SCC File No. 35866

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

PAUL FRANCIS TATTON

Respondent

APPELLANT'S FACTUM
(ATTORNEY GENERAL FOR ONTARIO)

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PART I

STATEMENT OF FACTS

"Hi Janice, **I'm sorry but your house is fucking on fire** and I'm getting out of here. Good luck in the future. I hope your insurance comes through for you. Good night. I'm not an asshole, but I'm getting out of here. This place is shit."

- The respondent left this voicemail for his ex-girlfriend almost **an hour before he set her house on fire**

A. OVERVIEW

1. This is a Crown appeal as of right based on the dissenting judgment of Goudge J.A. of the Court of Appeal for Ontario. It raises a single question: Is the offence of arson contrary to section 434 of the *Criminal Code* a crime of general or specific intent? If arson[1] is a crime of general intent, evidence of an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is inadmissible and irrelevant to an assessment of *mens rea.* If arson is a crime of specific intent, evidence of an accused person's voluntary intoxication is admissible and relevant to an assessment of *mens rea.*

2. The majority of the Court of Appeal (Pardu and van Rensburg, JJ.A.) held that arson contrary to section 434 of the *Criminal Code* is a crime of specific intent. Goudge J.A., dissenting, held that arson is a crime of general intent. The Crown submits that Goudge J.A. is correct. For the reasons set out in his persuasive dissenting judgment, the Crown submits that this appeal should be allowed and a new trial ordered.

3. The question raised in this appeal is narrow. The general principles respecting voluntary intoxication and criminal liability are well-established. This Court has conclusively held that the distinction between crimes of general and specific intent is a well-embedded feature of Canadian criminal law. And this Court has conclusively held that for crimes of general intent, evidence of an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is inadmissible and irrelevant to an assessment of *mens rea.* The Court of

[1] The *Criminal Code* contains several arson-related offences. This case concerns arson causing damage to property, contrary to section 434 of the *Code* – referred to simply as "arson" in this factum.

Appeal for Ontario unanimously applied these well-established principles. They are not contested by the Crown or the respondent.

4. The sole question that divided the Court of Appeal for Ontario is whether arson contrary to section 434 of the *Criminal Code* is properly characterized as a crime of general or specific intent. This is an important question. Drunk people have been known to start fires, so the improper characterization of arson as a crime of specific intent will affect other arson prosecutions. And the reasoning of the majority of the Court of Appeal would arguably also lead to improperly characterizing many offences other than arson as crimes of specific intent to which an accused person's voluntary intoxication is admissible and relevant. This holding runs contrary to this Court's approach to defining a crime as one of specific or general intent. It is also bad criminal law policy.

B. THE FACTS

5. The respondent and Janice Spencer began dating in January, 2010. In March, 2010, the respondent moved in to Ms Spencer's Brockville home. Ms Spencer ended the relationship completely at the end of July, 2010, but she allowed the respondent to stay in her guest room while he looked for a new place to live. The respondent had trouble coming to terms with the fact that their relationship was over, hoping against all odds that Ms Spencer's feelings for him would be rekindled and he could remain in her life.

> *Agreed Statement of Facts*, Appellant's Record Volume II, pp. 136-137, paras. 5, 7-10
> *Testimony of Paul Tatton*, Transcript dated May 14, 2013, Appellant's Record Volume I pp. 119-120; Transcript dated May 15, 2013, Appellant's Record, Volume II, pp. 73, 91-92

6. On September 24, 2010, Ms Spencer told the respondent that she intended to visit friends in Kingston. The respondent, inflamed by jealousy, argued with her about leaving and accused her of going to Kingston to "fool around with other men." After she left, he drank and worked on some renovations to her home. Over the course of the night he repeatedly attempted to call her but she did not pick up the phone. He left her the following increasingly agitated and aggressive voice messages, including the prescient voicemail quoted above, in which he told her that her home was on fire when in fact it wasn't… yet:

9:54 p.m. from Ms Spencer's residence:

Hey butthead, I guess you're in Kingston and you're safe. Thanks for letting me know. Anyways, I'm having fun here working on the fireplace. So… ah… have fun this weekend, OK? I like you. Bye.

11:39 p.m. from Ms Spencer's residence:

Yeah, if it were anybody else but me, you'd call, but… anyways… [inaudible] trying to be negative. I just hope you got there alright and you're feeling good and … uhm … twenty to twelve… I'm listening to some old music and working on the fireplace, and uhm… **I won't hurt your house, honey**. I saw the way you looked at me before you left. Y'know, I'm not evil. I can love you and I can hate you in a heartbeat. I don't know why but after that there's no passion. So … anyway, bye.

11:57 p.m. from Ms Spencer's residence:

That's a fuckin' lie… thanks a lot for letting me know you got there all right. And it's funny how, ah, you left with your truck, and, ah, [inaudible] needed my help – borrowed my car. That's fine, honey. I don't know what's going on, but I hate you in a second and I love you even more. Thing is, there's no passion to, uh, compensate for that. You just, you just don't fuckin' care. I'm not trying to be ignorant and, uh … like I'm trying to fix your house up, so you get some value out of it, and uh, when I'm done, that's fine, **kick my ass out, cause I want the fuck out of here.** I'm quite happy tonight: you're not around. 'kay? Bye.

12:00 a.m. from Ms Spencer's residence:

Hi. Anyways, ah, I know you won't call me back 'cause you never do – you always lie and you say you will but you don't. Stay away as long as you can. **Your house is in good hands. I'm going to set everything up as best I can, and I'm fucking out of here 'cause I've had it with you.**

1:14 a.m. from Ms Spencer's residence:

Hi Janice, I'm sorry but **your house is fucking on fire** and I'm getting out of here. Good luck in the future. I hope your insurance comes through for you. Good night. I'm not an asshole, but I'm getting out of here. This place is shit.

1:17 a.m. from Ms Spencer's residence:

Janice, call me, I'm getting sick of trying to get ahold of you. **This is very important, but, ah, that's OK 'cause I'm a piece of shit**. [Inaudible], ah, you'd better call me.

1:18 a.m. from Ms Spencer's residence:

Yeah, Janice, give me a call. It's, ah, twenty after one or two … I can't see the clock right now. But ah, **I'm sure you've had your fill of telling everybody what an asshole I am. Well, you're going to find out**, bye.

Agreed Statement of Facts, Appellant's Record Volume II, pp. 137-139, para. 11
Testimony of Paul Tatton, Transcript dated May 14, 2013, Appellant's Record Volume I at pp. 155-157; Transcript dated May 15, 2013, Appellant's Record Volume II at pp. 104-110

7. After the respondent warned Ms Spencer that he was a "piece of shit" and that she would find out "what an asshole" he was, he set her house on fire. He set her house on fire almost an hour **after** he told her that her "house is fucking on fire". And before he set her house on fire he ransacked it. When firefighters attended, they discovered that prior to the fire, furniture and other belongings had been overturned and broken.

Agreed Statement of Facts, Appellant's Record Volume II, pp. 139, 141-142, paras. 13, 25

8. The respondent testified that prior to setting fire to Ms Spencer's house, he was feeling hurt and depressed about what had happened in their relationship. He said that he drank around 50 ounces of alcohol. He testified that he had no recollection of making the heated telephone calls to Ms Spencer. At some point in the evening he passed out. When he woke up he decided to cook some bacon. He put some oil in a pan and placed it on the stove. He turned the element on the stove to "high". He admitted that he would not normally need oil when cooking bacon, but testified that he used it on this occasion because the pan was "marked up".

Testimony of Paul Tatton, Transcript dated May 14, 2013, Appellant's Record Volume I, pp. 155-157; Transcript dated May 15, 2013, Appellant's Record Volume II, pp. 5-8, 38-39

9. The respondent testified that he then drove to a Tim Hortons, leaving behind the pan of oil on the hot burner on the stove. He returned fifteen to twenty minutes later. The kitchen at the back of the house was already full of flames. He went to a neighbour up the street to call the fire department. From the neighbour's house he left a further voice message for Ms Spencer in which he stated, "Yeah Janice? Your house is on fire. Please call me or do something … come here. Bye. Thank you."

Testimony of Paul Tatton, Transcript dated May 15, 2013, Appellant's Record Volume II, pp. 8-12, 21
Agreed Statement of Facts, Appellant's Record Volume II, p. 139, para. 11

10. The respondent gave a voluntary statement to the police in which he said that he had left the oil in the pan "on simmer" when he went to Tim Hortons thinking that "it would be alright". Fire investigators determined that the dial had, in fact, been left in the "high" position.

Reasons of Tausenfreund J., Appellant's Record Volume I, pp. 61-62
Agreed Statement of Facts, Appellant's Record Volume II, p. 141, para. 23

11. Fire investigators also confirmed that the fire had originated in the kitchen; the fire had not resulted from "any electrical or power failure or event, nor was the fire due to any malfunctioning of the stove itself"; and the first fuel that ignited in the residence was vegetable oil. Ms Spencer's home and its contents were completely lost in the fire.

Agreed Statement of Facts, Appellant's Record Volume II, p. 141, paras. 23-24; p. 140, para. 17

12. The respondent admitted that he knew of earlier instances in which he had caused the risk of fire in similar circumstances. He described instances in which he would go to the bar "all day and night" and return home hungry. He would put food on the stove or in the oven, pass out and not wake up until "the whole house was full of smoke." The respondent noted that he was lucky that "there was never a fire, thank God."

Testimony of Paul Tatton, Transcript dated May 14, 2013, Appellant's Record Volume I p. 142

13. The day after the fire, the respondent left a voice message for Ms Spencer in which he stated, "I'm sorry for what happened. It was an accident."

Reasons of Tausenfreund J., Appellant's Record Volume I, pp. 62-63
Testimony of Paul Tatton, Transcript dated May 15, 2013, Appellant's Record Volume II, p. 15

C. THE DECISION OF TAUSENFREUND J. OF THE SUPERIOR COURT OF JUSTICE FOR ONTARIO

14. The respondent was charged with intentionally or recklessly causing damage to Ms Spencer's property by fire, contrary to s. 434 of the *Criminal Code*. Section 434 states:

> Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

He was tried before Tausenfreund J. of the Superior Court of Justice for Ontario, without a jury.

Indictment, Appellant's Record Volume I, pp. 100-105

15. The trial judge was satisfied beyond a reasonable doubt that the house was Ms Spencer's property; that the damage was caused by the fire; and that the cause of the fire was ignition of the oil in the frying pan on the burner of the stove, which the respondent had left on "high". The only remaining issue was whether the respondent intentionally or recklessly caused the fire.

Reasons of Tausenfreund J., Appellant's Record Volume I, p. 64

16. The trial judge was satisfied that the respondent was "strongly under the influence of alcohol" when he caused the fire. To determine whether the respondent's intoxication was relevant to *mens rea*, the trial judge considered whether arson is a crime of general or specific intent. The law is well settled that for crimes of general intent, an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is inadmissible and irrelevant to an assessment of *mens rea*. Because there was no evidence that the respondent's intoxication rose to that extreme level, the trial judge reasoned (correctly) that intoxication could only be considered on the issue of *mens rea* if arson were a crime of specific intent.

Reasons of Tausenfreund J., Appellant's Record Volume I, pp. 65-68

17. The trial judge reviewed this Court's decision in *R. v. Daviault*, [1994] 3 S.C.R. 63 and concluded that the question of whether arson is a crime of general or specific intent is a question of fact. He decided that, considering the facts respecting how the fire started in this case, "this charge of arson" was a crime of specific intent. He therefore concluded that evidence of the respondent's intoxication was relevant. Taking the respondent's intoxication into account, he was not satisfied beyond a reasonable doubt that the respondent caused the fire either intentionally or recklessly. Accordingly, he acquitted the respondent.

Reasons of Tausenfreund J., Appellant's Record Volume I, pp. 65-70, 79-81

D. THE APPEAL TO THE COURT OF APPEAL FOR ONTARIO

18. The Crown appealed from the respondent's acquittal. The Crown argued that the trial judge had erred from the start by approaching the classification of arson as a crime of general or specific intent as a question of fact. Because his approach was mistaken, his conclusion was mistaken. The Crown argued that arson contrary to section 434 of the *Criminal Code* is always a crime of general intent, regardless of the factual circumstances in which the offence is alleged to have been committed. Given that arson is a crime of general intent, an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is inadmissible and irrelevant to an assessment of *mens rea*.

19. The respondent conceded these errors. He agreed that the trial judge had erred by approaching the classification of arson contrary to section 434 of the *Criminal Code* as a crime of general or specific intent as a question of fact. He also agreed that arson was a crime of general intent to which voluntary intoxication short of alcohol-induced automatism was irrelevant and inadmissible. The respondent focused solely on the test in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277: he argued that the Crown could not meet its burden of showing that the verdict would have been different but for these admitted errors.

Vézeau v. The Queen, [1977] 2 S.C.R. 277
R. v. Graveline, [2006] 1S.C.R. 609

20. The Court of Appeal for Ontario (Goudge, Pardu and van Rensburg, JJ.A.) unanimously held that the trial judge had erred in concluding that the characterization of a crime as one of general or specific intent turns on the facts of the particular case. However, the Court was split on whether, on a proper analysis, arson is a crime of general or specific intent and, accordingly, whether an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is admissible and relevant to an assessment of *mens rea*.

> *R. v. Tatton*, [2014] O.J. No. 1683 (C.A.), Appellant's Record Volume I, pp. 24-25, paras. 63-64 (Pardu J.A.); pp. 26, para. 67 (Goudge J.A.)

21. Pardu J.A., writing for herself and van Rensburg J.A., held that arson contrary to section 434 of the *Criminal Code* is a crime of specific intent, so she dismissed the Crown's appeal. Goudge J.A., dissenting, held that arson is a crime of general intent and that, accordingly, the trial judge had erred by considering the respondent's voluntary intoxication in his assessment of *mens rea.* He held that the Crown had met the test in *R. v. Vezeau* of showing that the verdict would have been different but for this error, so he would have allowed the appeal and ordered a new trial.

> *R. v. Tatton*, [2014] O.J. No. 1683 (C.A.) Appellant's Record Volume I, pp. 24-25, para. 64 (Pardu J.A.); pp. 35-36, paras. 91-93 (Goudge J.A.)

22. For the reasons set out below, the Crown submits that Goudge J.A. is correct. This appeal should be allowed and a new trial should be ordered.

PART II

POINTS IN ISSUE

23. This appeal raises the following issue:

Is the offence of arson, contrary to section 434 of the *Criminal Code,* a crime of general or specific intent?

24. The Crown submits that arson contrary to section 434 of the *Criminal Code* is a crime of general intent. Evidence of an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism is inadmissible and irrelevant to an assessment of the *mens rea* of the offence.

PART III

BRIEF OF ARGUMENT

A. THE GENERAL PRINCIPLES RESPECTING VOLUNTARY INTOXICATION AND CRIMINAL LIABLITY

25. This Court has addressed the general principles respecting voluntary intoxication and criminal liability on several occasions over the last 50 years.[2] By now these principles are well-established. The most recent and definitive statement is this Court's decision in *R. v. Daviault.* There, this Court traced the historical evolution of the law's treatment of voluntary intoxication as a defence and outlined the modern Canadian approach to the admissibility and relevance of evidence of voluntary intoxication to the issue of *mens rea.*

R. v. Daviault, [1994] 3 S.C.R. 63

26. This Court definitively held in *R. v. Daviault* that the well-established common law distinction between crimes of general and specific intent should remain a part of Canadian criminal law. This Court also affirmed that for crimes of general intent, evidence of an accused person's voluntary intoxication is usually inadmissible and irrelevant to an assessment of *mens rea.* However, Cory J., writing for the majority of this Court, carved out a "limited exception" to this rule in cases involving extreme intoxication akin to automatism. He held that in the very rare case in which an accused person commits a crime of general intent while in an extreme state of intoxication that calls into doubt whether the offence can even be considered the voluntary, volitional act of the accused, principles of fundamental justice require that the trier of fact consider the evidence of extreme intoxication in reaching a verdict.

R. v. Daviault, [1994] 3 S.C.R. 63 at paras. 4, 47

27. The correct approach to characterizing an offence as one of general or specific intent was also described in *R. v. Daviault.* Sopinka J. dissented in the result in *Daviault,* but his reasoning on this point was endorsed and supplemented by Cory J. for the majority. According to Sopinka J., the proper approach is based principally on a textual analysis aimed at identifying the

[2] See for example: *R. v. George,* [1960] S.C.R. 871*, R. v. Leary,* [1978] 1 S.C.R. 29, *R. v. Swietlinski,* [1980] 2 S.C.R. 956, *R. v. Chase,* [1987] 2 S.C.R. 293, *R. v. Bernard,* [1988] 2 S.C.R. 833, *R. v. Quin,* [1988] 2 S.C.R. 825, and *R. v. Daviault,* [1994] 3 S.C.R. 63.

elements of the offence, supplemented by policy considerations where a textual analysis results in uncertainty or a potentially inequitable outcome.

R. v. Daviault, [1994] 3 S.C.R. 63 at paras. 13 (per Cory J.), 110-122 (per Sopinka J.)

1) Textual Analysis

28. Crimes of general intent require only the intention to do that which constitutes the *actus reus* of the offence. By contrast, crimes of specific intent generally require the Crown to prove an additional, ulterior motive or intent beyond the intention to do that which constitutes the *actus reus*.

29. Because the distinction between crimes of general and specific intent turns on whether the *mens rea* of the offence extends beyond the *actus reus*, it is important to define the *actus reus* of an offence accurately. As Cory J. explained, the *actus reus* of an offence may consist of "committing a prohibited act, creating a prohibited state of affairs, or omitting to do that which is required by the law."[3] The "prohibited state of affairs" that may constitute part of the *actus reus* refers to the prohibited consequences of the prohibited act.[4] Because offences of general intent require only the intention to do that which constitutes the *actus reus*, they are those offences where no prohibited consequence is referred to as part of the offence, or, if one is referred to, it is part of the *actus reus* and must be realised before the crime is regarded as having been committed.

R. v. Bernard, [1988] 2 S.C.R. 833 at para. 78
R. v. Daviault, [1994] 3 S.C.R. 63 at para. 117
R. v. George, [1960] S.C.R. 871 at 877 (*per* Fauteux J.), at 890 (*per* Ritchie J.)
R. v. Purcell, 2007 ONCA 101 at paras. 12-19
R. v. Porter, 2012 ONSC 3504 at paras. 34-37
Glanville Williams, *Textbook of Criminal Law*, 1st ed., (London: Steven & Sons, 1978) at pp. 429-430; cited in UK Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability,* (London: HMSO, 1995) at p. 26, para. 3.18-3.19

30. Consider, for example, the offence of mischief to property contrary to section 430 of the *Criminal Code*. If an accused person is charged with mischief to property as a result of an

[3] *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 7. See also: *R. v. Creighton,* [1993] 3 S.C.R. 3.
[4] Sopinka J.'s judgment in *R. v. Daviault* confirms that prohibited consequences may form part of the *actus reus* of an offence: see paras. 100-104.

allegation that he threw a stone through a window, the prohibited act is the throwing of the stone, and the prohibited consequence is the resulting damage to property. The prohibited act and the prohibited consequence together constitute the *actus reus* of the offence; both must be proven beyond a reasonable doubt before the accused person may be found guilty. The *mens rea* for mischief to property does not extend beyond the *actus reus*; it extends only to the volitional performance of the prohibited act (throwing the stone) and the intentional or reckless causing of the prohibited consequence which is included within the *actus reus* (causing damage to the window). Accordingly, mischief to property is properly characterized as a crime of general intent.

*R. v. Schmidtk*e, [1985] O.J. No. 84 (C.A.)

31. As indicated earlier, crimes of specific intent are distinguishable from crimes of general intent because they generally require the Crown to prove an additional, ulterior motive or intent beyond the intention to do that which constitutes the *actus reus.* They are those offences whose intention goes beyond the intention to perform the prohibited act and to cause any prohibited consequence which is part of the *actus reus*. They include a requirement that an additional consequence be intended or foreseen without requiring that the consequence actually occur. Crimes of specific intent are often more serious than crimes of general intent. The further ulterior motive or purpose is often an important aggravating feature of the offence which distinguishes it from a lesser included general intent offence.

R. v. Bernard, [1988] 2 S.C.R. 833 at para. 78
R. v. Daviault, [1994] 3 S.C.R. 63 at para. 117
R. v. Quin, [1988] 2 S.C.R. 825
R. v. Swietlinksi, [1980] 2 S.C.R. 956
R. v. Chase, [1987] 2 S.C.R. 293
*R. v. Schmidtk*e, [1985] O.J. No. 84 (C.A.)
R. v. Morgan, [1975] 2 All E.R. 347 at 363; cited with approval by the Court of Appeal for Ontario in *R. v. A.E.,* [2000] O.J. No. 2984 (C.A.) at para. 22
R. v. Fraser, [1984] B.C.J. No. 1692 (C.A.) at paras. 13, 16
Glanville Williams & Dennis J. Baker, *Textbook of Criminal Law,* 3d ed. (London: Sweet & Maxwell, 2012) at pp. 666-676

32. Consider, for example, the offence of assault with intent to resist or prevent arrest contrary to section 270(1)(b) of the *Criminal Code*. The *actus reus* is simply the prohibited act that constitutes an assault. The *mens rea* extends beyond the intentional performance of this

prohibited act to include the additional, ulterior purpose of resisting or preventing arrest. The Crown need not prove, as part of the *actus reus*, that the assault actually resisted or prevented an arrest, so the *mens rea* extends beyond any prohibited consequence included within the *actus reus*. Accordingly, the offence of assault with intent to resist or prevent arrest is a crime of specific intent. Assault *simpliciter* is a lesser included crime of general intent.

R. v. Daviault, [1994] 3 S.C.R. 63 at para. 117

33. Based on this textual analysis, offences whose *mens rea* may be established by proof of recklessness are necessarily crimes of general intent. Because offences of specific intent are generally offences with an ulterior motive which extends beyond the intention to perform the prohibited act and to cause any prohibited consequence which is part of the *actus reus*, a person accused of such an offence must have an actual intention to cause the additional consequence – for example, the intention to resist or prevent arrest by committing an assault. But when a person commits an offence recklessly, he does not have any specified and proscribed intention, let alone an actual intention to cause an additional consequence. He merely knows of the probable consequences of the act and commits the act in the face of those consequences. No deliberate intention is required, ulterior or otherwise.

R. v. Creighton, [1993] 3 S.C.R. 3 at para. 110

34. Because offences that may be committed recklessly are necessarily crimes of general intent, an accused person's voluntary intoxication should not be considered in an assessment of recklessness.[5] How is this rule applied in practice? Criminal recklessness denotes the attitude of one who foresees that his conduct may bring about a consequence prohibited by a criminal offence but, nevertheless, takes an unjustifiable risk of bringing it about. It is the conduct of one who sees the risk and who takes the chance. To say that drunkenness should not be considered

[5] To say that an accused person's voluntary intoxication should not be considered in an assessment of recklessness is to say that an accused person's voluntary intoxication is never an excuse. However, an accused person's voluntary intoxication may in some cases contribute to proof of recklessness, and thereby support the Crown's case. In the present case, for example, there was evidence that the respondent knew of earlier instances in which he had caused the risk of fire in similar circumstances: he described instances in which he came home after drinking all day at a bar and started cooking a meal, only to pass out and then later wake up with the house full of smoke (see paragraph 12, above). This evidence was capable of supporting the conclusion that the respondent's decision to cook bacon while home alone drunk was reckless. See: *R. v. Anderson,* [1985] M.J. No. 70 (C.A.) at paras. 16-21 (rev'd on other grounds); [1990] 1 S.C.R. 265 at paras. 18-21; See also: *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 39.

in an assessment of recklessness is to say that one should not ask whether the accused person, in his drunken state, saw the risk and took the chance. Rather, one should ask whether the same accused person would have seen the risk had he been sober. For crimes of general intent, the law holds the drunken accused person to the standard of prudence to which we hold those who are sober.

> *R. v. Muma,* [1989] O.J. No 1520 (C.A.)
> *R. v. Sansregret,* [1985] 1 S.C.R. 570 at para. 21
> *R. v. Lawrence,* [1981] 1 All ER 974 at 982 per Lord Diplock; cited in *R. v. G. and another,* [2003] UKHL 50 at para. 21 per Lord Bingham of Cornhill
> *Attorney General for Northern Ireland v. Gallagher,* [1963] A.C. 349 at 380-381 per Lord Denning; cited with approval in *R. v. Perrault,* [1971] S.C.R. 196
> Glanville Williams, *Textbook of Criminal Law,* 1st ed., (London: Steven & Sons, 1978) at p. 431; cited in *R. v. Caldwell* [1981] 1 All ER 961 per Lord Edmund-Davies

35. Treating an accused person's voluntary intoxication short of alcohol-induced automatism as irrelevant to whether he is criminally reckless does not transform a subjective *mens rea* element into an objective one. The question remains whether the particular accused person would have foreseen that his conduct may bring about the consequence prohibited by the offence but, nevertheless, took an unjustifiable risk of bringing it about. The requisite knowledge may still be inferred directly from what the particular accused person indicates about his mental state, or indirectly from the nature of the act and its consequences – in other words, all available evidence except the evidence of intoxication. A particular accused person who would not have foreseen the prohibited consequence had he been sober, notwithstanding that a reasonable person would have foreseen the risk, will not be reckless so as to satisfy the requisite subjective *mens rea*.

> *R. v. Creighton,* [1993] 3 S.C.R. 3 at para. 110
> *R. v. G. and another,* [2003] UKHL 50

36. These principles respecting recklessness and voluntary intoxication have been recognized and applied repeatedly by several high authorities in Canada, the United Kingdom and the United States. For example:

- ***R. v. Schmidtke,* [1985] O.J. No. 84 (C.A.):**
  In *R. v. Schmidtke,* the Court of Appeal for Ontario held that mischief to property is a crime of general intent to which voluntary intoxication affords no defence. In reaching

this finding, the Court reasoned that the offence of mischief to property is made out if the Crown establishes that an accused person intentionally or recklessly destroys or damages property. The Court held, "… the introduction of recklessness as an element of the offence results in mischief being properly classified as an offence of general and not specific intent. …"

R. v. Schmidtke, [1985] O.J. No. 84 (C.A.)

- ***R. v. Muma,* [1989] O.J. No. 1520 (C.A.):**

  R. v. Muma was an unlawful act manslaughter case in which the unlawful act giving rise to the victim's death was an alleged arson.[6] The trial judge had charged the jury that in order to prove the arson, the Crown had to show that the fire was "willfully" and "intentionally" set. The accused was acquitted and the Crown appealed. The Court of Appeal for Ontario held that the trial judge had erred by failing to charge the jury that the mental element for arson included recklessness. The Court quoted from *R. v. Schmidtke* and confirmed that the introduction of recklessness as an element of the offence results in the offence being properly characterized as one of general intent. The Court held that, accordingly, the jury should have been instructed that "evidence of intoxication would be irrelevant to the issue of recklessness…"

  R. v. Muma, [1989] O.J. No. 1520 (C.A.)

- ***R. v. Caldwell*, [1981] 1 All ER 961:**

  In *R. v. Caldwell* (a case of reckless arson), Lord Diplock delivered a speech to the House of Lords in which he stated:

  > [The respondent's] act of setting fire to [a hotel] was one which the jury were entitled to think created an obvious risk that the lives of the residents would be endangered; and the only defence with which your Lordships are concerned is that the respondent had made himself so drunk as to render him oblivious of that risk. …
  >
  > The speech of Lord Elwyn-Jones LC in *Majewski*, with which Lord Simon, Lord Kilbrandon and I agreed, is authority that self-induced intoxication is no defence

[6] Mr. Muma was charged with second murder. He was acquitted after trial and the Crown appealed to the Court of Appeal for Ontario. On appeal, the Crown sought an order for a new trial only on the lesser included offence of manslaughter.

> to a crime in which recklessness is enough to constitute the necessary mens rea. … Reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime. …
> So, in the instant case, the fact that the respondent was unaware of the risk of endangering the lives of residents in the hotel owing to his self-induced intoxication would be no defence if that risk would have been obvious to him had he been sober.
>
> *R. v. Caldwell*, [1981] 1 All ER 961

- ***R. v. G. and another*, [2003] UKHL 50:**

  In *R. v. G. and another*, Lord Bingham of Cornhill delivered a speech to the House of Lords in which he stated:

  > The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and inacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (**for reasons other than self-induced intoxication** (see *DPP v. Majewski*) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment. [emphasis added; citations omitted]
  > …
  >
  > … one instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others" – a risk that would have been obvious to the defendant had he been sober. [emphasis added]
  >
  > *R. v. G. and another*, [2003] UKHL 50 at para. 32

- **2009 UK Law Commission Report on Intoxication and Criminal Liability:**

  In a 2009 Report on Intoxication and Criminal Liability, the UK Law Commission unambiguously held:

  > … Recklessness is not regarded as a "specific intent". So, D [defendant] is considered to have been reckless … if, though the relevant risk was not foreseen by D on account of voluntary intoxication, D would have foreseen that risk if D had not been voluntarily intoxicated.
  > …
  > … subjective recklessness need not be proved if D would have been aware of the relevant risk of harm if D had not been voluntarily intoxicated.

UK Law Commission, *Intoxication and Criminal Liability*, (London: HMSO, 2009) at paras. 1.43, 1.60

- **1995 UK Law Commission Report on Intoxication and Criminal Liability:**

  In an earlier 1994 Report, the UK Law Commission recommended codification of the law respecting intoxication and criminal liability, including clarification that intoxication should not be considered in an assessment of recklessness. The Commission recommended that when an offence alleges recklessness, "a voluntarily intoxicated defendant should be treated as having been aware of anything of which he would have been aware but for his intoxication".

  Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability,* (London: HMSO, 1995) at paras. 1.34, 3.22; 6.34

- **American Law Institute Model Penal Code:**

  The American Law Institute Model Penal Code provides that::

  > When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of the risk of which he would have been aware had he been sober, such unawareness is immaterial.

  American Law Institute, *Model Penal Code,* (Philadelphia.: The Institute, 1980-1985) at s. 2.08(2)
  See also: *Montana v. Egelhoff,* 518 US 37 (1996)

2) Policy Implications

37. As indicated earlier, a textual analysis may not definitively answer whether an offence should be classified as one of general or specific intent. Where uncertainty arises, it is resolved by assessing the policy implications of characterizing the offence one way or the other. In *R. v. Daviault,* Sopinka J. identified two complementary policy considerations that may be engaged. First, the court should consider whether the offence is of a type that persons who are drunk are apt to commit. If it is, making voluntary intoxication a defence would defeat the policy behind the offence. Second, the court should consider the importance of the mental element to the offence. If the mental element is an important feature that distinguishes the offence from other less serious offences, it may be appropriate to characterize the offence as one of specific intent

and to permit the trier of fact to consider an accused person's voluntary intoxication in its assessment of *mens rea*.

R. v. Daviault, [1994] 3 S.C.R. 63 at paras. 113-118 (Sopinka J.)

38. A textual analysis may also lead to an inequitable outcome due to the serious nature of the offence and the penalty facing the accused person upon conviction. In such circumstances, the serious offence may be deemed to be a crime of specific intent even if a textual analysis suggests otherwise. The clearest example is murder. On a pure textual analysis, murder would be classified as a crime of general intent. The *actus reus* of murder is comprised of a prohibited act (say, an assault), and a prohibited consequence (the death of the victim). The *mens rea* extends only to the intentional doing of the prohibited act and the intentional causing of the prohibited consequence. There is no additional ulterior purpose or motive that must be proven. Nevertheless, as a matter of policy murder has always been classified as a crime of specific intent. Sopinka J. explained this policy decision as follows:

> In addition to the ulterior intent offences there are certain offences which by reason of their serious nature and the importance of the mental element are classed as specific intent offences notwithstanding that they do not fit the criteria usually associated with ulterior intent offences. The outstanding example is murder. This is the most serious of criminal offences which carries a fixed penalty. By reason of the importance of the required mental element and the fixed penalty, this offence is classified as a specific intent offence. The defence of drunkenness is allowed so as to reduce the crime to manslaughter tempering the harshness of the law which precludes drunkenness as a consideration as to sentence. The classification of murder as a specific intent offence illustrates the proper application of policy in a case in which the application of the normal criteria might lead to a different result.
>
> *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 118 (Sopinka J.)

3) The Success of *Daviault's* Approach

39. Because *Daviault's* approach to classifying an offence as one of general or specific intent is not based exclusively on pure deductive logic, it will not always generate the purest of logical results. But the surest test of a legal rule is not whether it satisfies a team of logicians; it is how

it performs in the real world.[7] History shows that *Daviault's* approach performs well in the real world:

- ***Daviault's* approach is not prone to generating inequitable outcomes:**
  Evidence of an accused person's voluntary intoxication which does not rise to the extreme level of alcohol-induced automatism will rarely be logically relevant to the basic *mens rea* of a crime of general intent. Given the minimal nature of the mental element often required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite *mens rea* and will be found to have acted voluntarily. For this reason, precluding consideration of voluntary intoxication in crimes of general intent does not work an unfairness to an accused person.

  > *R. v. Bernard*, [1988] 2 S.C.R. 833 at para. 82 (per Wilson J.)
  > *R. v. Daviault*, [1994] 3 S.C.R. 63 at para. 59 (per Cory J.), para. 116 (Sopinka J.)

- ***Daviault's* approach has strong policy underpinnings:**
  These policy underpinnings have, as Sopinka J. observed in *Daviault*, "permitted it to survive for over 150 years in England and to be adopted in Canada and most states of the United States" despite the criticisms that have been leveled against it.

  The courts across Canada and throughout the United Kingdom have decisively held that the public must be protected from offences committed by accused persons who are intoxicated. This principle was set out by the House of Lords over 40 years ago in *DPP v. Majewski* and it has been repeated many times since. For example, the England and Wales Court of Appeal recently remarked that "the law refuses as a matter of policy to afford a general defence to an offender on the basis of his own voluntary intoxication. The pressing social reasons for maintaining this general policy of the law are certainly no less present in modern conditions of substance abuse than they were in the past." And in 2009, the UK Law Commission reached the following conclusion having conducted a scholarly and comprehensive review of the subject:

[7] Paraphrasing Lord Steyn in *R. v. G. and another,* [2003] UKHL 50 at para. 57 in a passage respecting the legal test for recklessness.

> Whatever strict legal logic might dictate, we suspect that most people would agree, as we do, with Professor Glanville Williams' observation that, "it would be inimical to the safety of all of us if the judges announced that anyone could gain exemption from the criminal law by getting drunk". In this area of the law, concerns about public safety need to be taken into consideration, even if they offend against subjectivists' logical arguments.
>
> *R. v. Daviault*, [1994] 3 S.C.R. 63 at para. 112 (per Sopinka J.)
> *DPP v. Majewski*, [1976] 2 All ER 142
> *R. v. Coley; R. v. McGhee; R. v. Harris*, [2013] EWCA Crim 223 at para. 17
> UK Law Commission, *Intoxication and Criminal Liability*, (London: HMSO, 2009) at para. 1.54
> Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability*, (London: HMSO, 1995) at paras. 1.14-1.21

- ***Daviault's* approach serves the purposes underlying many general and specific intent offences:**

  As Sopinka J. explained in *Daviault*, crimes of general intent are "generally offences that persons who are drunk are apt to commit and it would defeat the policy behind them to make drunkenness a defence." By contrast, crimes of specific intent are generally offences that include a subjective mental element that extends beyond the *actus reus* and forms an important part of the offence which enhances its culpability. *Daviault's* approach takes the purposes of both categories of offences into account. It limits consideration of intoxication in those cases where public order demands it, and it allows consideration of intoxication where it is required to assess the true gravamen of the offence.

  R. v. Daviault, [1994] 3 S.C.R. 63 at para. 116 (per Sopinka J.)

- ***Daviault's* approach tempers potential harshness by allowing for exceptions:**

  In cases like murder where the equities favour a consideration of an accused person's voluntary intoxication, *Daviault's* approach permits it. For reasons set out below, the Crown submits that the offence of arson contrary to section 434 of the *Criminal Code* is plainly not such a case.

B. ARSON IS A CRIME OF GENERAL INTENT

40. Arson is a crime of general intent. Both lines of the inquiry mandated by *R. v. Daviault* make this clear.

1) Textual Analysis

41. The plain wording of section 434 of the *Criminal Code* creates an offence of general intent. As indicated earlier, section 434 states:

> Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

42. The *mens rea* of section 434 does not extend beyond the *actus reus*. The *actus reus* consists of a prohibited act (an act that causes a fire or explosion) and a prohibited consequence (causing damage to another person's property by fire or explosion). Both must be proven beyond a reasonable doubt before the accused person may be found guilty. The *mens rea* extends only to the volitional performance of the prohibited act and the intentional or reckless causing of the prohibited consequence which is included within the *actus reus*. The Crown need not prove any ulterior motive beyond the intention to perform the act that causes the fire or explosion and the intentional or reckless causing of damage to property. The offence does not require the Crown to prove, for example, that the accused person caused damage by fire or explosion for a fraudulent purpose (section 435) or possessed incendiary material for the purpose of committing another arson offence (section 436.1) – both of which, on a plain reading, include ulterior motives or purposes that the Crown is obliged to prove, and both of which are thereby properly characterized as crimes of specific intent.

R. v. Daviault, [1994] 3 S.C.R. 63 at paras. 113-118

43. The fact that the *mens rea* of arson contrary to section 434 of the *Criminal Code* may be established by proof of recklessness confirms that the offence is properly characterized as one of general intent. As indicated earlier, there is a long line of authority, both within Canada and abroad, that makes it clear that the introduction of recklessness as the *mens rea* of an offence necessarily implies that the offence is one of general intent to which an accused person's voluntary intoxication short of alcohol-induced automatism is irrelevant and inadmissible.

2) Policy Considerations

44. Social policy considerations weigh in favour of classifying arson as an offence of general intent.

45. Permitting voluntary intoxication short of alcohol-induced automatism to afford a defence to arson would undermine the social policy of making arson an offence in the first place. Drunk people have been known to set fires recklessly. Drunk people are more likely to discard cigarettes recklessly, to mishandle lighters recklessly, and to walk away from pans of oil heating on the stove. It would be bad policy to permit their drunkenness to ground a defence when their reckless behaviour, stemming from their drunkenness, is exactly the kind of social ill that Parliament has chosen to target with this offence.

> *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 116 (Sopinka J.)
> *Blackstone v. Bentham,* (1976) 92 L.Q.R. 516 at 525-526, quoted in *R. v. Bernard,* [1988] 2 S.C.R. 833 at para. 65

46. In addition, arson is not so serious an offence that it would be inequitable to preclude consideration of voluntary intoxication in an assessment of *mens rea.* Section 434 appears in Part XI of the *Criminal Code,* which contains property offences, not offences of violence against the person. Arson does not carry nearly the same social stigma as murder. Unlike murder, arson's penalty is flexible, not fixed, and no mandatory minimum penalty applies. Arson is often a less serious offence than sexual assault, which this Court and others have held is properly characterized as an offence of general intent.

> *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 118 (Sopinka J.)
> *R. v. Bernard,* [1988] 2 S.C.R. 833 at paras. 66-67 (McIntyre J.), at para. 82 (Wilson J.)
> *R. v. Heard,* [2007] 3 All ER 306 at 315-316

3) Supporting Authorities

47. The authorities support the conclusion that arson is a crime of general intent.

48. As indicated earlier, in *R. v. Muma,* the Court of Appeal for Ontario held that arson is a crime of general intent to which an accused person's voluntary intoxication is irrelevant and inadmissible. *Muma* was decided in 1989, at which time the offence of arson was worded

differently than the present section 434 of the *Criminal Code.* But the difference does not affect the application of *Muma* to section 434 of the *Criminal Code.* Then, as now, the *mens rea* for arson was satisfied by proof of recklessness. Then, as now, this resulted in the offence being properly characterized as one of general intent.

R. v. Muma, [1989] O.J. No. 1520 (C.A.)
See also: *R. v. Buttar*, [1989] 2 S.C.R. 1429

49. *R. v. Muma* followed the Court of Appeal for Ontario's earlier decision in *R. v. Schmidtke,* in which the Court concluded that the offence of mischief to property was a crime of general intent. This finding applies equally to the offence of arson contrary to section 434 of the *Criminal Code.* Arson contrary to section 434 of the *Criminal Code* is nothing more than a specific kind of mischief to property in which the cause of damage to property is fire or explosion. Both the textual analysis and the policy considerations outlined in *Daviault* support the conclusion that if, as the Court of Appeal for Ontario held in *Schmidtke*, the offence of mischief to property is crime of general intent, so too is the crime of arson. Moreover, as the Court of Appeal for Ontario observed in *Schmidtke,* "it would be anomalous in the extreme to find that while the respondent's drunkenness would afford him no defence had he assaulted someone, it affords him a complete defence when he destroys or damages property". This observation remains true regardless of whether the destruction or damage to property occurs as a result of fire or explosion or some other cause.

*R. v. Schmidtk*e, [1985] O.J. No. 84 (C.A.)
See also:
R. v. Dahl, [2006] S.J. No. 115 (Prov. Ct.)
R. v. J.B., [2005] A.J. No. 266 (Prov. Ct.)
R. v. Toma, [2000] B.C.J. No. 1804 (C.A.) – citing *Schmidtke* and agreeing that mischief to property is a general intent offence
R. v. St. Pierre, [1987] S.J. No. 630 (C.A.) – citing *Schmidtke* and agreeing that mischief to property is a general intent offence
R. v. Jacobson, [1987] N.W.T.J. No. 164 at paras. 14-25 (C.A.)

50. The UK authorities support the holdings in *R. v. Muma* and *R. v. Schmidtke. R. v. Caldwell* was a case of reckless arson. The House of Lords concluded that the offence of arson is a general intent offence to which voluntary intoxication affords no defence. This holding was affirmed in 2003 by the House of Lords in *R. v. G. and another*.

R. v. Caldwell [1981] 1 All ER 961
R. v. G. and another, [2003] UKHL 50

51. Authority in Australia is the same. In 1980, the High Court of Australia delivered its controversial decision, *R. v. O'Connor,* abolishing the distinction between crimes of general and specific intent and holding that voluntary intoxication is admissible and potentially relevant to an assessment of the *mens rea* for all offences. Subsequently, several Australian states passed legislation reversing *R. v. O'Connor* in whole or in part. New South Wales, for example, passed legislation in 1996 limiting the admissibility and relevance of evidence of voluntary intoxication to crimes of specific intent. The legislation provides that a crime of specific intent is "an offence of which an intention to cause a specific result is an element". Some 60 examples of offences of specific intent are set out in a table. Notably, the New South Wales equivalent of arson contrary to section 434 of the *Criminal Code* is absent from this list, and the arson offences with an added mental element beyond intentionally or recklessly causing damage by fire or explosives (such as destroying or damaging property by means of fire or explosives with intent to injure a person) are included.

R. v. O'Connor, [1980] HCA 17
See also:
R. v. Coley; R. v. McGhee; R. v. Harris, [2013] EWCA Crim 223
R. v. Cullen, [1993] Crim LR 936
Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication,* (Melbourne: Govt. Printer, May 1999) at paras. 3.16-3.21, 3.29
Criminal Legislation Amendment Act 1996 No 6 (NSW), Schedule 1, pp. 14-20
Crimes Act 1900 No 40 (NSW), ss. 195-200; 428B(2)

52. There is some authority that contradicts these authorities. In particular, there is an older decision of the Yukon Territory Court of Appeal, called *R. v. Swanson*, in which the Court held that arson is a crime of specific intent. There are many reasons that this Court should not follow *R. v. Swanson*. First, it is contradicted by the persuasive judgments of the Court of Appeal for Ontario in *Muma* and *Schmidtke*, and with widespread international consensus. Second, in deciding *Swanson* the Court did not refer to the earlier contrary decision in *Schmidtke* (*Muma* had not yet been decided). Third, the decision turns on the precise wording of the offence of arson as it then existed, and the offence has since been amended to expressly refer to "recklessness" as an available mental element. Fourth, the decision pre-dates *R. v. Daviault*, in

which this Court clarified the proper approach to determining whether an offence is one of general or specific intent, and in which this Court confirmed that voluntary intoxication short of alcohol-induced automatism affords no defence to an offence of general intent. Fifth, at least one court (the British Columbia Provincial Court) has declined to rely on *Swanson*, citing *Schmidtke* and other contradictory appellate authority in British Columbia.

> *R. v. Swanson*, [1989] Y.J. No. 194 (C.A.)
> See also:
> *R. v. Dominic*, [2009] B.C.J. No. 949 (Prov. Ct.) at paras. 67-75 – declining to follow *Swanson*
> *R. v. O'Brien,* [2002] Y.J. No. 61 (Terr. Ct.) at para. 20 – applying *Swanson*
> *R. v. S.D.D.*, [2002] N.J. No. 79 (C.A.) at para. 25
> *R. v. Jim*, [1999] B.C.J. No. 2619 (Prov. Ct.) at paras. 27-33 – applying *Swanson*
> *R. v. Hudson*, [1993] M.J. No. 609 (C.A.) at para. 13 – stating, without citing any cases, that intoxication may be relevant to a reckless arson
> *R. v. Evans*, [1981] B.C.J. No. 398 (County Ct.)

C. THE TRIAL JUDGE'S ERRONEOUS CONCLUSION THAT ARSON IS A CRIME OF SPECIFIC INTENT

53. The Court of Appeal for Ontario unanimously held that the trial judge's approach to characterizing arson as a crime of specific intent was flawed. The Crown submits that it was correct to do so. The trial judge's approach runs contrary to the approach established in *Daviault* and is unworkable in practice.

54. The trial judge approached the question of whether arson is a crime of general or specific intent as a question for the trier of fact, which is dependent on the factual circumstances in which the particular fire underlying a charge was started:

> … In my view, a charge of arson under s. 434 of the *Criminal Code of Canada* be [*sic*] either a general intent or a specific intent charge depends [*sic*] entirely on the circumstances and the fact of how the fire started. A fire might be started with a match and obvious combustible material such as paper, or gasoline. If damage then results, a charge of arson based on such facts would likely be a crime of general intent. However, with [*sic*] the start of the fire is more nuanced, it may well be that the trier of fact might conclude that in such circumstances the charge of arson might be seen as a crime of specific intent. The question in the latter case then becomes whether the drunkenness of the accused is such that it raised a reasonable doubt whether he or she had the necessary mental capability to connect the dots such that the actions in question would likely cause damage to property. [emphasis added]
>
> *Reasons of Tausenfreund J.,* Appellant's Record Volume I, pp. 68-70

55. This approach is wrong in law. It appears that the trial judge arrived at this erroneous approach through a misinterpretation of a line from Sopinka J.'s judgment in *R. v. Daviault*, taken out of context. Sopinka J. stated in *Daviault* that, in classifying an offence as one of general or specific intent, a court ought to examine whether that classification serves the public interest "in a particular case" [emphasis added]. The trial judge appears to have read "in a particular case" to mean "with regard to the particular facts underlying a particular charge." That is an incorrect interpretation of *Daviault.* Sopinka J. was speaking about the "case" of each different criminal offence (e.g. assault, sexual assault, murder), not each factual scenario underlying a particular charge in a particular case. This becomes clear from reading the *Daviault* judgment as a whole. A few paragraphs earlier Sopinka J. stated that the "classification of specific and general intent offences has occurred on a case-by-case basis" because "the mental element for various crimes varies from crime to crime and must frequently be implied from the nature of the offence and the wording of the statute…" [emphasis added]

> *R. v. Daviault,* [1994] 3 S.C.R. 63 at paras. 115; 121 (para. 121 quoted in *Reasons of Tausenfreund J.,* Appellant's Record Volume I, p. 68)

56. The trial judge's conclusion that the "the trier of fact" determines whether the offence should be classified as one of general intent or specific intent also contradicts *R. v. Daviault's* textual and policy-based approach to this classification. The textual analysis described in *Daviault* involves examining the wording of the offence itself. This is a question of law involving the principles of statutory interpretation. The secondary policy analysis described in *Daviault* involves defining the mental element having regard to the "social policy sought to be attained by criminalizing the particular conduct." Again, this is a question of law. Contrary to the trial judge's approach, neither consideration has anything to do with the factual foundation of a particular charge. Both considerations raise legal questions that fall outside the purview of the trier of fact.

> *R. v. Daviault,* [1994] 3 S.C.R. 63 at paras. 113-118

57. The trial judge's approach is also unworkable in practice. Short of extreme intoxication akin to automatism, voluntary intoxication is no defence to offences of general intent. It follows that the parties will only know whether voluntary intoxication short of alcohol-induced

automatism may afford a defence to an accused person when they know whether the offence with which the accused person is charged is one of general or specific intent. But if the trial judge were correct, this determination could not be made until the factual circumstances of the case are known, which often will not be until the evidence has been heard. So, on the trial judge's approach, the parties may not know whether drunkenness is a potential defence until the end of the case, by which point it may be too late to lead evidence either supporting or rebutting the defence. This is a circular approach: the evidence led will reveal the nature of the offence, which will reveal what evidence is relevant and needs to be led. And in a jury trial, the jury would have to be instructed that drunkenness may or may not constitute a defence, depending on the facts found by the jury. The jury would have to interpret for itself what the mental element of the offence is and, by implication, what evidence is relevant to its assessment of that mental element, at the same time as it considers whether the Crown has proved the mental element beyond a reasonable doubt.

D. THE ERRONEOUS APPROACH OF THE MAJORITY OF THE COURT OF APPEAL FOR ONTARIO

58. Pardu J.A. (van Rensburg J.A. concurring) developed six points in support of her conclusion that arson is a crime of specific intent. The Crown respectfully submits that these points are not compelling.

1) The Relevance of Intoxication to Crimes of General Intent

59. Pardu J.A. held that voluntary intoxication may be relevant to an assessment of the *mens rea* for arson. It appears that she reasoned that this favoured classifying arson as a crime of specific intent. She held that it is not necessarily the case that an intoxicated person who starts a fire does so intentionally or recklessly, with foresight of the risk that a fire will start as a result of his actions. She also noted that, in some cases, excessive consumption of alcohol may actually support a finding of recklessness, which shows that "voluntary intoxication would be relevant to those circumstances". She distinguished arson from assault, the paradigmatic crime of general intent, on the basis that it is difficult to imagine a drunken accidental assault, but accidental fires are common.

R. v. Tatton, [2014] O.J. No. 1683 (C.A.), Appellant's Record, Volume I at pp. 15-16, paras. 41-43

60. Pardu J.A. also held that, in light of the potential relevance of intoxication to *mens rea*, if evidence of an accused person's voluntary intoxication were not taken into account in assessing *mens rea*, the subjective *mens rea* component of the offence of arson would be replaced with an "objective mental element" which would focus not on "what was actually in [the respondent's] mind" at the time of the fire, but rather on "what the respondent would have foreseen had he been sober".

R. v. Tatton, [2014] O.J. No. 1683 (C.A.) Appellant's Record, Volume I at pp. 23-24, paras. 58-61

61. There are at least five reasons that this analysis is flawed.

62. First, Pardu J.A.'s analysis runs contrary to *R. v. Daviault*'s approach to classifying a crime as one of general or specific intent. According to *Daviault*, the potential logical relevance of voluntary intoxication to the *mens rea* of an offence does not determine whether the offence should be classified as one of general or specific intent. As indicated earlier, *Daviault* affirmed a textual and policy-based approach to designating offences one way or the other.

63. Second, Pardu J.A.'s analysis would make the distinction between general and specific intent offences redundant. If, as Pardu J.A.'s analysis implies, the logical relevance of evidence of voluntary intoxication leads to classifying an offence as one of specific intent, the distinction between general and specific intent offences would be unnecessary. Juries would simply be instructed to consider voluntary intoxication whenever it is relevant and to disregard it whenever it is irrelevant.

64. Third, Pardu J.A.'s distinction between arson and assault is overly simplistic. The offence of assault encompasses many factual scenarios, far more complex than the simple throwing of a punch, in which voluntary intoxication may be logically relevant to an assessment of *mens rea*. Consider, for example, a drunken hooligan who hurls an empty bottle across a crowded bar intending to smash it against a wall. Instead of hitting the wall, the bottle hits

another patron, causing serious injuries. In his drunken state, the hooligan may not have appreciated the risk of striking the patron, but if he had been sober he most certainly would have. On these facts, the hooligan's voluntary intoxication could be logically relevant to an assessment of his recklessness, yet as a matter of good social policy the law prevents the trier of fact from considering it. Similarly, an accused person's voluntary intoxication may be logically relevant to a sexual assault where the accused person's subjective appreciation of the victim's lack of consent is at issue, but this Court has conclusively held that sexual assault is nonetheless a general intent offence to which evidence of voluntary intoxication short of alcohol-induced automatism is irrelevant and inadmissible.

R. v. Bernard, [1988] 2 S.C.R. 833 at paras. 66-67 (McIntyre J.), para. 82 (Wilson J.)

65. Fourth, because intoxication may be logically relevant to an accused person's subjective appreciation of the foreseeable risk of his actions, Pardu J.A.'s reasoning compels the conclusion that intoxication should be considered when recklessness suffices as the *mens rea* of an offence. This conclusion reverses the long line of authorities, described earlier, holding that offences whose *mens rea* may be established by proof of recklessness are necessarily crimes of general intent.

66. Fifth, Pardu J.A. was wrong to conclude that the subjective *mens rea* of arson would be transmuted into an objective *mens rea* if arson were classified as a crime of general intent. If this were true, the same reasoning would apply to virtually any general intent offence. Contrary to Pardu J.A.'s reasoning, when an accused person's voluntary intoxication is not considered by the trier of fact in its assessment of *mens rea*, the *mens rea* analysis of the offence remains subjective. The question remains whether the particular accused person would have foreseen that his conduct may bring about the consequence prohibited by the offence but, nevertheless, took an unjustifiable risk of bringing it about. A particular accused person who would not have foreseen the risk of the prohibited consequence had he been sober will not be reckless so as to satisfy the requisite subjective *mens rea*. This remains true even if a reasonable person would have foreseen the risk.

R. v. Creighton, [1993] 3 S.C.R. 3 at para. 110
R. v. G. and another, [2003] UKHL 50

2) "Distant" Consequences

67. Pardu J.A. held that arson contrary to section 434 contains an "ulterior motive or intention" which the Crown must prove. She noted that arson "requires an awareness of the more distant consequences of [the accused person's voluntary act], and a conscious decision to proceed in the face of those consequences" [emphasis added]. She observed that many ordinary household activities can cause fires. She observed that these household activities should only attract criminal liability when they are undertaken "with the specific and ulterior motive or intention of furthering or achieving an illegal object or recklessly, with subjective knowledge that damage by fire will probably result" [citation omitted].

R. v. Tatton, [2014] O.J. No. 1683 (C.A.) Appellant's Record Volume I at p. 18, para. 47

68. This reasoning wrongly conflates the notion of a prohibited consequence which is part of the *actus reus* (the existence of which does not imply that an offence is one of specific intent), with an ulterior motive or intention which goes beyond the prohibited consequence that is part of the *actus reus* (the existence of which does imply that an offence is one of specific intent). Contrary to Pardu J.A.'s reasoning, an offence contains an ulterior motive, and is thereby properly classified as a crime of specific intent, where the Crown is obligated to prove an intent beyond the intention to do that which constitutes the *actus reus*. The *mens rea* for arson contrary to section 434 of the *Criminal Code* does not extend beyond the *actus reus;* it does not extend beyond the volitional performance of the prohibited act (the act that causes fire or explosion) and the intentional or reckless causing of the prohibited consequence (damage to property by fire or explosion).

69. The prohibited consequence of arson (damage to property by fire or explosion) may be a "more distant consequence" than that which is realised when one throws a punch, but this does not transform arson into a crime of specific intent. Even a distant or complex prohibited consequence may still form part of the *actus reus*. Lord Simon of Glaisdale made this point in his speech to the House of Lords in *R. v. Morgan*:

> By "crimes of basic intent" I mean those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus:* The *actus reus*

> generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in the *actus reus.* I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The *actus reus* of assault is an act which causes another person to apprehend immediate and unlawful violence. The *mens rea* corresponds exactly. The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence or that he was reckless as to whether or not his act caused such apprehension. This foresight (the term of art is " intention ") or recklessness is the *mens rea* in assault. For an example of a crime of basic intent where the consequence of the act involved in the *actus reus* as defined in the crime is less immediate, I take the crime of unlawful wounding. The act is, say, the squeezing of a trigger. A number of consequences (mechanical, chemical, ballistic and physiological) intervene before the final consequence involved in the defined *actus reus*—namely, the wounding of another person in circumstances unjustified by law. But again here the *mens rea* corresponds closely to the *actus reus.* The prosecution must prove that the accused foresaw that some physical harm would ensue to another person in circumstances unjustified by law as a probable consequence of his act, or that he was reckless as to whether or not such consequence ensued. [emphasis added]
>
> *R. v. Morgan,* [1975] 2 All E.R. 347

3) Difficulties for a Jury

70. Pardu J.A. held that a rule preventing the trier of fact from considering an accused person's voluntary intoxication in an arson case would be "unreasonable and unnecessarily complicated." In particular, she held that it would be unreasonable to "ask a jury to compartmentalize their thinking by excluding from their consideration the effects of alcohol and answer a hypothetical question as to what the accused's intent or mental state would have been but for the consumption of alcohol." She added that it would impractical to characterize arson as a crime of general intent because doing so would "require the trier of fact to consider the effects of alcohol to decide whether a fire was set voluntarily or intentionally and to ignore the effects of alcohol to decide whether the accused was reckless".

> *R. v. Tatton,* [2014] O.J. No. 1683 (C.A.) Appellant's Record, Volume I at pp. 15-16, para. 42; p. 23, para. 59

71. This analysis amounts to an attack on *R. v. Daviault* itself: an attack on the whole notion of restricting the admissibility of evidence of voluntary intoxication where an accused person is charged with a general intent offence. There is no principled reason that a jury would have any

greater difficulty applying the rule in *Daviault* to arson than to assault or to any other general intent offence. Moreover, there is no evidence that the "complications" described by Pardu J.A. have arisen over the 20 years that have passed since *Daviault* was decided.

4) Negligent Arson Contrary to Section 436

72. Pardu J.A. held that Parliament's enactment of section 436 of the *Criminal Code* supports the conclusion that arson contrary to section 434 of the *Criminal Code* was not intended to cover "accidental fires set by those under the influence of alcohol". Section 436 states:

> **436.** (1) Every person who owns, in whole or in part, or controls property is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years where, as a result of a marked departure from the standard of care that a reasonably prudent person would use to prevent or control the spread of fires or to prevent explosions, that person is a cause of a fire or explosion in that property that causes bodily harm to another person or damage to property.
>
> (2) Where a person is charged with an offence under subsection (1), the fact that the person has failed to comply with any law respecting the prevention or control of fires or explosions in the property is a fact from which a marked departure from the standard of care referred to in that subsection may be inferred by the court.

73. Pardu J.A. held that the enactment of this offence signaled Parliament's intention to distinguish between intentional, reckless, and negligent fires. On her view, section 436 was designed to apply to "negligent fires." By contrast, she held, section 434 was "not intended to cover accidental fires, even accidental fires set by those under the influence of alcohol." She concluded that "where an intoxicated accused does not have the subjective intent required for arson under s. 434, he could be guilty of arson by negligence under s. 436 if his conduct amounted to a marked departure from the conduct expected of a reasonable person, and the other requirements of that section were met."

> *R. v. Tatton*, [2014] O.J. No. 1683 (C.A.) Appellant's Record, Volume I at p. 16, para. 44; pp. 19-20, paras. 49-50; p. 23, para. 60

74. This analysis misconstrues the history and the reach of section 436. Section 436 was never intended to apply to intentional or reckless drunken arsons like the present case. Rather, it was enacted to criminalize a very different kind of social ill: the conduct of landlords who fail to take reasonable fire prevention precautions and whose tenants are harmed by fire as a result. It

applies when an accused person causes bodily harm to another person by causing a fire or explosion in the accused person's property as a result of negligently preventing the control or spread of fire. On its terms it plainly could not apply to the present case. And its enactment does not assist in the proper interpretation of the very different offence of arson contrary to section 434. Better comparisons are found in section 435 (arson for a fraudulent purpose), and section 436.1 (possession of incendiary materials for the purpose of committing another arson offence) of the *Criminal Code*. Unlike arson contrary to section 434 of the *Criminal Code*, these sections create true specific intent offences which require the Crown to prove an ulterior motive beyond the intention to carry out the *actus reus*.

House of Commons Debates, 34th Parl, 2nd Sess, Vol. 6 (15 February 1990) at 8372 (Doug Lewis)
Law Reform Commission of Canada, *Damage to Property: Arson* [Working Paper No. 36] (Ottawa: Supply and Services Canada, 1984) at pp. 20-21

5) *R. v. Muma* and *R. v. Schmidtke*

75. Pardu J.A. held that *R. v. Muma* and *R. v. Schmidtke* were distinguishable. She distinguished *Muma* on the basis that the statutory landscape had since changed – namely that "arson has been differently defined and the offence of negligent arson has been refined in the *Criminal Code.*" She also cited two other authorities, *R. v. Swanson* and *R. v. Hudson*, which, she held, support the conclusion that arson contrary to section 434 is an offence of specific intent.

R. v. Tatton, [2014] O.J. No. 1683 (C.A.) Appellant's Record Volume I at pp. 17-21, paras. 45-54
R. v. Swanson, [1989] Y.J. No. 194 (C.A.)
R. v. Hudson, [1993] M.J. No. 609 (C.A.)

76. *R. v. Muma* and *R. v. Schmidtke* are not distinguishable. The statutory changes since *Muma* was decided are irrelevant to the classification of the present section 434 as a general intent offence. Neither the change in the definition of arson, nor the "refining" of negligent arson, affects the reasoning in *Muma* that where recklessness satisfies the *mens rea* of an offence, there can be no requisite ulterior intention and the offence is properly classified as one of general intent. Even if these statutory changes did make *Muma* distinguishable, *R. v. Swanson* would be distinguishable on the same basis, having also been decided before the "refinement" of

negligent arson in 1990 and before other revisions to the definition of arson. As indicated earlier, the persuasive reasoning in *Muma* and *Schmidtke* should overtake the reasoning of *Swanson* and *Hudson,* both of which predate *Daviault* and take an incorrect approach to classifying an offence as one of general or specific intent.

6) The Role of Intoxication in Arson and Mischief

77. Pardu J.A. quoted McIntyre J. of this Court in *R. v. Bernard* as having held that voluntary intoxication is no defence to assault because "intoxication, whether by alcohol or drugs, lies at the root of many if not most violent assaults; intoxication is clearly a major cause of violent crime". Pardu J.A. held that, by contrast, there is no basis to say that "household fires generated by ordinary household activities which get out of control are similarly associated with intoxication". She also held that "most fires result from accidents or carelessness, not criminal misconduct".

> *R. v. Tatton*, [2014] O.J. No. 1683 (C.A.) Appellant's Record Volume I at pp. 19-20, paras. 49-50

78. To the extent that Pardu J.A. was concerned that classifying arson as a general intent offence would lead to the criminalization of innocent, accidental fires, this concern is misplaced. The defence of accident remains available to an accused person regardless of how arson is classified, and regardless of whether an accused person's voluntary intoxication is available as a defence. Where an intoxicated accused person, through some ordinary household activity, causes an accidental fire that she would not have foreseen if sober, the accused person will be acquitted regardless of whether arson is classified as a crime of general or specific intent.

> *R. v. Parris*, [2013] O.J. No. 3660 (C.A.) at paras. 106-107
> *R. v. Stevenson*, [1990] O.J. No. 1657 (C.A.)

79. To the extent that Pardu J.A. concluded that intoxication contributes to violence but does not contribute to the risk of fire, this conclusion is not supported by human experience or by scientific research. It is well known that many people do foolish and dangerous things when drinking. Psychopharmacological studies support this common sense observation. Alcohol is known to produce a disinhibitory effect leading to increased risk-taking. In controlled

experiments, otherwise normal subjects showed risk-taking patterns when intoxicated that were "remarkably similar to subjects with a history of maladaptive risky behaviour."

> Scott D. Lane et al., "Alcohol effects on human risk taking," (2004) 172 *Psychopharmacology* 68 at 75
> Kim Fromme et al., "Effects of Alcohol Intoxication on the Perceived Consequences of Risk Taking," (1997) 5:1 *Experimental and Clinical Psychopharmacology* 14

80. As Goudge J.A. noted in his dissenting judgment, arson is a "sub-species" of mischief – it criminalizes conduct that causes damage to property by a particular mechanism, namely fire. Arson and mischief are exactly the kinds of offences that tend to be committed by intoxicated people with lowered inhibitions and increased risk-taking. Classifying them as specific intent offences would undermine the policy choices historically and presently underpinning the distinction between general and specific intent offences. It would be bad public policy to allow an accused person's voluntary intoxication to excuse the damage he drunkenly causes by intentionally or recklessly setting a fire.

> *R. v. Tatton*, [2014] O.J. No. 1683 (C.A.) Appellant's Record Volume I at p. 34, para. 88 (per Goudge J.A.)

E. APPLICATION OF THESE PRINCIPLES TO THE FACTS OF THIS CASE

81. *R. v. Daviault* holds that, except in cases of extreme intoxication akin to automatism, voluntary intoxication is no defence to an offence of general intent. Arson contrary to section 434 of the *Criminal Code* is a general intent offence. There was no evidence that the respondent's intoxication rose to the extreme level of alcohol-induced automatism. It should not have been open to the defence to argue that the respondent's voluntary intoxication rendered his actions unintentional or non-reckless.

> *R. v. Daviault*, [1994] 3 S.C.R. 63 at paras. 63, 116
> *R. v. Creighton*, [1993] 3 S.C.R. 3 at para. 42 *per* Lamer C.J.C.
> *R. v. Daley*, [2007] 3 S.C.R. 523 at paras. 41-43

82. The trial judge failed to apply this reasoning. Having wrongly concluded that arson was a crime of specific intent in this particular case, the trial judge wrongly considered that the respondent was "clearly drunk" when he set fire to Ms Spencer's home. He wrongly stressed that the respondent had "consumed alcohol and lots of it". In considering whether the fire was

accidental or caused by the respondent's intentional or reckless plan, the trial judge wrongly asked "Was he mentally able to carry out such a plan in view of his drunken condition?" This was one of the factors the trial judge considered in concluding that he was not satisfied that the respondent set fire to Ms Spencer's home intentionally or recklessly. The verdict would not necessarily have been the same but for this error. A new trial should be ordered.

Reasons of Tausenfreund J., Appellant's Record Volume I, pp. 64-65, 76, 79-81

PART IV
SUBMISSIONS ON COSTS

83. The Crown makes no submissions as to costs.

PART V
ORDER REQUESTED

84. It is respectfully submitted that the appeal should be allowed, the acquittal be set aside, and a new trial be ordered.

ALL OF WHICH is respectfully submitted this 23rd day of July, by:

_____

Randy Schwartz
Of Counsel for the appellant
The Attorney General for the Province of Ontario

_____

Hannah Freeman
Of Counsel for the appellant
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PART VI

AUTHORITIES CITED

Reports

Texts

Journals

Parliamentary Debates

PART VII
STATUTES, REGULATIONS, RULES

Para.