

# EXTREME INTOXICATION AS A DEFENCE: *R. V. SULLIVAN*

## ACTIVITY #1: DEBATE

Should a person who commits a criminal offence while in a state of self-induced extreme intoxication be found guilty of the criminal offence?

The Supreme Court of Canada upheld the Ontario Court of Appeal's decision, deeming section 33.1 of the *Criminal Code* to be unconstitutional. This was a controversial decision, and raised many questions and concerns.

**Remember:** Today, an accused person can use section 33.1 of the *Criminal Code*, and use extreme intoxication as a defence to committing a violent crime, but it is a high bar for the defence to be accepted.

Consider the following questions and concerns:

- What does this mean for cases of assault and other violent crimes where alcohol or other drugs are a factor?
- How does this decision impact victims and/or survivors who want to report a violent crime?

- How can victims and/or survivors feel comfortable and empowered enough to seek justice?
- How does this decision change the prosecution of serious criminal acts?

Divide the students into two groups. Assign each group to prepare arguments either for or against self-induced extreme intoxication as a defence.



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## ACTIVITY #2: SCENARIOS

An accused person can use the extreme intoxication defence if they can prove, beyond a reasonable doubt, that he or she could not foresee their loss of control when the intoxicants were consumed.

Using the above test to determine whether an accused person can use the extreme intoxication defence, explain whether the person in the following scenarios would be successful in using the defence. Why or why not?

### Scenario 1:

The Class of 2023 is preparing to celebrate their graduation, after four years of intense high school classes! The post-graduation party is set to be in the backyard of Holly's house. Holly's family owns a large plot of land in the country—perfect for a party of 30 students and other guests. There will be no noise policies, and a variety of alcoholic beverages.

Maria and Damir are two of the graduating students, and decide to attend the party. Both Maria and Damir have had drinks over the duration of the party. As the night progresses, Maria and Damir continue to drink and recall some high school memories, including the

time when Damir was not selected to be on the basketball or volleyball teams.

This is an upsetting moment for Damir because basketball and volleyball are Damir's favourite sports. Damir does not like this memory, and threatens Maria. This leads to a fight between Maria and Damir, resulting in a broken nose for Damir. Holly's parents intervene and police officers arrive at the scene. Maria is charged with assault.

Maria argues they were intoxicated and that she did not intend to break Damir's nose. Can Maria invoke the extreme intoxication defence? Is there a different defence that Maria can rely on?

## Scenario 2:

Nushi agrees to go on a date with Ella. Ella plans an eventful evening. First, watch the new Fast X movie at a drive-in theatre. Second, dinner at East Side Mario's, Nushi's favourite restaurant! Ella suffers from Attention-deficit/Hyperactivity Disorder (ADHD), and consumes methamphetamine, prescribed by Dr. Smith to assist with her ADHD.

ADHD is a neurodevelopmental disorder. People with ADHD may have a short attention span, impulsive behaviours, and feel restless. Methamphetamine can be prescribed to treat ADHD, and is a stimulant for the nervous system. Its use increases the individual's attention, and decreases restlessness.

On the day of her date with Nushi, Ella takes the prescribed amount of medication to ensure the date is perfect. She wants to give Nushi her full attention. Before the movie begins to play, Ella ingests additional tablets in hopes of easing their anxiety. The over-consumption of the medication causes Ella to be in a state of psychosis. Ella acts out of control, flailing her arms, not aware of where she is or who she is with, and injures Nushi. Ella pushes Nushi into the passenger window, and Nushi suffers from a concussion.

Nushi is fearful for their life. They decide to proceed with charges of assault against Ella.

Would Ella be successful in using the extreme intoxication defence against their charges of assault? Why? Why not?

## Scenario 3:

Michael has a criminal history of aggravated assault and sexual assault. He suffers from an alcohol addiction, which leads to aggressive behaviour. Michael does not attend Alcoholics Anonymous (AA) meetings to cope with his alcohol addiction. This is a repeated cycle for Michael: he consumes an excessive amount of alcohol, assaults a person, is charged with assault, serves his sentence, and repeats.

On one beautiful Sunday morning, Michael consumes an excessive amount of alcohol. This time is different; Michael's mother passed away, and alcohol is his coping mechanism. He wanders into the community, yelling at each person who walks by him. He walks into the local park, where he sees a mother playing with their child. Michael believes she is his own mother, and wonders why she left him. Angry, Michael walks up to the woman, pulls out a knife, and stabs her.

Michael is charged with assault with a weapon. Can Michael invoke the extreme intoxication defence? Is it an important factor that Michael has a history of committing assault?

## Scenario 4:

**Trigger Warning:** The following scenario involves sexual assault. The content may be triggering and/or may not be suitable for younger youth.

Nathaniel and his friends have just finished their first year of university, and want to celebrate. So, they decide to attend the local pub for food and drinks! Each person has consumed alcoholic beverages.

By the end of the night, Nathaniel and his friends are very intoxicated. Nathaniel's friends live 25 minutes away from the pub, and they call an Uber to go home. However, Nathaniel lives downtown. So he decides to walk home, intoxicated. On his way home, he notices a person walking toward him. He starts shouting to them, "Hi! You look pretty!" They ignore him. He grabs their arm and says, "I was talking to you. Don't ignore me." Nathaniel forcibly moves the stranger to a spot out of sight of the street and commits a sexual assault.

Nathaniel walks home. The next morning, the stranger files a complaint, and Nathaniel is charged with sexual harassment and sexual assault.

Is the extreme intoxication defence available to Nathaniel?

## ACTIVITY #2: SCENARIOS

### ANSWERS

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#### Scenario 1 Answer:

Maria cannot use the extreme intoxication defence.

To use this defence, Maria must prove, beyond a reasonable doubt, that they could not foresee their loss of control when they consumed alcohol.

In this scenario, Maria was aware that they were attending a post-graduation party, where alcohol would be present.

The Supreme Court of Canada has emphasized, mere intoxication is not sufficient to use the extreme intoxication defence. Maria was in a state of intoxication, but they were cognizant of Damir's threat, and acted in response to that threat.

Maria may not have intended to break Damir's nose, but they did intend to fight back.

Maria did not provoke Damir by recalling high school memories. Unfortunately, Damir was triggered by remembering he was not selected to be on either the basketball or volleyball team, and initiated the fight by threatening Maria. Though Maria cannot use the extreme intoxication defence, it is possible for them to raise self-defence.

#### Scenario 2 Answer:

There is a possibility that Ella would be successful in using the extreme intoxication defence against her charges of assault.

Ella is prescribed methamphetamine to treat her ADHD, but she voluntarily consumed additional tablets. Therefore, her state of intoxication was self-induced. This led to a state of psychosis, putting Ella in a state akin to automatism, where she was not in control of her actions or behaviour.

Ella would need expert evidence to support her use of the extreme intoxication defence. Regardless, Ella did not intend to injure Nushi. Indeed, Ella should not have consumed the additional tablets (exceeding the prescribed dosage), but her actions occurred while in a state of psychosis which she could not have foreseen.

### Scenario 3 Answer:

Michael would not be successful in using the extreme intoxication defence. The scenario does not specify how much Michael drank. However, he has a history of consuming an excessive amount of alcohol, which leads to assault.

Michael's state of intoxication is self-induced because he voluntarily consumed an excessive amount of alcohol. However, with an alcohol addiction and a history of aggressive behaviour, Michael ought to have foreseen that he could lose control when he consumed alcohol.

Therefore, Michael cannot use the extreme intoxication defence.

It is an important factor that Michael has a history of committing assault. If Michael did not suffer from an alcohol addiction, and did not have a history of assault, he may not have been able to foresee that his excessive consumption of alcohol would lead to stabbing somebody. It was his excessive consumption of alcohol that led him to a state of intoxication in which he hallucinated, and genuinely thought the stranger in the park was his mother.

### Scenario 4 Answer:

The extreme intoxication defence will not be available to Nathaniel. The Supreme Court emphasized that mere intoxication is not a defence for violent crimes such as sexual assault.

In this scenario, there is nothing to prove that Nathaniel was intoxicated to the extent of being in a state of extreme intoxication. Instead, Nathaniel seemed cognizant of his surroundings, where he was going, his encounter with the stranger, and what he proceeded to do. Nathaniel knew that the stranger was ignoring him and that he did not have consent.

Nathaniel's awareness of the situation would create great difficulties in proving that he was, beyond a reasonable doubt, in a state of extreme intoxication, where he did not understand the nature of his actions.



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## ACTIVITY #3: SECTION 33.1 VS. SECTION 16

Section 33.1 is similar to Section 16 of the Criminal Code. But they are different in key ways. What is the difference?

### ***Section 16: Using the Defence of Mental Disorder***

Section 16 (1) of the Criminal Code states that “no person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”.

Section 16 (2) of the Criminal Code states that “every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities”.

Section 16 (3) of the Criminal Code states that “the burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue”.

## ACTIVITY #3: SECTION 33.1 VS. SECTION 16

### ANSWERS

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#### **Extreme Intoxication (Section 33.1):**

This is when a person voluntarily consumes an intoxicant that leads to a state akin to automatism, in which the person is not cognizant of their surroundings.

The person who raises this defence is someone who is in a state of extreme intoxication, who intends to and does consume intoxicants, but does not intend to enter into a state of extreme intoxication. This is a higher legal standard than that of mere intoxication. Here the person loses volitional control of their actions and behaviour. However, they must prove beyond a reasonable doubt that they could not foresee the loss of control.

#### **Not Criminally Responsible (Section 16):**

This is when a person diagnosed with a mental disorder commits a crime, without understanding the nature of the crime.

The individual fails to understand that the act itself is wrong. It must be proven, on a balance of probabilities, that the individual suffers from a mental disorder.

In addition, the individual is not exempt from criminal responsibility, but may not be sentenced to imprisonment. Instead, the individual will be sentenced to a treatment regime, where their mental disorder will be treated in an attempt to prevent the individual from engaging in the illegal act again.

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## ACTIVITY #4: DISCUSSION QUESTIONS

1. How does this decision impact victims and/or survivors who want to report a violent crime?
2. How can victims and/or survivors feel comfortable and empowered enough to seek justice?
3. Do you think there will be discrepancies between legal professionals regarding the definition of self-induced extreme intoxication?
4. Do you think the line between self-induced extreme intoxication and mere drunkenness will become blurred?
5. Consider the definition of “self-induced.”
  - a. What if the person who committed the criminal offence, while in a state of self-induced extreme intoxication, *was forced to ingest the intoxicant*?
  - b. What if the person who committed the criminal offence, while in a state of self-induced intoxication, *did not know they consumed an intoxicant*?

For example, a person put an intoxicant into another person’s drink when they were not looking.

## ACTIVITY #4: DISCUSSION QUESTIONS ANSWERS

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1. This decision may create feelings of frustration for victims and/or survivors who want to report a violent crime. Prior to the *R. v. Sullivan* decision, victims and/or survivors hesitated to report a violent crime for many reasons:

- there are stereotypes implying that victims and/or survivors are lying if they do not report the violent crime as soon as possible (or if the victim and/or survivors are not crying);
- victims and/or survivors may not have familial or legal support to report the violent crime;
- the victim and/or survivor may feel that it's their fault, and that the perpetrator had a reason for committing the violent crime.

After the *R. v. Sullivan* decision, victims and/or survivors may feel there is less support to bring an action against the perpetrator, especially if others think the perpetrator did not intend to commit the crime (because they were intoxicated).

2. If victims and/or survivors are provided with more support from the legal and justice systems, they can feel more comfortable

and empowered to seek justice. However, there are systemic contradictions in encouraging victims and/or survivors to report a violent crime, while creating additional barriers and grief by not believing them when they find the courage to share their victimization, or by being told that they were “asking to be victimized” based on their choice of clothing.

3. Due to the strict test used to determine whether an individual was, beyond a reasonable doubt, intoxicated to the extent that they could not foresee their loss of control, and the requirement of expert evidence, there may be a few discrepancies between legal professionals regarding the definition of self-induced extreme intoxication.

4. The line between self-induced extreme intoxication and mere drunkenness is unlikely to become blurred. The Supreme Court of Canada has emphasized numerous times that mere intoxication is not a defence to violent crimes. There must be sufficient (expert) proof indicating the individual could not foresee their loss of control when the intoxicant was consumed.

5. Consider the definition of “self-induced”.
- a. If the person charged with the criminal offence, while in a state of self-induced extreme intoxication, *was forced to ingest the intoxicant*, the person cannot invoke the extreme intoxication defence. In order to invoke the extreme intoxication defence, the intoxicant must have been consumed voluntarily. The accused person may choose to argue that they were forced to ingest the intoxicant against their will, thus not satisfying the element of voluntariness.
  - b. If the person who committed the criminal offence, while in a state of self-induced intoxication, *did not know he/she consumed an intoxicant*, the extreme intoxication defence may not be available for the same reason as the above. However, the person who put the intoxicant into somebody else’s drink may be charged with a criminal offence.



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## FACT SHEET

### First things first:

#### Defining our terms

Before we get into the Sullivan case and how it made its way through the Canadian court system, let's make sure we have an understanding of some of the key terms used in this case.

#### Self-induced extreme intoxication

An accused person can use the extreme intoxication defence (intoxication akin to automatism) if they can prove, beyond a reasonable doubt, that they could not foresee their loss of control when the intoxicants were consumed. This claim must be supported with expert evidence.

“**Self-induced**” means that the person voluntarily chose to consume an intoxicant.

“**Extreme intoxication**” means “intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour”.

“**Automatism**” means “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action”.

### The Facts

David Sullivan voluntarily consumed an overdose of a prescription drug, Wellbutrin, in an attempt to commit suicide. He experienced a state of automatism, and attacked his mother with a knife and injured her. He was charged with numerous criminal offences, including aggravated assault and assault with a weapon.

### At Trial:

#### The Superior Court of Justice

Mr. Sullivan argued that his state of intoxication was so extreme that his actions were involuntary. The trial Judge found that Mr. Sullivan had acted involuntarily.

By consuming an overdose of Wellbutrin, a drug for which psychosis is a side effect,

Mr. Sullivan experienced a state of automatism. However, Mr. Sullivan's intoxication was voluntary, and he knew or ought to have known that Wellbutrin would cause him to be impaired. He was found guilty of aggravated assault, assault with a weapon, and four counts of breach of a non-communication order.

Mr. Sullivan appealed the decision to the Ontario Court of Appeal.

## **On Appeal:** **The Ontario Court of Appeal**

Section 33.1 of the *Criminal Code* prohibited an accused person from using the extreme intoxication defence for violent crimes like assault, sexual assault, and manslaughter.

The Ontario Court of Appeal held that section 33.1 was unconstitutional and of no force or effect, and Mr. Sullivan was entitled to use the extreme intoxication defence.

Mr. Sullivan was acquitted on his assault charges. The Crown appealed the decision to the Supreme Court of Canada, regarding the constitutionality of section 33.1.

## **The Final Ruling:** **The Supreme Court of Canada**

The Supreme Court of Canada upheld the Court of Appeal's decision, and dismissed the appeal. The Supreme Court of Canada confirmed Mr. Sullivan's acquittal.

## **The New Law and what it means:** **Self-induced Extreme Intoxication**

After the Supreme Court of Canada's decision, Parliament introduced Bill C-28, and amended section 33.1 of the *Criminal Code*. Now, an accused person can use the extreme intoxication defence. The old law violated the *Charter* in a way that could not be justified in a free and democratic society, and was not constitutional. In this case, Mr. Sullivan was acquitted because he was able to prove that he was intoxicated to the point of automatism and the trial judge had found that he was acting involuntarily. The amended law is below:

33.1 (1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if

- (a.) all the other elements of the offence are present; and
- (b.) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

33.1 (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

33.1 (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.





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## TIMELINE

### September 1994

Parliament enacted **section 33.1 of the *Criminal Code***, preventing an accused person from using the extreme intoxication defence for violent crimes like assault, sexual assault, and manslaughter.

In *R v. Devault*, the Supreme Court of Canada held that a state of drunkenness akin to automatism is a defence.

### September 1995

### September 1995 - May 2022

The Supreme Court of Canada held, in relation to the *R v. Brown*, *R v. Sullivan* and *R v. Chan* cases, section 33.1 of the *Criminal Code* was unconstitutional and of no force or effect, allowing an accused person to use the extreme intoxication defence.

The extreme intoxication defense is prohibited.

### May 2022

Parliament introduced **Bill C-28**, amending section 33.1 of the *Criminal Code*. Now, an accused person can use the extreme intoxication defence if they can prove beyond a reasonable doubt that they could not foresee their loss of control when the intoxicants were consumed.

### June 2022