Mr. Dominic's drinking session led Justice Woods to believe that Mr. Dominic was not incapable of having the *mens rea* required to commit the killing.

#### **3.1.4 A Possible Appeal to the Decision**

Justice Woods' final judgment was as follows:

[76] In summary and conclusion, the evidence led at the trial of the charge that, on May 28, 2007, in Smithers, B.C., Mr. Dominic willfully and without lawful excuse killed a dog kept for a lawful purpose, has persuaded me beyond a reasonable doubt that:

- (a) Ms. Pete's dog was a dog "kept for a lawful purpose";
- (b) Mr. Dominic was the person who killed Ms. Pete's dog. He did so by stomping down hard on it, twice, with his right foot and then picking it up and throwing it to the ground;
- (c) Despite his having consumed a substantial amount of alcohol over a comparatively short period, Mr. Dominic was not in a state of extreme intoxication "akin to automatism" but, rather, was in a state of advanced



intoxication;

(d) In stomping down hard on Ms. Pete's dog twice, and then picking it up and throwing it to the ground, Mr. Dominic acted voluntarily. The *mens rea* element of the general intent s. 445(a) offence can in this case be inferred from the performance, by Mr. Dominic, of the acts of stomping hard on the dog twice and then picking it up and throwing it to the ground. In forming that inference I invoke the principle that a person intends the natural consequences of his or her voluntary acts; and

(e) Mr. Dominic's advanced, but not extreme, state of intoxication impaired his functioning but it did not deprive him of the ability to form the minimal intent required for conviction of the general intent offence under s. 445(a) with which he has been charged.

[77] Accordingly, I convict Mr. Dominic of willfully and without lawful excuse killing Ms. Pete's dog, contrary to s. 445(a) [as it then was] of the *Criminal Code* [*Regina v. Dominic*, 2009 BCPC 0145, para. 76-77].

Despite the conviction, it is likely that Mr. Dominic could have appealed Justice Woods' decision based on the fact that Justice Woods used the subjective approach to interpret his *mens rea*. Such an appeal would take issue mostly with point (e) in Justice Woods' decision above. Justice Woods had viewed Mr. Dominic subjectively, even though Mr. Dominic was not a person he knew subjectively. This is not the sole issue, however. To reach his judgment, Justice Woods had to imagine Mr. Dominic's mental capacity that night. Imagining what another person's mental capacity was at a certain

time is not an easy task; some may say it is impossible. Nevertheless, because Mr. Dominic consumed alcohol and because alcohol has been shown to alter one's mental functioning, Justice Woods was able to interpret Mr. Dominic's mental functioning to a certain degree. Justice Woods could have matched Mr. Dominic's alcohol consumption with a numerical BAL level. Thus, it seems that he could also accurately know Mr. Dominic's degree of intoxication that night. What we know for sure is that Mr. Dominic was somewhat tolerant of alcohol.

Let us now imagine a hypothetical situation. Recall from the previous chapter that if Mr. Dominic were psychologically tolerant but not pharmacologically tolerant, he would appear to be tolerant while being non-tolerant. In this hypothetical situation, Mr. Dominic's appearance could be deceiving, even for himself. While he would not tolerate alcohol, he might believe, and therefore present as evidence, that he does. Not having expert testimony on Mr. Dominic's true level of tolerance could disadvantage him, but finding such testimony is not always practical. It might not be worthwhile to have expert testimony on this matter when the case is for a lesser offence, such as killing a dog. Thus, in this case, Mr. Dominic would be at a disadvantage if his *mens rea* were interpreted subjectively.

Given the hypothetical situation outlined above, Justice Woods' judgments could face criticism. Mr. Dominic's memory lapses could be the result of his severe intoxication. To his five friends and to Justice Woods, Mr. Dominic might not have appeared severely intoxicated since he found his way to Highway 16 and knew he had to return home before his curfew. He might have believed he was tolerant enough to be capable of consuming one drink every ten minutes for two hours. Furthermore, his

awareness that Coolers and liquor have a negative affect on him would further support the fact that he is actually non-tolerant. In effect, should this hypothetical situation occur, Justice Woods' judgment that Mr. Dominic was not intoxicated to the point of automatism would be incorrect. His conclusion that Mr. Dominic had the ability to form the minimal intent required for conviction of the general intent offence under s. 445(a) could also be criticized.

Should this hypothetical situation actually occur, Justice Woods' use of a subjective standard of *mens rea* could be reason to appeal his judgment. In an attempt to understand Mr. Dominic's psyche subjectively, Justice Woods is forced to make assumptions about his intoxicated state. These assumptions include Mr. Dominic's ability to remember certain events and not others. Though these assumptions generally apply to most intoxicated individuals, they do not always apply to all intoxicated individuals. However, when trying to understand why an intoxicated person acts the way he does at a given time, one must make assumptions about how intoxicated he is. Using the subjective approach forces Justice Woods to make these assumptions because he is unable to make objective judgments about Mr. Dominic's mental functioning. He cannot claim, for instance, that as a reasonable man, Mr. Dominic should have known to avoid violent situations when he knew that he was drunk. Interestingly, Justice Woods decides, in the end, that Mr. Dominic's offence is of general intent. Had he known this at the beginning, he would not necessarily have allowed a subjective approach.

In the next chapter I will show that taking another approach to interpreting Mr. Dominic's *mens rea* would help prevent an appeal to Justice Woods' decision. I will also show that having a rule to choose the more beneficial approach for cases such as this

would allow judges to decide on the correct approach at the beginning of each case. Now, I will present a case that was appealed because it was not clear whether the intoxication defence should have been used. In this case, the objective approach is the questionable approach.

## **3.2 *Regina v. Bernard***

### **3.2.1 Trial Facts**

The case of *Regina v. Bernard* was appealed to the Supreme Court of Canada from the Court of Appeal for Ontario. The issue needing to be resolved was whether or not self-induced intoxication (voluntary intoxication) should be considered when interpreting one's *mens rea*. In the first trial for this case, Nelson Pierre Bernard was charged with sexual assault causing bodily harm (*Regina v. Bernard*, [1988] 2 S.C.R., per headnote). In 1988, the year of the Supreme Court appeal, sexual assault causing bodily harm was outlined as a crime in section 246.2(c) of the *Criminal Code*. In the first trial, the judge, Justice Vannini, and the jury found Mr. Bernard guilty. Mr. Bernard confessed to forcing the complainant to have intercourse with him but blamed his actions on his intoxication (*Regina v. Bernard*, [1988] 2 S.C.R., per headnote). An appeal was made and dismissed at the Ontario Court of Appeal.

In the Supreme Court appeal, the appellant's lawyer raised two issues:

- (i) whether sexual assault causing bodily harm contrary to s. 246.2(c) of the *Criminal Code*, R.S.C. 1970, c. C-34, is an offence of “specific” intent;
- (ii) whether drunkenness can ever be a “defence” to a charge of sexual assault causing bodily harm. [*Regina v. Bernard*, [1988] 2 S.C.R., per headnote]

In the first trial, the following facts were revealed. The complainant was an eighteen-year-old woman, a friend of Mr. Bernard's. At the time, Mr. Bernard was twenty-four years old. The night of the incident, Mr. Bernard went to a bar with some friends while the woman stayed in his apartment. Mr. Bernard separated from his friends, returned to his apartment and was alone with the woman (*Regina v. Bernard*, [1988] 2 S.C.R., para. 4). The woman testified that she “complied with the appellant's request to remain in the apartment” because she was not feeling well emotionally (*Regina v. Bernard*, [1988] 2 S.C.R., para. 5). It was the woman's first Christmas alone since her father had passed away. She was under the impression that Mr. Bernard, her father's good friend, was going to spend the night talking to her about her father (*Regina v. Bernard*, [1988] 2 S.C.R., para. 5). To this end, Mr. Bernard and the woman lay down on the couch to talk. The woman claimed in court that Mr. Bernard then forced her to engage in sexual intercourse with him (*Regina v. Bernard*, [1988] 2 S.C.R., para. 6). The woman also stated that she did not consent to this intercourse and that her lack of consent led Mr. Bernard to cause her physical harm (*Regina v. Bernard*, [1988] 2 S.C.R., para. 6). Evidence showed that Mr. Bernard had “punched the complainant twice with a closed fist” and then threatened to kill her (*Regina v. Bernard*, [1988] 2 S.C.R., para. 6).

Mr. Bernard and his Counsel admitted that intercourse had occurred (*Regina v. Bernard*, [1988] 2 S.C.R., para. 6).

The woman believed Mr. Bernard to have been intoxicated but able to walk, “to see everything, to talk clearly, and to put albums on the record player” (*Regina v. Bernard*, [1988] 2 S.C.R., para. 7). In other words, she believed he was not severely intoxicated. Another one of Mr. Bernard’s friends with whom he went to the bar testified that Mr. Bernard “became rowdy” but was still walking and talking as normal (*Regina v. Bernard*, [1988] 2 S.C.R., para. 7). When the police found Mr. Bernard, he was waking from a deep sleep and suffering from the effects of his alcohol consumption. Mr. Bernard told the police that his intoxicated state led him to attack the woman (*Regina v. Bernard*, [1988] 2 S.C.R., para. 8).

Mr. Bernard did not testify at his trial. Instead, he made statements to the police that were used against him in court. He stated that he forced the girl to have sexual intercourse with him and that he did not know why he had acted in this way (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9). He believed his intoxication brought about his actions (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9).

Usually, the Crown must show beyond a reasonable doubt that the accused had the *mens rea* required to commit a prohibited act. Hence, the jury must also believe beyond a reasonable doubt that Mr. Bernard had the required *mens rea*. Nevertheless, Justice Vannini did not tell the jury about the *mens rea* requirement (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9). He only told the jury that the issue was whether the Crown had shown beyond a reasonable doubt that the woman did not consent to the intercourse because of the assault and the threats (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9). The

jury was only aware of one thing regarding Mr. Bernard's intoxication defence. They were told that there was no evidence of intoxication except that Mr. Bernard himself claimed to have been "all drunk up" (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9). They were also told that even if Mr. Bernard was intoxicated, his intoxication was no defence to the type of charge against him (*Regina v. Bernard*, [1988] 2 S.C.R., para. 9). Mr. Bernard was then convicted of the charge against him, sexual assault causing bodily harm, and sentenced to four years imprisonment (*Regina v. Bernard*, [1988] 2 S.C.R., para. 10). After the conviction, the question that led to the Supreme Court appeal was about the type of offence committed. Was sexual assault causing bodily harm a general or specific intent offence? Recall that an intoxication defence might be dismissed if the offence is of general intent.

### **3.2.2 Decision on the Type of Offence**

In the Supreme Court appeal, the issue of whether the offence of sexual assault causing bodily harm should be considered a specific intent crime was considered. Referring to precedent, he claimed that the Supreme Court held in *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, that "indecent assault ... was an offence of general intent" (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). He also noted that in this case, such an assault was judged according to an objective standard of *mens rea* (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). Chief Justice Dickson also noted that the Supreme Court dealt with sexual assault in *Regina v. Chase*, [1987] 2 S.C.R. 293 (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). In this case, it was determined that sexual assault is "assault committed

in circumstances of a sexual nature, such that the sexual integrity of the victim is violated” (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). It was also determined that the intent behind such an offence is an indication of whether the assault is sexual (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). For instance, if Mr. Bernard only intends to assault the woman and accidentally comes in contact with her sexually, he might not have committed sexual assault as defined. The intent of the accused must be “sexual gratification” for the assault to be considered sexual in nature (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). In *Regina v. Chase*, it was said that this view of sexual assault implies that the offence is of general intent (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). The court believed that sexual gratification had many various motivating factors (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). Thus, the Crown should not have had to prove a specific intent behind the sexual assault. The intent would have been difficult to outline and to understand. Notice that the reason to consider sexual assault a general intent offence was not because the actor lacked any intent to commit the crime. It was solely because it was difficult to describe the intent in question.

Nevertheless, in *Regina v. Bernard*, Mr. Bernard committed more than sexual assault. He also caused bodily harm. Chief Justice Dickson found that the definition of bodily harm was outlined (at the time of the crime) in section 245.1(2) of the *Criminal Code* (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). This section read as follows:

245.1 (2) For the purposes of this section and sections 245.3 and 246.2, “bodily harm” means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than merely transient or trifling in



nature.

This definition of bodily harm states that the injury inflicted on the victim has to be *more than merely transient or trifling in nature*. This definition implies that when one causes a significant amount of bodily harm, one generally will have had the intention to do so. A person is less likely to inflict such a great degree of harm if he does not intend to hurt anyone. If a person greatly harms someone without intending to do so it is generally because he lacks the mental control to stop himself on because of recklessness. Thus, when someone inflicts great harm on another, his actions are generally rooted in criminal intentions. For this reason and from the definition of bodily harm, Chief Justice Dickson deduced that the mental element behind committing this sexual assault is “only the intention to commit assault” (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66). This finding indicates that sexual assault was to be classified as a general intent offence, since the accused would not have a specific intent to commit sexual assault. The only intention would be for assault, simpliciter. Hence, Chief Justice Dickson concluded that the Crown only needed to show that the assault was sexual in nature and that there was bodily harm. Once this was shown, it would be evident that there was some kind of intention behind the action (*Regina v. Bernard*, [1988] 2 S.C.R., para. 66).

Since sexual assault was classified as a general intent offence, the intoxication defence was not allowed. In particular, Chief Justice Dickson believed that if an accused were ever allowed an intoxication defence, he would take advantage of it. Chief Justice Dickson believed that such an individual would consume more alcohol in order to have a better defence against his conviction (*Regina v. Bernard*, [1988] 2 S.C.R., para. 68). The

accused's desperate attempt to be permitted an intoxication defence would undermine the fact that the offence he committed was rooted in intentions. The case would then mostly focus on his intoxication defence.

### 3.2.3 Evidence of Objective *Mens Rea* Used

The Supreme Court appeal was made, in part, because Justice Vannini used the objective approach to interpret Mr. Bernard's *mens rea* in the original trial. The original trial was appealed because it was unclear whether sexual assault was an offence of general or specific intent. The original verdict was that Mr. Bernard committed a general intent offence. For this reason, his *mens rea* should have been interpreted objectively. Nevertheless, Chief Justice Dickson gave his own account in the Supreme Court appeal. He claimed that the fundamental nature of the *mens rea* requirement was to recognize that an accused who causes harm does so with a "blameworthy state of mind" (*Regina v. Bernard*, [1988] 2 S.C.R., para. 16). However, he did believe that intoxication affects a person's mental state, including one's perception of how one acts and one's understanding of the consequences of one's actions (*Regina v. Bernard*, [1988] 2 S.C.R., para. 16). Thus, Chief Justice Dickson believed that because intoxication affects one's mental state, the accused's intoxication at the time he committed the prohibited act should be considered. However, this should only be taken into account when the judge and jury are determining whether the Crown has proved the accused's *mens rea* beyond a reasonable doubt (*Regina v. Bernard*, [1988] 2 S.C.R., para. 16). This is because the Crown may successfully show that the accused had the *mens rea* required to commit the prohibited act, but the fact that he was intoxicated could

encourage the judge or jury to assign him a lesser punishment. Note that Chief Justice Dickson's view was not that an accused should be allowed to use the intoxication defence during his trial. If this were the case, the Crown would not need to show that he had the *mens rea* required to commit the prohibited act because he would not have had a *mens rea*. Chief Justice Dickson's view was that once the Crown had proved that the accused had the required *mens rea* to commit the prohibited act, his intoxication defence would not affect his incrimination.

In essence, Chief Justice Dickson's view was that allowing an accused to use an intoxication defence suggests that he can avoid a harsh conviction even if he is liable for his prohibited actions (*Regina v. Bernard*, [1988] 2 S.C.R., para. 17). It is this view in conjunction with the view that intoxication should only be considered after the Crown has shown the existence of the requisite *mens rea* that leads me to believe Chief Justice Dickson also uses the objective approach. Nevertheless, the Supreme Court was divided on this case. Chief Justice Dickson wanted to allow the appeal. He wanted a new trial ordered because Justice Vannini had misinformed the jury in the original case (*Regina v. Bernard*, [1988] 2 S.C.R., para. 56-57). Other judges, such as Justice McIntyre, believed the appeal should be dismissed because "the common law rules on the defence of drunkenness ... have a rationality which not only accords with criminal law theory, but has also served society well" (*Regina v. Bernard*, [1988] 2 S.C.R., para. 65). For current purposes, we need to recall that the appeal's goal was to resolve whether sexual assault could be classified as a specific intent offence. Should sexual assault have been considered a specific intent offence, Chief Justice Dickson might have had reason to take the subjective approach. Nevertheless, Chief Justice Dickson decided that the objective

approach to interpreting Mr. Bernard's *mens rea* was the best approach for the case. Since Chief Justice Dickson did not believe that an accused should be given the chance to use his intoxication to defend his actions, he did not take the subjective approach in this case. Although Chief Justice Dickson was rightly concerned about taking advantage of the intoxication defence, I believe that not allowing it could lead to further appeals (if not in this case, then in others). In the next section I will show that better forms of appeal can be made to the case of *Regina v. Bernard* because of Justice Vannini's decision to use the objective approach to interpret Mr. Bernard's *mens rea*.

#### **3.2.4 A Possible Appeal to the Original Case**

Despite that fact that there has been a great amount of controversy surrounding *Regina v. Bernard*, there is one kind of appeal that could succeed. Justice Vannini used the objective approach to interpret Mr. Bernard's *mens rea* and in doing so, he relied on what was then called the *Leary* rule. Though I will give a more detailed discussion of the *Leary* rule in the next chapter, I mention it here for the purpose of this case. The *Leary* rule was introduced in *Regina v. Leary* (*Regina v. Leary*, (1977), 33 C.C.C. (2d) 473 (S.C.C.)). Allan H.P. Leary was said to have "forced [a girl] at knife point to submit to coition and other acts of sexual humiliation" while intoxicated (*Leary v. The Queen*, [1978] 1 S.C.R. 29). This was the first case in Canada in which specific intent offences were distinguished from general intent offences. In this case "it was determined that becoming intoxicated could supply the *mens rea* for general intent offences" and this became known as the *Leary* rule (Roach, 222). In other words, if an accused had committed a

general intent offence while intoxicated, judges could have convicted him based on his intention to become intoxicated, as opposed to his intention to actually commit the prohibited act. Indeed, the accused would be held responsible for becoming intoxicated even if he had not committed the prohibited act. The *Leary* rule was mostly applied when objective standards were applied. Only the objective standard allowed judges to ignore the defence of intoxication and, hence, allowed them to consider intoxication a blameworthy state of mind.

The appeals made in response to Mr. Bernard's conviction were also aimed at overruling the *Leary* rule. Using the rule in combination with using the objective approach to interpret Mr. Bernard's *mens rea* was found to have violated his *Charter* rights. Chief Justice Dickson held that "legislation which imposes the sanction of imprisonment without proof of a blameworthy state of mind violates the guarantee of fundamental justice contained in s. 7 of the *Charter*" (*R. v. Bernard*, [1988] 2 S.C.R. para 31). He believed that the *Leary* rule succeeded in deterring those who voluntarily intoxicate themselves from committing crimes because it did not allow them a defence (*Regina v. Bernard*, [1988] 2 S.C.R., para. 42). However, he also believed that the rule did not deter those who were involuntarily intoxicated and who committed crimes solely because they were intoxicated (*Regina v. Bernard*, [1988] 2 S.C.R., para. 42). Chief Justice Dickson claimed that this latter notion violated fundamental principles of justice and convicted those who should not be held criminally liable (*Regina v. Bernard*, [1988] 2 S.C.R., para. 42). In finding the *Leary* rule to be unfavourable to the accused, he opted to overrule it (*Regina v. Bernard*, [1988] 2 S.C.R., para. 55). Nevertheless, he faced opposition.

Given that there was controversy surrounding the Supreme Court appeal of *Regina v. Bernard*, there could be one way to have a successful appeal. Recall that Mr. Bernard was charged with committing sexual assault causing bodily harm. He committed the act while intoxicated. To his friends and to the woman, he did not appear intoxicated. In fact, Justice McIntyre's dissent cited the fact the Mr. Bernard was not intoxicated to the point of automatism (*Regina v. Bernard*, [1988] 2 S.C.R., para. 59). Justice McIntyre was given reason to believe that Mr. Bernard was not severely intoxicated that night because witness testimony revealed that he did not appear to be. Now consider the following hypothetical situation. Say that Mr. Bernard was psychologically tolerant. In this situation, the witness testimony would not be good evidence of his degree of intoxication. Furthermore, he might have been severely intoxicated and in a state of automatism without knowing it himself. In this case, using the objective approach to interpret his *mens rea* would not allow judges such as Justice Vannini and Chief Justice Dickson to consider Mr. Bernard's psychological tolerance of alcohol. The subjective approach would have allowed them to decide, based on his condition that night, whether Mr. Bernard could have the *mens rea* required to commit sexual assault. Instead, the judges had to focus either on using the *Leary* rule or on comparing Mr. Bernard to the reasonable man. Under neither of these conditions would Mr. Bernard's psychological tolerance of alcohol be considered, thus further violating his *Charter* rights. I believe that if Mr. Bernard were shown to be psychologically tolerant of alcohol, Justice McIntyre would have less reason to dissent from Chief Justice Dickson's decisions. In addition, the case could be appealed successfully because Justice Vannini did not decide to interpret Mr. Bernard's *mens rea* using an approach that would best reveal his actual mental state.

In the next chapter, I will show that another approach to interpreting Mr. Bernard's *mens rea* would help prevent a successful appeal to Justice Vannini's decision. I will also show that despite the controversy that arises over technical details in a case, using the best approach to interpret the accused's *mens rea* would reduce the reasons to appeal the case. I will argue that using the best approach would better prevent controversial questions from altering the focus of the case.

## 4 A SUBJUNCTIVE STANDARD OF *MENS REA* AND THE THREE-STEP RULE

In this chapter, I present and support a three-step rule that helps decide between using a subjective or objective standard for determining *mens rea*. The three-step rule is only intended for use in cases where the accused might use the intoxication defence. I begin by arguing that one can best interpret an accused's *mens rea* only if one uses a standard that least violates the accused's rights. I examine the *Leary* rule in more detail and show that it fails because it assigns objective standards to general intent offences even though the accused's rights may have been violated. I give reasons to adopt the three-step rule and show that it selects that standard for determining *mens rea* that least violates the accused's rights, given the type of offence with which he is charged. In doing so, I introduce a new standard of *mens rea* namely, the *subjunctive* standard. I complete this chapter by showing the three-step rule's applicability to cases such as *Regina v. Dominic* and *Regina v. Bernard*. I show that the three-step rule reduces the likelihood of possible appeals in these types of cases.

### 4.1 Reasons for Adopting a Rule of Best Fit

Recall that in the second chapter, I presented a need for a rule of best fit. The need exists because there is uncertainty about which standard of *mens rea* best interprets the accused's *mens rea*, given the offence he is charged with. As mentioned in the second chapter, the fear that the objective approach would collapse into the subjective approach,



or vice versa, prevents courts from using a rule of best fit. Thus, a rule that selects between different degrees of subjectivity or objectivity may lead to controversial judgments. Such a rule, for instance, could assign the use of a low degree of subjective *mens rea* for cases in which the accused uses an intoxication defence. The reasoning might be that using a lower degree of subjectivity when applying subjective standards of *mens rea* eliminates the judge's need to make subjective assumptions about the accused's intoxicated psyche. This rule might eliminate controversial judgments because it prevents the judge from making false assumptions about the accused. However, the rule might also collapse the subjective standard of *mens rea* into an objective one. Hence, a rule of best fit must avoid changing the definition and function of both the subjective and the objective standards of *mens rea*. Most importantly, the rule must not change these definitions so to force-fit at least one of the two standards of *mens rea* into a criminal case. Even if such a rule existed, there would still be controversy over which standard best interprets the accused's *mens rea*, given the offence with which he is charged. Judgments could still be appealed, as we saw in *Regina v. Bernard*, because the accused believed that the judge used the wrong standard of *mens rea* for the offence in question. Thus, I propose that the rule of best fit must assign the use of a standard of *mens rea* that best fits with the offence in question. What determines which standard has the best fit is its consistency with the accused's rights. This means that the particular standard, applied to the particular offence, cannot lead to judgments that violate the accused's rights.

As seen in the previous chapter, when a case involves an intoxication defence, the judgment has sometimes been appealed because the accused believes his rights have been violated. Whether it is because of the *Leary* rule (as in *Regina v. Bernard*) or because of

an assumption about the nature of intoxication (as in the hypothetical appeal resulting from the decisions made in *Regina v. Dominic*), the accused's rights are vulnerable to how judges understand intoxication. In the former case, the use of the *Leary* rule violates the accused's rights because the rule implies that intoxication alone supplies the *mens rea* for general intent offences (I will explain this in more detail in the next section). In the latter hypothetical case, the accused's rights are also violated. Intoxication affects different people differently. Currently, there is no practical, scientific way to reveal the inner state of mind of a person who is intoxicated. Thus, there is no scientific way to reveal whether a person is pharmacologically or psychologically tolerant of alcohol. For this reason, the accused should be given the chance to use the intoxication defence. Otherwise, he would feel that his rights have been violated. Though Mr. Dominic was given this chance, the judge decided to disregard his defence.

Understanding intoxication is a challenging task for judges and juries alike. It would therefore benefit the court if there were some way to eliminate the need to fully understand an accused's degree of intoxication. In doing so, we must take care not to violate the accused's rights. We must not simply eliminate the judge's chance to view the accused subjectively. Thus, we must approach the problem with several factors in mind. Consider this example. An accused is charged with a specific intent offence. If the accused had the specific intention to commit a prohibited act, his intoxicated state would be at issue. In such a case, using the subjective standard to interpret his *mens rea* would be the fairest standard to use. The accused would have the chance to show that he was unable to form the intentions required to commit the act. This example shows that it is possible to be fair to the accused's rights and yet avoid understanding the exact degree of

intoxication. This example also demonstrates that one way to avoid understanding the exact degree of intoxication is to use a standard of *mens rea* that is the most fair to the accused's rights, given the type of offence he is charged with. Hence, a rule of best fit should, without violating the accused's rights, eliminate the need to make judgments about the exact degree of intoxication.

Another reason to adopt a rule of best fit would be always to classify the offence type before interpreting the accused's *mens rea*. As we saw in *Regina v. Dominic*, Justice Woods made this classification at the end of his decision-making process. He allowed Mr. Dominic to use the intoxication defence throughout the trial even though he later found that the offence he committed was of general intent. Justice Woods' finding that killing a dog was a general intent offence could have meant that Mr. Dominic should not have used the intoxication defence. As a result, the court would not have had to make assumptions about Mr. Dominic's intoxicated state when he tried to interpret his defence. As mentioned above, using a standard of *mens rea* that does not fit the offence type can result in the violation of an accused's rights. Thus, it is important that a judge classify the offence type before deciding which standard of *mens rea* to use. A rule of best fit would require that this classification occur first.

Another reason to adopt a rule of best fit would be to prevent shifting the focus of the trial away from the facts. Some trials include debates over controversial questions. Some of these questions concern which standard of *mens rea* best suits the case. If there is a good rule in place, there should not be many controversial questions regarding the fitness of one standard over another. As we saw in the Supreme Court appeal of *Regina v. Bernard*, Chief Justice Dickson disagreed with Justice McIntyre over whether the *Leary*

rule should be overruled and whether the intoxication defence should be considered. In effect, the controversy rose because it was unclear whether sexual assault causing bodily harm was of specific or general intent and whether the *Leary* rule properly assigned the use of objective standards. Such controversial questions have the potential to shift the focus of the trial away from the facts. They engage judges in debates over tangential conceptual questions. Though this kind of debate is necessary for the decision-making process, it would be best to try and settle debates over which standard of *mens rea* would best suit each case in a more mechanical, uncontroversial way. Recall that the issue to be resolved in the Supreme Court appeal of *Regina v. Bernard* was

- (i) whether sexual assault causing bodily harm contrary to s. 246.2(c) of the *Criminal Code*, R.S.C. 1970, c. C-34, is an offence of “specific” intent;
- (ii) whether drunkenness can ever be a “defence” to a charge of sexual assault causing bodily harm. [*Regina v. Bernard*, [1988] 2 S.C.R.]

The focus of this trial should have been on the nature of offences such as sexual assault causing bodily harm and on the intention required to commit such offences. The focus should also have been on whether the intoxication defence should be considered in defence to such offences. Consequentially, the *Leary* rule would have been at issue. Nevertheless, the focus was shifted. There was a lot of debate over the possible dangers of allowing an intoxication defence despite the offence type. There was also a great deal of debate over whether the distinction between specific and general intent offences was artificial and based on legal fiction (*Regina v. Bernard*, [1988] 2 S.C.R., para. 62). In

fact, the majority of dissents focused on both these debates. If the focus of the dissents had been on the issues of the appeal, it is more likely that the judges could have resolved them. Thus, a rule of best fit is needed to prevent the focus of the trial shifting away from resolving the main issues in question. Such a rule would clearly outline which standard of *mens rea* should be used with each offence type and hence, eliminate controversy over relating issues.

#### **4.1.1 The *Leary* Rule and its Inevitable Failure**

The *Leary* rule had the form of a rule of best fit. However, this rule is no longer accepted because it failed to tell judges which standard of *mens rea* least violates the accused's rights. Since the creation of the *Charter*, the *Leary* rule has been found to violate the accused's rights and has thus been overruled. In this section I will explain the *Leary* rule and examine its failure. I will argue that its failure can be attributed to the fact that it assigned objective standards to general intent offences even though the accused's rights may have been violated. It is important to note that at the time the *Leary* rule was created, the *Charter* had not been created. Hence, it was not believed that the *Leary* rule violated and of the accused's rights. I believe that the *Leary* rule was unable to withstand the creation of the *Charter* because it did not include a condition that would allow judges to use a subjective standard. I believe that without a condition requiring judges to use a standard that least violates the accused's rights, the *Leary* rule and other rules of best fit inevitably fail.

In the trial notes for *Regina v. Bernard*, it was stated that the *Leary* rule “impose[d] a form of absolute liability on intoxicated offenders” (*Regina v. Bernard*, [1988] 2 S.C.R.). In *Regina v. Leary*, Allan Henry Patrick Leary was convicted of rape before Meredith J (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 31). It was said that Mr. Leary had forced the complainant, at knifepoint, to engage in sexual acts against her consent (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 31). He had committed this act while in a severely intoxicated state. Mr. Leary appealed Justice Meredith’s decision in 1978. He took issue with the decision because he believed that “the learned trial judge erred in law in directing the jury that drunkenness was not a defence to a charge of rape” (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 31). The issue to be resolved in the Supreme Court appeal was whether drunkenness could be a defence to the general intent offence of rape (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 32).

In his dissent, Chief Justice Dickson claimed that even if Mr. Leary lacked the ability to understand the consequences of his actions, evidence of his intoxication is irrelevant to interpreting his *mens rea* (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 35). Chief Justice Dickson noted that this claim was only true because rape was considered to be a general intent offence and such an offence type did not allow an intoxication defence (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 36). He later stated that when an accused defends his actions by claiming that he lacked the mental functioning to form intentions, his defence is not drunkenness (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 43). In this case, the accused’s defence is his inability to commit voluntary actions, something that comes as a result of drinking excessively (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 43). Described in this way, the intoxication defence was more detrimental to Mr. Leary’s

fate than it was helpful. Chief Justice Dickson believed the question was no longer whether Mr. Leary was severely intoxicated but whether his action was voluntary (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 43).

To discover whether Mr. Leary's actions were voluntary, Chief Justice Dickson first highlighted that the offence of rape required volition. He claimed that "cases where a man will have had intercourse without intending to do so must be rare" (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 44). He also claimed that it is even more rare that an accused would mistakenly believe, while severely intoxicated, that the woman gave him her consent (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 44). Most importantly, Chief Justice Dickson emphasized that when rape is committed, the committer intends to have intercourse and knows that the woman will not usually consent (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 44). He granted that though Mr. Leary may have lacked control, he had the intention to commit rape (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 44). Chief Justice Dickson warned that if an intoxication defence were allowed to show a lack of intent, it might "assist in exculpating [the] accused if he got drunk in order to get courage to commit the crime" (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 44).

In addition to Chief Justice Dickson's dissent, Justice Pigeon delivered the judgment for the Supreme Court appeal. She cited precedence and highlighted that in *Regina v. Boucher*, the Supreme Court held that an accused cannot claim that he was too intoxicated to know that the complainant did not consent to rape (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 56). Justice Pigeon agreed with the Supreme Court's previous decision that rape is a crime "involving only a general intention [...]" and is therefore a crime in which the defence of drunkenness can have no application" (*Leary v. The*

*Queen*, [1978] 1 S.C.R. 29, pg. 57). She supported this decision by indicating that rape cannot be a specific intent offence. To commit rape, the accused does not require an intent that goes beyond the act (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 58). The accused's intention is merely to engage in sexual intercourse with someone who does not consent to it. This intention is the same as the act itself. Thus, Justice Pigeon believed that rape is not a specific intent offence (*Leary v. The Queen*, [1978] 1 S.C.R. 29, pg. 58). Note that when Chief Justice Dickson and Justice Pigeon decided that the intoxication defence did not apply to a general intent offence such as rape, they used an objective standard of *mens rea*. The use of an objective standard of *mens rea* in *Leary v. The Queen* enabled judges to use this standard in most cases that dealt with general intent offences. The objective standard used in the *Leary* case made it easier for judges to believe that one who commits a general intent offence did not need to be viewed subjectively. The objectivity of the law and the comparison to the reasonable man would apply to an accused who was severely intoxicated when he committed a prohibited act. In fact, what came to be known as the *Leary* rule stated that "becoming intoxicated could supply the *mens rea* for general intent offences" (Roach, 222).

In *Regina v. Bernard*, Chief Justice Dickson chose to overrule the *Leary* rule. He claimed that the *Leary* rule infringed on the *Charter* right outlined in s. 11(d), namely that an accused is to be presumed innocent until proven guilty (*Regina v. Bernard*, [1988] 2 S.C.R., para. 37). The reason was because, after *Leary*, the accused's guilty intent was "presumed upon proof of intoxication" (*Regina v. Bernard*, [1988] 2 S.C.R., para. 38). Proof of the accused's intoxication, however, was not proof that the accused committed the prohibited act. Hence, the accused would have been said to have the *mens rea*



required to commit the prohibited act when he may have at best been blamed for becoming intoxicated. This presumption of *mens rea* only occurred when the offence was of general intent (*Regina v. Bernard*, [1988] 2 S.C.R., para. 38). In summary, Chief Justice Dickson claimed that the *Leary* rule finds the accused blameworthy because he deliberately became intoxicated, and it punishes him based on consequences of his actions that may have been unintended (*Regina v. Bernard*, [1988] 2 S.C.R., para. 42). Rules such as the *Leary* rule have been adopted so as to deter people from engaging in activities with foreseen consequences. Nevertheless, Chief Justice Dickson saw no evidence that the *Leary* rule deterred people from committing prohibited acts that they did not intend (*Regina v. Bernard*, [1988] 2 S.C.R., para. 42). For instance, it would not prevent a person who is involuntarily drugged from committing a prohibited act.

Chief Justice Dickson also believed that the *Leary* rule had failed despite the *Charter*. He states that the *Leary* rule “undermines the clarity and certainty of the law” because it complicates the jury’s task to determine whether the accused truly lacked the ability to form intentions (*Regina v. Bernard*, [1988] 2 S.C.R. para. 37). Instead, it focuses the jury’s attention on the accused’s intoxication rather than on his *mens rea*. Taking attention away from the accused’s *mens rea* also prevents judges and juries from properly interpreting it. It might be the case that taking a subjective approach to interpreting the accused’s *mens rea* would not violate his rights. Using the *Leary* rule, judges and juries would not be able to consider such a possibility.

Recall the case of *Regina v. Bernard*. In the original trial, Justice Vannini used the *Leary* rule to determine which standard should be used to interpret Mr. Bernard’s *mens rea*. Since the *Leary* rule was in place, Vannini J. decided to use an objective standard of

*mens rea*. At the time, using a subjective standard would have countered precedence. In order for Justice Vannini to use a subjective standard, he would have needed a strong argument as to why the *Leary* rule should have been overruled. Though overruling the rule later became one of the issues at the Supreme Court appeal, Justice Vannini's use of the *Leary* rule was not necessarily misplaced at the time. Nevertheless, consider how the original trial of *Regina v. Bernard* might have ended if the *Leary* rule had been created with a condition. Recall that the *Leary* rule stated that "becoming intoxicated could supply the *mens rea* for general intent offences" (Roach, 222). Instead, imagine that this rule had stated that "becoming intoxicated could supply the *mens rea* for general intent offences unless the accused's intoxication is either caused involuntarily or is so severe that it cannot allow the formation of criminal intentions". Call this the *Leary 2* rule. The statement in the original *Leary* rule implies that an objective standard of *mens rea* should be used in cases where a general intent offence is committed. This is because only an objective standard would allow judges and jurors to consider the act of becoming intoxicated to be culpable in itself. The *Leary 2* rule, however, does not imply that an objective standard should be used in cases where a general intent offence is committed. This rule would imply that an objective standard should be used unless the accused has no control over becoming intoxicated or over forming criminal intentions. Since objective standards would not be used in these latter cases, the *Leary 2* rule would imply that subjective standards should be used.

If the *Leary 2* rule had been in place, it would have had a better chance of withstanding the test of the *Charter*. The *Leary 2* rule does not presume the accused's guilty intent merely because he becomes intoxicated. Thus, it does not infringe the

accused's *Charter* right. Instead, the *Leary 2* rule only presumes the accused's guilty intent when he is voluntarily intoxicated and when his intoxication is not severe enough to prevent the formation of criminal intentions. In other words, the *Leary 2* rule only presumes the accused's guilty intent when his guilty intent is evident. If Justice Vannini used the *Leary 2* rule in *Regina v. Bernard*, Mr. Bernard would not have had an easy opportunity to appeal his judgment. Recall that the appeal was made to determine whether sexual assault causing bodily harm could be considered a specific intent offence and whether the intoxication defence was allowed for this type of offence. First, the *Leary 2* rule would not have presumed that Mr. Bernard had the *mens rea* required to commit sexual assault causing bodily harm. This would have had to be proven beyond a reasonable doubt. Second, the *Leary 2* rule would not have allowed Justice Vannini's to use a subjective standard of *mens rea* because Mr. Bernard was severely intoxicated. Hence, Mr. Bernard would have been allowed to use an intoxication defence and thus, he would have had less reason to appeal Justice Vannini's judgment.

I must clarify that I am not arguing for a modification to the *Leary* rule. I am hoping to show that a rule of best fit can withstand the creation of new rights if it includes some sort of condition that preserves such rights. Without such a condition, I believe that any rule of best fit would fail over time. Since scientists are still researching the nature of intoxication, there inevitably be a time when certain aspects of the objective or subjective standards will be believed to violate the accused's rights. In order to prevent the failure of a rule of best fit, the rule must at least include a condition that preserves the accused's rights.

## 4.2 Reasons for Adopting the Three-Step Rule

Even though Chief Justice Dickson sought to overrule the *Leary* rule in *Regina v. Bernard*, judges have yet to suggest a rule that would allow them to determine which standard of *mens rea* should be used. Until now, I have given reasons to adopt a rule of best fit that prevents judges from using standards of *mens rea* that have the potential to violate the accused's rights. I also have suggested what that rule should include so that it reduces the likelihood of appeal prevents. In this section, I give three reasons for adopting a specific rule of best fit that, like the *Leary* rule, stems from precedence but that, unlike the *Leary* rule, helps judges and jurors use the standard of *mens rea* that least violates the accused's rights. I have presented most of these reasons in this or the previous chapter. I bring them together here. I argue that all the reasons for adopting this specific rule of best fit can be found in previous court cases and have thus been learned from precedence. I call this rule the three-step rule of best fit. I will present this rule in the next section.

The first reason to adopt the three-step rule can be found in cases where a subjective standard of *mens rea* has the potential to violate the accused's rights. Using the subjective approach to interpret the accused's *mens rea* sometimes forces judges to conjecture about the accused's mental capacity. As we have seen, this method can be risky since it has the potential to introduce criteria that are too subjective to ensure sound judgments. Furthermore, when the offence was of general intent, the use of a subjective standard of *mens rea* forced the judge to allow use of the intoxication defence. In this case, the intoxication defence was neither relevant nor beneficial to the accused. It merely led the judge to dwell on subjective details about the accused that were not well

established. We saw in the previous chapter that the judgment made in *Regina v. Dominic* could have been appealed. Recall that in *Regina v. Dominic*, Justice Woods made certain assumptions about Mr. Dominic's intoxicated state based on his ability to remember certain events and not others. These assumptions, though applicable to some intoxicated individuals, may not be applicable to all. Had Mr. Dominic been psychologically tolerant of alcohol, Justice Woods' assumptions about Mr. Dominic's psyche might have led to his undeserved conviction. Thus, we need a rule of best fit that does not blindly assign the use of subjective standards to any kind of offence. It should especially avoid assigning the use of subjective standards to general intent offences. What is evident is that if the accused has committed a specific intent offence while in a severely intoxicated state, judges have generally agreed to take the subjective approach (even Justice Woods decided on this approach after finding that the offence was of general intent). A truly intoxicated individual does not have the mental capacity to form a specific intent to commit a crime. Thus, he should not be convicted of it. The three-step rule, as I will show, does not blindly assign the use of a subjective standard of *mens rea* to any offence. In particular, it does not assign the use of a subjective standard of *mens rea* to general intent offences. Since the use of a subjective standard of *mens rea* has not yet failed for specific intent offences, precedence shows no reason not to allow this use.

The second reason to adopt the three-step rule can be found in cases where an objective standard of *mens rea* has the potential to violate the accused's rights. Using an objective standard of *mens rea*, in the case of general intent offences, has the potential to violate the accused's *Charter* rights. We saw in the previous chapter that the judgment made in *Regina v. Bernard* was appealed. This judgment was appealed because the *Leary*

rule was used. At that time, the *Leary* rule had the potential to violate Mr. Bernard's rights. We have seen that stronger appeals could also have been made if Mr. Bernard had been psychologically tolerant of alcohol. If Mr. Bernard were psychologically tolerant of alcohol, Justice Vannini would not have been able to consider it because he used an objective standard of *mens rea*. Instead, the subjective approach would have allowed Justice Vannini to consider Mr. Bernard's intoxicated state when deciding if he had the *mens rea* required to commit sexual assault causing bodily harm. In addition, a subjective standard of *mens rea* cannot lead judges to presume the accused's guilty intent upon proof of his intoxication. The benefit of such a standard is that it is rooted in a subjective understanding of the accused. To gain this subjective knowledge, the judge must wait to weigh the evidence presented in court against the credibility of the accused. He cannot make presumptions solely based on the accused's intoxicated state. Thus, we need a rule of best fit that avoids assigning the use of an objective standard of *mens rea* to general intent offences. It is important to note that the rule of best fit is intended for use in cases where the accused is believed to have committed a prohibited act while intoxicated. Only in this case should we try to avoid assigning the use of an objective standard of *mens rea* to general intent offences. The three-step rule, as I will show, avoids making such an assignment.

The third reason to adopt the three-step rule follows from the previous reason above. Consider the following scenario. A heavily intoxicated man, Smith, starts a fight with an acquaintance, Jones. The fight is not based on malicious intentions. Smith simply cannot tolerate alcohol and unfortunately, its effects make him unnecessarily aggressive. This kind of effect is not uncommon. Smith takes his last beer bottle, breaks it and uses it

as a weapon. He threatens to kill Jones and dizzily spins around with the broken beer bottle in his hand. He thrusts himself towards Jones and lands on him. In the commotion, the broken glass on Smith's bottle accidentally tears into Jones' neck, slicing it. Jones loses blood rapidly and dies within minutes. Now, in the absence of premeditation, judges would agree that Smith should not be convicted of murder since he lacks the intent to kill for a specific purpose. At most, his crime is manslaughter, an offence for which he only needs to have the general intention of killing a man. It seems that when Smith angrily thrusts himself towards Jones, he does not intend to kill him *per se*. Another man may have been standing in Smith's way. The broken glass may have sliced another man's throat. In either case, Smith was too intoxicated to know the difference between having a broken beer bottle in his hand and having a man die because of it.

A person such as Smith might be too intoxicated to have the ability to form any intentions, let alone guilty ones. As we have seen above, using objective standards might force judges to presume Smith's guilty intent upon proof of intoxication. This violates Smith's *Charter* rights. Thus, if the accused commits a general intent offence, all we will have seen is that objective standards should not be used. We have not yet considered using a subjective standard of *mens rea* for general intent offences. Consider again the above example. Smith commits a general intent offence. If one interpreted his *mens rea* subjectively, one would give him the chance to use an intoxication defence. Nevertheless, should the defence be successful, it would not be obvious that Smith should be acquitted of manslaughter. It is true that he was not in any state to form a clear thought. However, the threats he called out in that state cannot be a clear indication of his intentions. The threats may either be side affects of the alcohol or of some deeply rooted anger he has

always felt towards his Jones. To take the subjective approach and to claim he was heavily intoxicated could prevent the conviction of a man who truly wanted to kill Jones. Such a case requires guesswork. It forces a judge to make assumptions about Smith's intoxicated state that could lead to wrongful conviction or false acquittal. Nevertheless, taking the subjective approach is a good start. It prevents judges from using an objective standard to interpret the *mens rea* of an accused who in no way resembles the reasonable man. It allows judges to get to know the accused and to begin to determine his credibility. Becoming familiar with the accused's credibility could mean that judges can learn to tell the difference between when an accused suffers from being in an intoxicated state and when he takes advantage of it.

Instead of simply assigning subjective standards to general intent offences, I believe that we must view the accused in two respects. In one respect, we should consider, subjectively, the intentions he had while he was intoxicated. In another respect, we should consider, *subjunctively*, the intentions he would have had if he was not drunk and put in a similar situation. For instance, would Smith go so far as to kill Jones in the street fight if he was not intoxicated? It may appear that using such a subjunctive approach forces us to engage in more guesswork than the subjective approach. I argue that it does not. During the course of a trial, the judge learns a lot about the credibility of the accused. As shown above, the judge in *Regina v. Dominic* questioned Mr. Dominic's credibility and it was this fact that led him to convict Mr. Dominic of a general intent offence. The credibility of the accused can show the judge whether or not he has the personal restraint and the mental capacity to refrain from committing a prohibited act when alcohol is not a factor. I believe the subjunctive approach is a completely different



approach. As stated in the appeal for *Regina v. Bernard*, intoxication cannot be used as a tool to “gain the courage to commit a crime” and then be used as a defence of that very crime (*Regina v. Bernard*, [1988] 2 S.C.R. 833). To avoid this, judges must consider the credibility of the accused. In the next section, I will explain the subjunctive approach in more detail.

In summary, the third reason to adopt the three-step rule is that we need a rule of best fit that does not assign the use of either a subjective or an objective standard of *mens rea* to general intent offence when both standards have the potential to violate the accused’s rights. Recall that I suggested the need for a rule of best fit that includes a condition preventing the use of a standard of *mens rea* that violates the accused’s rights. Not assigning the use of any standard of *mens rea* to general intent offences when both standards violate the accused’s rights is an example of such condition. As I will show, the three-step rule includes a variation of this condition so that judges may use a different standard, namely the subjunctive standard, when the other two standards have the potential to violate the accused’s rights.

### **4.3 The Three-Step Rule**

The three-step rule I want to propose results from the above three motivating factors. The rule is as follows:

- 1) Has the accused committed a general intent or a specific intent offence?

- 2) If the accused committed a specific intent offence, then we are required to use the subjective approach. If the accused has committed a general intent offence, then we are required to consider his credibility.
- 3) If his credibility reasonably leads one to believe that he would not commit the crime in the absence of alcohol, then we are required to use the subjective approach. Otherwise, we are required to use the objective approach.

The three-step rule is intended to be a rule that judges can rely on when deciding which standard of *mens rea* best suits a case. The case might involve an intoxication defence or it might not. Nevertheless, the accused must have committed a prohibited act while intoxicated. Note that the three-step rule avoids requiring judges to understand the severity of an accused's intoxication. It avoids putting judges in a position where they necessarily have to make assumptions about the accused's alcohol tolerance or ability to form intentions. The only situation in which the judge might make such assumptions would be if the rule requires the use of the subjective approach. If the accused commits a specific intent offence, the rule requires the use of the subjective approach. However, in such a case, the Crown would have to show that the accused was not intoxicated to the point of automatism and that he had the ability to form the intentions required to commit the offence. The Defence would have to examine witnesses to reveal the opposite. Most of the evidence would be about the intoxicated state of the accused and thus, the judge would typically not need to make assumptions.

If the accused commits a general intent offence, the three-step rule assigns the use of a subjective standard only if the accused's credibility reasonably leads the judge to

believe that he would not commit the crime in the absence of alcohol. Thus, as in the specific offence case, the Crown would focus on showing that the accused did not intend to commit the prohibited act because of his intoxicated condition. Most of the evidence would be presented to show the accused's intoxicated state and the judge would not need to make assumptions about it. Hence, the three-step rule is a rule of best fit that eliminates the need to understand the accused's degree of intoxication.

I believe that the three-step rule is the rule of best fit that we need. The three-step rule is a rule of best fit that does not blindly assign the use of a subjective standard of *mens rea* to any offence. It assigns the use of a subjective standard of *mens rea* to specific intent offences and to general intent offences when judges are unable to find a reason for the accused to commit the offence in the absence of alcohol. For reasons I have provided above, I believe these assignments are least likely to violate the accused's rights. The three-step rule is also a rule of best fit that avoids assigning the use of an objective standard of *mens rea* to general intent offences if that assignment could lead to violating the accused's rights. It is important to note that when the three-step rule assigns the use of the objective approach to a general intent offence, the accused's rights are not violated. In this case, the three-step rule requires that judges and juries consider the credibility of the accused. They do this to discover whether the accused's credibility would lead them to believe that he would commit the offence in the absence of alcohol. Once the judge finds that the accused's character is a threat even in the absence of alcohol, the accused would not be presumed guilty upon proof of intoxication. In fact, the intoxication would no longer be a factor because he would be considered a threat regardless. Thus, the accused's *Charter* rights would not be violated. The three-step rule is also a rule of best

fit that does not assign the use of either a subjective or an objective standard of *mens rea* to a general intent offence if both standards have the potential to violate the accused's rights. According to the three-step rule, when the accused is charged with a general intent offence, the judge must consider his credibility. Depending on the accused's credibility, the three-step rule assigns the use of the standard of *mens rea* that least violates his rights.

#### **4.3.1 A Subjunctive Standard of *Mens Rea*: A Corollary**

In this section, I present a definition of the subjunctive standard of *mens rea*. I also present two possible worries one might have regarding the use of the subjunctive standard. The first worry concerns the place of the subjunctive standard in the three-step rule. One might argue that use of a subjunctive standard will reduce cases to debates over the accused's credibility when the focus should be elsewhere. I argue that this concern need not arise because of the subjunctive standard's placement in the three-step rule. In effect, the rule asks judges to debate the accused's credibility so early in the process that this concern becomes unfounded. The second worry is that the subjunctive standard of *mens rea* can simply be reduced to the subjective standard. I argue that this is not true, despite the fact that the two standards might be similar.

The subjunctive standard of *mens rea* is a standard that evaluates the accused based on whether he would have had the *mens rea* required to commit a prohibited act if he had committed it in the absence of alcohol. Thus, the subjunctive standard of *mens rea* should only be used when the accused is believed to have committed a prohibited act while intoxicated. The test to see whether the accused would have this *mens rea* is based on

how credible he is. In a criminal trial, the accused's credibility becomes known through character evidence. This is because character evidence "is any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour" (Paciocco, and Stuesser, 44). There are different ways that evidence regarding the accused's character can be presented in court. Witness testimony, admissions by the accused himself, and certificates proving the accused's criminal history are considered ways to reveal evidence regarding the accused's character (Paciocco, and Stuesser, 44).

However, some kinds of evidence are not admissible in criminal trials because they can lead the jury to form unnecessary or irrelevant prejudices towards the accused. For example, if the accused has a certificate of conviction showing he had been convicted of committing a prohibited act while intoxicated, the jury might be prone to believe that the accused should be convicted again. For this reason, the "rules of evidence are extremely guarded about the admission of character evidence" (Paciocco, and Stuesser, 44). The trial judge determines the admissibility of character evidence. All evidence, including character evidence, has to be deemed admissible before the presentation of evidence begins and before the jury enters the courtroom to guard against prejudices (Paciocco, and Stuesser, 44). Thus, the jury in general will only hear the admissible character evidence. Sometimes, the jury might hear inadmissible evidence if it is revealed during the cross-examination period of a trial. The judge, however, will advise the jury against considering such evidence in their decision. In sum, most of the character evidence available for a given case is presented to the judge before the case begins. There are also rules to guard the judge against forming irrelevant prejudices towards the accused. Thus,

the judge has all the tools to learn how credible the accused is before the trial even begins. However, evidence might be revealed during the cross-examination period that could affect the judge's view of the accused's credibility. I argue that this is a rare occurrence. If all the evidence for a case can convince the judge of the accused's credibility, it would take a significant piece of information to convince him otherwise.

The difference between the subjunctive standard and the other two standards is that the former cannot be used on its own to show that the accused has the *mens rea* required to commit a crime. It is for this reason that the three-step rule does not assign the subjunctive standard of *mens rea* to an offence type. Under the subjunctive standard, conviction cannot mean that the Crown has proved beyond a reasonable doubt that the accused would have the *mens rea* required to commit the crime in the absence of alcohol. If conviction were determined by the subjunctive standard, serious problems would arise. The most obvious problem would be the fact that the Crown would have to prove beyond a reasonable doubt an event that has not occurred. The accused has not actually committed the prohibited act in question while in a sober state. Thus, proving that he would commit the act while sober is absurd, legally speaking. Furthermore, it presumes the accused is guilty of committing the prohibited act upon proof of his credibility. Hence, using the subjunctive standard of *mens rea* on its own leads to violating the accused's *Charter* rights. With this in mind, the subjunctive standard of *mens rea* can be seen to be a standard that

- (1) views the accused subjectively in the absence of alcohol, where the subjectivity is used to determine the accused's credibility,

(2) is used only when the accused is believed to have committed a prohibited act while intoxicated and,

(3) cannot be used on its own to convict the accused.

I should clarify point (1). When the judge and jury attempt to determine whether the accused is credible or not, they must view him subjectively. Judgments about the accused's credibility will be based on factors such as the consistency of his own testimony and whether his testimony is consistent with other evidence. Thus, in order to make judgments about his credibility, the judge and jury need to view him subjectively. They need to compare testimony about his intoxicated state to testimony about his sober state. They also need to compare his actions while intoxicated with his actions prior to and after his intoxication.

One might worry that the subjective standard of *mens rea*, when used in the three-step rule, reduces a criminal case to a debate over the accused's credibility. One might arrive at this worry because the three-step rule does not assign the use of a standard of *mens rea* to general intent offences without pausing over the accused's credibility. Thus, it seems that whenever an accused is charged with a general intent offence, his trial will begin with a debate over his credibility. Such a debate might become unnecessarily lengthy and might disregard valuable evidence regarding the events of the offence. I argue that this worry need not exist. The reason is that the three-step rule asks judges to pause over the accused's credibility in order to decide whether the subjective or the objective standard of *mens rea* best fits the case in question. For the most part, the judge would want to make this decision near the beginning of the case. As I have mentioned, a

rule of best fit should help judges decide which standard of *mens rea* to use at the beginning of the case. Thus, the judge's goal is to determine the accused's credibility so to decide which standard to use and to begin the case. In this case, the debate over the accused's credibility is preliminary and need not be long. There might be further debates over the accused's credibility later in the case. These debates, however, would be based on witness testimony and revealed through the cross-examination period. Thus, these debates would be routine. They would not be caused by the use of the subjunctive standard.

One might also worry that the subjunctive standard of *mens rea* views the accused in the same subjective light that the subjective standard views the accused. Thus, it seems that the subjunctive standard is really the subjective standard of *mens rea* with a variation in the syntax. When the subjective standard is used to evaluate the accused's intentions given his intoxicated state, the subjunctive standard is used to evaluate the accused's intentions *despite* his intoxicated state. Thus, one might argue that regardless of the accused's intoxicated state, the subjunctive standard is nothing more than the subjective standard. I argue that this not true. As established in the definition above, the subjunctive standard of *mens rea* asks the judge to make judgments about the accused's credibility. In order to make such judgments, judge and jury will need to view him subjectively. After the accused's credibility reasonably leads a judge to believe that he would not commit the crime in the absence of alcohol, then the three-step rule assigns the use of the subjective standard. Hence, the subjunctive standard is never used simultaneously with the subjective standard. They are similar, yet they are means to different ends.



#### 4.4 Applying the Three-Step Rule to *Regina v. Dominic* and *Regina v. Bernard*

In this final section, I put the three-step rule to the test. By applying the three-step rule to the cases discussed in the previous chapter, I hope to show that the rule has the potential to prevent the appeals made in those cases.

Recall that in *Regina v. Dominic*, Justice Woods used a subjective standard of *mens rea* to convict Mr. Dominic of killing a dog. In the previous chapter, I explained that Mr. Dominic might have appealed Justice Woods's judgment because he used a subjective standard. It was the use of the subjective standard that allowed Justice Woods to make assumptions about Mr. Dominic's intoxicated state. Some of those assumptions were based solely on witness testimony. This testimony was mostly about Mr. Dominic's appearance the night he was intoxicated. Should Mr. Dominic have been psychologically tolerant of alcohol, Mr. Dominic might not have appeared severely intoxicated even though he might have been so. Recall that Justice Woods' judgment included the following point:

(e) Mr. Dominic's advanced, but not extreme, state of intoxication impaired his functioning but it did not deprive him of the ability to form the minimal intent required for conviction of the general intent offence under s. 445(a) with which he has been charged. [*Regina v. Dominic*, 2009 BCPC 0145, para. 76-77]

If Mr. Dominic were psychologically tolerant of alcohol, he might have appealed this part

of the judgment because it indicates that Justice Woods wrongly interpreted his *mens rea*. Mr. Dominic would not have had the ability to form the minimal intent required for conviction of the general intent offence. Recall also that Justice Woods based much of his judgment on Mr. Dominic's credibility. He decided that Mr. Dominic was not a credible person for two reasons. First, Mr. Dominic's testimony contained inconsistencies and second, his memory lapses lead one to believe that he was not as intoxicated as he claimed he was.

Now, let us apply the three-step rule to this case. Before using the rule, Justice Woods would have to determine the offence type. According to his findings in *Regina v. Dominic*, we know that killing a dog was classified as a general intent offence. Thus, the three-step rule states that Justice Woods should consider Mr. Dominic's credibility. In doing so, Justice Woods must use the subjunctive standard of *mens rea*. This means that he considers Mr. Dominic's credibility only to discover whether Mr. Dominic might have killed the dog in the absence of alcohol. Hence, it is not enough to claim that Mr. Dominic was not a credible person because his testimony was inconsistent. According to the evidence, Mr. Dominic did not believe the alcohol "grossly impaired" him to the point of automaton (*Regina v. Dominic*, 2009 BCPC 0145, para. 45). Recall that Justice Woods claimed that "the overall picture of Mr. Dominic's functioning that was revealed in his evidence bespeaks presence of mind, planned and purposeful behaviour and a much greater command of his faculties overall than he admitted to having on the stand" (*Regina v. Dominic*, 2009 BCPC 0145, para. 45). From these statements, we can deduce that Justice Woods believed Mr. Dominic capable of killing the dog in the absence of alcohol. Justice Woods made it clear that Mr. Dominic was able to form intentions and

nevertheless, he killed the dog. In conclusion, the three-step rule requires that we use the objective standard of *mens rea* in such a case. Justice Woods would then not have allowed the intoxication defence, and without the intoxication defence, Justice Woods would not have had to consider Mr. Dominic's intoxicated state. His judgment would not have included a statement about Mr. Dominic's intoxication affecting his mental functioning. Hence, Mr. Dominic would not have been able to appeal Justice Woods judgment because of such a statement.

Recall that in *Regina v. Bernard*, Justice Vannini used an objective standard of *mens rea* to convict Mr. Bernard of sexual assault causing bodily harm. In this case, the judgment was appealed because the *Leary* rule had been used to convict Mr. Bernard. The Supreme Court appeal that followed lead to much controversy. The focus of the appeal shifted away from resolving the two issues that were raised. As I mentioned in the previous chapter, Mr. Bernard might have made a stronger appeal to Justice Vannini's judgment. When Justice Vannini used an objective standard of *mens rea*, he was not able to consider the possibility that Mr. Bernard might have been psychologically tolerant of alcohol. In this case, Mr. Bernard might have had more reasons to appeal the judgment than just the use of the *Leary* rule.

Now, let us apply the three-step rule to this case. Before using the rule, Justice Vannini would need to determine the offence type. As was determined in the original trial, sexual assault causing bodily harm was a general intent offence. According to the three-step rule, Justice Vannini should first consider Mr. Bernard's credibility. He would then decide which standard of *mens rea* to use. Recall that in the original trial, Mr. Bernard admitted that he did engage in sexual intercourse with the woman. Nevertheless,

his apparent intention was to sit with the woman and talk about her father's passing. It seemed that he intended to comfort her. The woman was also under the impression that his intentions were to talk about her father. Furthermore, police found Mr. Bernard to be suffering from the affects of alcohol when they arrived at his apartment. Since Justice Vannini used an objective standard of *mens rea*, his judgment did not rely heavily on Mr. Bernard's credibility. For this reason, the trial facts do not reveal a deep understanding of his credibility. From the facts above, we see that it appears he might not have committed the offence in the absence of alcohol. After all, he may have intended to comfort the woman. In this case, the three-step rule would suggest that a subjective standard of *mens rea* be used. Using this standard would have allowed Justice Vannini to consider the possibility of psychological tolerance. In addition, he would have escaped using the *Leary* rule even though it was in place at the time. Neither the appeal regarding the use of objective *mens rea* nor the appeal regarding the use of the *Leary* rule would then have been made.

## 5 CONCLUSION

The purpose of this thesis has been to establish a rule that will assist judges and lawyers to determine which standard of *mens rea* to use in cases where an accused has committed a prohibited act while intoxicated. Having to prove beyond a reasonable doubt that an accused has the *mens rea* required to commit a crime is a task involving risks. One can argue that discovering what is in a person's mind is a nearly impossible task. As a result, the task of proving *mens rea* becomes equally difficult. According to this argument, the Crown should not have to prove anything in relation to an accused's mind. However, imagine what would happen if the Crown's task were reduced to proving only that the accused committed the *actus reus* of a crime. Would such a proof be enough to convince a judge and jury that the accused should be convicted? When a person commits a prohibited act, he is not necessarily guilty. He may have committed the act involuntarily, being forced to rob a bank so to save his child from murder. He may have committed it unknowingly because he was intoxicated. Evidently, in most cases it is the accused's thoughts that reveal his guilt. As a result, it is his thoughts that must play a significant role when deciding conviction. Convicting an accused solely on the basis of his actions can lead to unjustified convictions. Thus, the concept of *mens rea* needs to play a role. It also needs to be clear and unambiguous so that the criminal law can make use of it.

Fortunately, as we have seen, in an attempt to disambiguate the task, the criminal law outlines four different ways to understand an accused's *mens rea*. These are intention, knowledge, willful blindness, and recklessness. Showing that an accused engages in one of these four types of criminal premeditation can prove that he has the

*mens rea* required to commit the crime. However, risk returns whenever it cannot be shown that the accused has one of these types of criminal premeditation. This occurs in two ways. Either the accused is not mentally capable of engaging in any of the four types of premeditation, or his mind is temporarily unable to do so. In the former, the accused most likely has a mental disorder. In the latter, the accused is most likely intoxicated. This thesis has focused on the latter.

Criminal law does not yet have a clear, unambiguous method for testing *mens rea* in cases of involuntary intoxication. In this thesis, I have considered two criminal cases that place a special burden on the Crown. In both cases, the judge's judgments were either appealed or in danger of being appealed. The first case was that of *Regina v. Dominic*. In this case, Mr. Dominic was charged with "willfully and without lawful excuse killing a dog kept for a lawful purpose" (*Regina v. Dominic*, 2009 BCPC 0145, para. 1). He claimed to have been severely intoxicated at the time of the killing. Mr. Dominic's intoxication changed the focus of the trial. The focus was not on whether or not he killed the dog. Justice Woods highlighted that the focus was on whether Mr. Dominic could use his alcohol consumption that day to defend his actions (*Regina v. Dominic*, 2009 BCPC 0145, para. 4). Because Mr. Dominic was intoxicated, the question arises as to what the Crown's task is. Could the Crown show that Mr. Dominic had the intentions required to commit the crime even if he were intoxicated to the point of automatism? The Crown's task was full of ambiguities because it was unclear whether Mr. Dominic was intoxicated to the point of automatism. Even if the evidence were to lead the judge and jury to believe that he was not intoxicated to the point of automatism, Mr. Dominic might have been psychologically tolerant of alcohol.

I believe that instead of understanding Mr. Dominic's actual degree of intoxication, Justice Woods had another way of disambiguating the Crown's task. The Crown's task would be different depending on which standard is used to interpret Mr. Dominic's *mens rea*. If Justice Woods had used a subjective standard of *mens rea* and allowed Mr. Dominic's intoxication defence, the Crown would not have to show that Mr. Dominic had the *mens rea* required to commit the crime. According to his intoxication defence, he lacked the mental functioning to have a *mens rea* at all. Hence, the use of a subjective standard of *mens rea* would be one way to disambiguate the Crown's task. The subjective standard also allows judges to better understand the accused's actions by better understanding his mental condition when he committed the prohibited act. Furthermore, it allows judges to interpret the accused's *mens rea* in terms of his engagement in one of the four types of criminal premeditation. Thus, the subjective standard would also be used to disambiguate the Crown's task because they would only have to prove that the accused engaged in a certain type of criminal premeditation to prove the existence of his *mens rea*.

On the other hand, if Justice Woods had used an objective standard of *mens rea* and prohibited Mr. Dominic's intoxication defence, the Crown would have had to show that Mr. Dominic had the *mens rea* required to commit the crime. By not allowing the intoxication defence, Mr. Dominic's intoxication would have played only a small role in his case and thus, a small role in the Crown's task. The objective standard of *mens rea* views the accused objectively and compares him to the reasonable man. Thus, Mr. Dominic's conviction would be the result of the Crown's ability to prove that he committed the prohibited act and that he had the *mens rea* required to commit it. Thus,

the objective standard would also be used to disambiguate the Crown's task. As I mentioned in chapter three, Justice Woods decided to use an objective standard of *mens rea* in this case. In chapter four, I showed that this was an appropriate decision on his part. Nevertheless, I believe he made this decision at the end of the trial and thus allowed the intoxication defence for the greater portion of the trial. In effect, allowing the intoxication defence meant that Justice Woods had to view Mr. Dominic subjectively. It was this subjectivity that forced him to make unnecessary assumptions about Mr. Dominic's intoxicated state. I argued that Justice Woods' subjective view of Mr. Dominic could have led to appeal. There was no rule in place suggesting that it would be better for standard of *mens rea* to be established at the beginning of the trial.

The second case I presented was that of *Regina v. Bernard*. I believe that this case also placed an unacceptable burden on the Crown. In this case, Mr. Bernard was charged with, and convicted of, sexual assault causing bodily harm (*R. v. Bernard*, [1988] 2 S.C.R., per headnote). Mr. Bernard admitted to forcing the complainant to have intercourse with him but defended his actions on the basis of an intoxication defence. At the time, the *Leary* rule was in place. The rule was used to disambiguate the Crown's task. Since Mr. Bernard committed a prohibited act while intoxicated, it was unclear whether he had the *mens rea* required to commit the act. The *Leary* rule instructed Justice Vannini to use an objective standard of *mens rea* and to consider that "becoming intoxicated could supply the *mens rea* for general intent offences" (Roach, 222). Using an objective standard of *mens rea* meant that the Crown had to prove that Mr. Bernard had the *mens rea* required to commit the crime despite the effects of alcohol on his mental functioning.



Although the *Leary* rule disambiguated the Crown's task, it also led to a violation of Mr. Bernard's *Charter* rights. The creation of the *Leary* rule pre-dated the creation of the *Charter*. With the *Charter* in place, the *Leary* rule was believed to violate the accused's *Charter* rights. The case of *Regina v. Bernard* occurred when the *Charter* was in place and hence, Mr. Bernard appealed Vannini J.'s decision because he used the *Leary* rule. In the Supreme Court decision, Chief Justice Dickson sought to overrule the *Leary* rule but faced opposition. He too used an objective standard of *mens rea*. He claimed that the affects of alcohol on Mr. Bernard's mental functioning should only be considered after the Crown made its case that he did have the *mens rea* required to commit sexual assault causing bodily harm.

I believe that Justice Vannini's use of an objective standard of *mens rea* gave Mr. Bernard good reason to appeal his judgment even though the Supreme Court appeal was not successful. In chapter three, I mentioned that Mr. Bernard might have had a successful appeal had he been psychologically tolerant to alcohol. He could have argued that Justice Vannini's use of an objective standard led him to ignore subjective considerations such as having a psychological tolerance of alcohol. In chapter four, I showed that if Justice Vannini had used a subjective standard of *mens rea*, he might have prevented an appeal. In particular, he could have prevented the Supreme Court appeal or, at least prevented shifting the focus of the appeal away from its primary issues and towards unrelated ones. Unfortunately, the rule in place used to disambiguate the Crown's task was faulty. Its ability to violate Mr. Bernard's rights led to its failure. There was no better rule in place that both could tell Justice Vannini which standard of *mens rea* best suits the case and which standard least violates the accused's rights.

In this thesis, I have suggested that we learn from the appeals that were made and those that could have been made to create a rule that both disambiguates the Crown's task and least violates the accused's rights. To understand the make-up of an intoxicated brain at a given time is neither practical nor completely possible. Thus, to disambiguate the Crown's task, I have argued that we need a rule that eliminates such a need. I have also argued that such a rule might violate the accused's rights because it might force judges to ignore the fact that the accused was intoxicated. In other words, judges would be reduced to viewing the accused objectively and might ignore his intoxication defence even when they should not. In sum, the two cases I analyzed in this thesis led me to believe that the rule we need should do the following: eliminate the judge and jury's need to understand the make-up of the accused's brain and not violate his rights while doing so. I called this rule the three-step rule. The creation of this rule called for the creation of a new standard, namely the subjunctive standard of *mens rea*.

The three-step rule disambiguates the judge's task as well as the Crown's. When an accused commits a prohibited act while intoxicated, the judge can use the three-step rule to help him decide which standard of *mens rea* best suits the case. Without the rule, judges will continue to find it difficult to decide which standard to use. They will face difficulties because they will want to choose a standard that least violates the accused's rights or because it will not be obvious which standard will benefit the case until the case is over and the facts are revealed. The three-step rule is based on precedence. At the moment, every time a judge is faced with a case in which the accused commits a prohibited act while intoxicated, the judge must look at previous cases. He must research

these cases to decide which standard of *mens rea* to use and whether or not to allow the intoxication defence. Without a rule in place, the judge must do this research each time.

As presented in chapter four, the three-step rule can be stated as follows:

- 1) Has the accused committed a general intent or a specific intent offence?
- 2) If the accused committed a specific intent offence, then we are required to use the subjective approach. If the accused has committed a general intent offence, then we are required to consider his credibility.
- 3) If his credibility reasonably leads one to believe that he would not commit the crime in the absence of alcohol, then we are required to use the subjective approach. Otherwise, we are required to use the objective approach.

Precedence has given us no reason not to assign the use of a subjective standard of *mens rea* to specific intent offences. Thus, the three-step rule allows this assignment. It seems obvious that if the accused is so intoxicated that he cannot form a specific intent, he should not be convicted of such an offence. Using the subjective standard of *mens rea* will allow the accused to offer an intoxication defence so that, when appropriate, he may be saved from conviction. However, as can be seen from *Regina v. Dominic*, using a subjective approach to interpreting the accused's *mens rea* when he is charged with a general intent offence is dangerous. A false conviction might result because the judge would make unnecessary assumptions about the accused's intoxicated state simply when trying to understand it. Interpreting the *mens rea* of an accused who is charged with committing a general intent offence does not require making subjective assumptions.

Precedence has given us little reason to assign the use of an objective standard of *mens rea* to general intent offences. Thus, the three-step Rule does not allow this assignment without further considerations. It was made clear in *Regina v. Bernard* and in its Supreme Court appeal that the use of the *Leary* rule violates the accused's rights. This rule required judges to use an objective standard of *mens rea* in cases where the offence is of general intent. Presuming that the accused has a guilty mind upon proof of intoxication violates the accused's rights. It presumes that he is guilty of an act that he has not yet been shown to have committed. Nevertheless, I argued that when the accused commits a prohibited act while intoxicated, his credibility will affect which standard of *mens rea* the judge uses. If we are to avoid using an objective standard when the accused commits a general intent offence, we are left with only a subjective standard. In such a case, the subjective standard might benefit the accused if he were severely intoxicated and did not intend to commit the offence. However, this is unclear until we learn more about his credibility.

We must learn the likelihood of whether the accused would commit the prohibited act in the absence of alcohol. We must interpret his *mens rea* from two different perspectives. When a person commits a general intent offence, he does not form any specific intentions in relation to the offence. Thus, understanding his *mens rea* becomes an ambiguous task. The judge might try to interpret his *mens rea* according to a subjective standard and find what his intentions were when he was intoxicated. Nevertheless, the accused's intentions might not be clear. He might have intended to commit the prohibited act and used intoxication as a tool to commit it. Thus, I argued that the judge must also interpret the accused's *mens rea* according to a subjunctive standard.

This way, the judge would find what the accused's intentions would be if he were not intoxicated. I believe that the best way to find this is to consider the accused's credibility.

The subjunctive standard of *mens rea* is at the heart of the three-step rule. It allows judges to avoid using an objective standard of *mens rea* when the accused is charged with a general intent offence but is otherwise a credible person. It allows judges to use this standard when the accused should not be allowed the intoxication defence, such as when he is charged with a general intent offence and when he could be a threat even in the absence of alcohol. As we have seen in *Regina v. Dominic*, the accused's credibility can play a major role in the judge's decision, especially when it is used to clarify the ambiguous task of understanding the *mens rea* of an intoxicated person.

In conclusion, this thesis has given judges and lawyers two new tools. The first tool is a rule they can use to decide which standard of *mens rea* best suits their case. It is a rule free from ambiguity and restraint. It does not force judges to use a specific standard of *mens rea* even though that standard might violate the accused's rights. The second tool is a new standard of *mens rea*. This new standard provides a new way to interpret the *mens rea* of an accused whose intoxicated mind could hardly be interpreted. Using the subjunctive standard, judges can know better if the accused actually intended to commit a prohibited act or if he was simply intoxicated, something important for prosecutors and defendants alike.

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