

# Learning Network

Mobilizing knowledge to end gender-based violence

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## Supporting Survivors of Sexual Violence in Response to the Extreme Intoxication Defence

In May 2022, the Supreme Court held that the previous ban on the extreme intoxication defence was unconstitutional. In response, the Parliament of Canada amended the *Criminal Code* to enable the defence under the condition that a reasonable person could not foresee their loss of control and actions due to self-intoxication. This means that an accused may now say that they were so intoxicated that they took part in actions that they did not wish to or acted in a state of “automatism” due to extreme self-intoxication. The defence can be used for general intent offenses including sexual assault, assault, and manslaughter.

As an advocate or counsellor that supports sexual violence survivors/victims in your work, you may be asking:

***What does the extreme intoxication defence mean for survivors of sexual violence?***

***How can we best support survivors considering this news?***

This Issue seeks to answer these questions by:

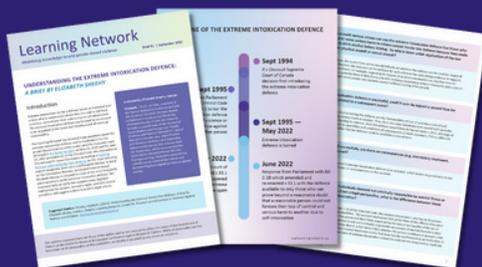
- Identifying how the extreme intoxication defence has been used in the past
- Exploring the implications of the defence for survivors of sexual violence
- Sharing best practices for talking to survivors about the defence

This topic is heavy and you may find you need support as you read. Please reach out to these services if so: [Ontario Sexual Assault Centres](#) | [Canada Sexual Assault Centres](#)



Authored by:  
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Jacqueline Benn-John, PhD, is an African/Black diasporic cisgender woman, mother, feminist, survivor, and immigrant. She is the Executive Director of the Women’s Support Network of York Region, a consultant, and community engaged educator. Her doctoral research sought to understand the perspectives and experiences of African/Black women who provide service to survivors of sexual violence, and the multifaceted and intersectional modes of expressing resistance through feminist violence prevention work in rape crisis centres within Ontario.



### LEARN MORE

For more information on the legal aspects of the defence, check out this Learning Brief by feminist lawyer Elizabeth Sheehy: [\*Understanding the Extreme Intoxication Defence: A Brief by Elizabeth Sheehy.\*](#)

## Sexual Violence and the Extreme Intoxication Defence

Researchers have identified links between intoxication due to alcohol consumption and drug use and sexual assault perpetration.

When the extreme intoxication was previously allowed in Canada from September 1994 to July 1995, it was advanced at least 30 times:



of its uses involved violence against women (12 cases)



involved sexual assaults (6 cases)

When the defence was barred between 1995 to 2021, there were 16 constitutional challenges raised for consideration relevant to sections 7 and 11 (d) of the *Charter* regarding justice and fair process. In those cases:



involved sexual assaults (7 cases)

All those sexual assaults were perpetrated by men



cases involved women  
as survivors/victims



case involved a man  
as a survivor/victim

Source: Sheehy, E. and Froc, K. 2022. Last Among Equals: Women's Equality, *R v Brown*, and the Extreme Intoxication Defence. Forthcoming in Volume 73 of the *University of New Brunswick Law Journal*.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4222393](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222393)

## Exploring Cases Invoking the Extreme Intoxication Defence

The first time the extreme intoxication defence was allowed was in 1994 with *R v Daviault*:

### *R v Daviault* (1994)

Daviault sexually assaulted a 65-year-old woman who was using a wheelchair and was a friend of his wife. He claimed he did not know what he was doing since he consumed up to eight beers and most of a 40-ounce bottle of brandy.<sup>1</sup>



After the *Daviault* case, the extreme intoxication defence was not allowed in Canadian courts between September 1995 to May 2022. Still, there were some cases where the constitutionality of the defence was considered even when it was not allowed. Below we share a few of those cases that involved sexual assault as they offer a glimpse into how the defence may be used in the future:

### *R v C.G.W.* (2011)

C.G.W. assaulted his 16-year-old daughter after consuming copious quantities of alcohol and cocaine. He was sharing a bedroom with his daughter and claimed he “blacked out” and does not remember the assault.<sup>2</sup>

### *R v SN* (2012)

SN sexually assaulted another man while they were both in the “drunk tank” of an RCMP detachment. Both SN and the victim/survivor said they do not remember the sexual assault due to intoxication. The sexual assault was confirmed by observations from a civilian guard and the police.<sup>3</sup>

### *R v McCaw* (2019)

McCaw sexually assaulted his roommate’s girlfriend who had fallen asleep on the living room couch after drinking with her boyfriend. Her boyfriend was asleep in his bedroom. She initially thought McCaw was her boyfriend and did not resist but when she realized it was McCaw, she left and went to her boyfriend. McCaw claimed that he was not in control of his actions as he consumed alcohol, marijuana, and GHB, the date rape drug.<sup>4</sup>

## The Extreme Intoxication Defence is a Barrier to Accessing the Criminal Justice System for Survivors

The Canadian criminal justice system's ability to address sexual violence is already poor. [Sexual assault conviction rates are very low.](#) Statistics Canada reports that

**only one in five cases of sexual assaults reported to police in Canada results with a trial.<sup>5</sup>**

[Even before a case goes to the courts, survivors face complex barriers to reporting.](#) The criminal justice system – which is largely based on verbal testimony, physical evidence, and the perceived credibility of the complainant – is not effective for those harmed by an offender that is known to them, in historical cases, and in situations where there are differences in social power between the accused and the victim/survivor. Most sexual violence survivors fall under one or more of these categories.

The majority of sexual violence is in fact perpetrated by acquaintances or others known to the victim/survivor.<sup>6</sup> It is also common that people wait a long time before they disclose sexual violence. The Ontario Coalition of Rape Crisis Centres shares that “most people who contact a sexual assault centre are reaching out to talk about something that happened to them many days, months or years ago.”<sup>7</sup>

The criminal justice system is least effective for survivors who are socially marginalized. Canadian research shows that Black women face systemic barriers to support when they experience sexual violence,<sup>8</sup> and First Nations, Inuit, and Métis women and girls are “often unable to obtain justice when they report sexual assault.”<sup>9</sup> Black, Indigenous, survivors of colour, and gender-diverse individuals face added complexities and concerns based on their multiple intersecting identities including but not limited to their ability, race, and gender identity. These identities are at the root cause of both who is most likely to be targeted for acts of violence, as well as negative experiences with systems. In its Ontario-wide research, Trans PULSE found that Trans people are the targets of specifically directed violence:

**20% of Trans people reported being physically or sexually assaulted for being Trans.<sup>10</sup>**

As we can see, the criminal justice system already brings many difficulties and potential harms for survivors of sexual violence. The extreme intoxication defence creates additional challenges.

***The ruling is a stark reminder of Canada's colonial history and its manifestation through unjust laws and policies which privilege dominant bodies resulting in less access to justice and equity.***

**Systemic realities such as ableism; cisnormativity; anti-Asian, anti-Black, and anti-Indigenous racism deter survivors from reporting.**

**Additional barriers that are compounded by systemic barriers include:**

- Shame, embarrassment, guilt, and self-blame experienced by survivors/victims
- The effects of rape myths and stereotyped beliefs
- Fear of retaliation by the perpetrator or reprisals (e.g. in trouble for drinking underage when assault occurred)
- Lack of awareness about sexual violence and available supports
- Lack of resources or access to services, especially to culturally competent services
- Distrust of formal supports
- Concerns about confidentiality and privacy
- Concerns about re-victimization by systems (e.g. criminal justice system)<sup>11</sup>

## The Extreme Intoxication Defence Reflects and Upholds Rape Myths

Whether a survivor uses the criminal justice system or not, *all* sexual violence survivors stand to be affected by the extreme intoxication defence. This is because all sexual violence survivors live in a social climate in which they face sexual violence myths.

Myths are harmful misconceptions that shape “how sexual violence is understood by those who have experienced it, by those who perpetrate it, by the families and friends of both victims/survivors and perpetrators, by those who respond to survivors and perpetrators in professional capacities, and by the public.”<sup>12</sup>

The extreme intoxication defence reflects [existing sexual violence myths](#) that:

- Excuse offenders’ actions
- Fail to hold offenders accountable<sup>13</sup>
- Minimize violent crimes, framing them instead as unfortunate accidents

The messages in these myths can contribute to survivors’ feelings of self-blame, invisibility, and isolation in the aftermath of sexual violence.

### Rape Myths:

- Exist despite advances through advocacy for victim/survivor rights, legal reform, public education, and a body of empirical evidence debunking myths about sexual violence
- Relate to stereotypical gender constructs and systems of oppression
- Narrowly restrict perceptions of sexual violence and cause people to question or minimize the experiences of victims/survivors that fall outside of these misperceptions
- Exist at individual and institutional/societal levels
- Blame the victim/survivor and contribute to the barriers they experience
- Excuse the perpetrator and contribute to the perpetuation of sexual violence
- Are often endorsed and reinforced through the media<sup>14</sup>



## Working with Survivors: Talking About the Extreme Intoxication Defence in Support Settings

As a survivor advocate or service provider, you may find yourself working with survivors who are seeking clarity about the ruling. Here are some ways in which you can create space for survivors' thoughts and fears connected to this ruling:

1. Survivors may hold misconceptions about the extreme intoxication defence. For example, they may fear it means that any intoxicated person will automatically not be responsible for a crime. Take time to learn about the meaning and limits of the ruling, and provide clarification:

- Learn more details about the ruling and its legal meaning [here \(history of this legal ruling\)](#) and [here \(the current ruling and recent amendments to the Criminal Code in response to it\)](#)
- Share information about legal rights and realities directly with survivors you are working with: "Let's talk a little about what this ruling will actually mean in practice."
- Invite survivors to share their thoughts and questions: "What do you think about this?"

### LEARN MORE

- Find answers to frequently asked questions about the extreme intoxication defence in this Learning Network Brief by feminist lawyer Elizabeth Sheehy: [\*Understanding the Extreme Intoxication Defence: A Brief by Elizabeth Sheehy\*](#).
- Find more information about the extreme intoxication defence and supportive responses in this Learning Network and Knowledge Hub Webinar presented by Jacqueline Benn-John and Elizabeth Sheehy: [\*The Supreme Court of Canada's Extreme Intoxication Decisions: Why We Should Care\*](#).

2. Discuss the implications and consequences of the ruling with survivors. Use accessible and plain language:

- "When someone violently hurts others, they may blame their action on the excessive amount of alcohol that they drank or drugs they took. They might say they would not have planned to hurt someone if they were sober. While the extreme intoxication defence may not find them criminally responsible, this does not mean that you are responsible for the serious violation and harm that was done to you."
- Think about the resources you are sharing with survivors to help them understand the ruling and its implications. Expand the scope of support and education from talk therapy to utilize diverse media platforms to ensure access to youth, survivors with disabilities, and those in rural, remote, and northern regions.



3. Many survivors wish to talk about their experiences of sexual violence but fear the reactions of others. Survivors often worry that they will not be believed or that their experience won't be taken seriously. Talk with survivors about their reactions to and feelings about the ruling:

- Invite survivor feelings and reactions: "Hearing about this ruling in the news must bring up a lot for you"; "What does it feel like when you hear people talking about this topic?"
- Connect survivors' reactions to their personal experiences: "What was your reaction when you heard about this ruling?"; "What did it mean to you as someone who has been sexually assaulted?"
- Where relevant, draw connections between the ruling and the contexts in which the survivor was harmed: "You were sexually assaulted in a situation where alcohol was present. How is this feeling for you?"
- Acknowledge that the ruling can be retriggering.

### Consider Angelia's Experience



Angelia lives with a disability and is gender non-binary, using the pronouns they/them.

Angelia shares with a sexual violence counsellor that they were raped by a friend, Jake. Jake claims not to remember what happened because he was high at the time. Angelia uses some self-blaming language when talking about the rape. For example, they tell the counsellor that they "should have been more careful," feel regret for staying on the scene where friends were using drugs, and shouldn't make "a big deal" of what happened since Jake was high and "did not mean to do it."

Angelia is uncertain about reporting to the police. Angelia believes they will not get justice because Jake may be able to use the "drunk excuse." Angelia also feels uncertain because Jake is their friend; they do not wish to punish someone for something he may not be responsible for. Last Angelia worries about the reporting experience: living with a disability and being non-binary, they doubt that people will believe them.

#### A supportive response for Angelia could include:

- Affirming who is responsible for what happened: "If someone is intoxicated when they do something harmful, they are still responsible for the harm. That's not on you."
- Clarifying what the extreme intoxication defence is and how it may be used.
- Affirming Angelia's experiences: "What happened *was* a big deal. It has had an impact on your life, and your friendship with Jake."
- Acknowledging Angelia's fear of lack of justice: "What happened to you was wrong. You deserve to be seen and heard. I believe you about what happened."
- Recognizing how individuals with disabilities and non-binary individuals face barriers to justice: "You are right, reporting what happened can be especially hard for some people. If you do choose to report, what do you think you will need to help you through it?"

4. Acknowledge that the ruling diminishes past legal victories protecting survivors of sexual assault. This can feel quite scary to vulnerable persons and populations, who, understandably, can fear a world that has less protections and less human rights.

- Provide trauma-informed supportive responses: “We all want to live in a world where crimes against us are seen, and those that harm us are held accountable. How do you feel, thinking about this legal ruling?”

5. Sexual violence survivors live in a world where they are affected by myths. Talk with survivors about the ruling and dispel sexual assault myths:

- Provide empathetic and trauma-informed culturally supportive responses to survivors who are seeking to understand the defence and may feel triggered.
- Normalize trauma symptoms: “Many sexual violence survivors experience fear or anxiety.”
- Acknowledge that seeking justice is harder for some communities and survivors. For example, Black, Indigenous, survivors of colour, and gender-diverse individuals face added complexities and concerns based on their multiple intersecting identities (e.g. ability, race, gender identity). These identities are at the root cause of negative experiences with systems and their reaction to the extreme intoxication defence.
- This history is felt acutely by Indigenous, racialized, and Trans survivors of sexual violence today: “This isn’t the first time that your community has faced a lack of justice. How is this feeling for you?”

**One in five women who experienced sexual assault share that someone made them feel responsible for their own victimization<sup>15</sup>**



6. Work to increase your comfort in hearing survivors' disappointment, sadness, and anger in the justice system. It is helpful for survivors to be able to name and talk about the limitations of these systems. Discussions like this can help to reduce feelings of revictimization and betrayal. They can also encourage us to think about recommendations for improving these systems in the future.

7. Remember that you too can advocate for improvements to how sexual violence is handled in the criminal justice system. Join local, provincial, territorial, and national organizations that are currently doing sexual violence advocacy!

**Actions you can take include:**



**Get involved with a local sexual assault centre**



**Donate to community-based organizations**



**Vote**



**Raise awareness**

## Please evaluate this Issue

Let us know what you think. Your input is important to us. Please complete [this brief survey](#) on your thoughts of this Issue

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## Endnotes

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- <sup>9</sup> Senn, C. n.d. *The Enhanced Assess, Acknowledge, Act (EAAA) Sexual Assault Resistance Program: ASSESS, Unit 1*, p. 16.
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