ALCOHOL, AUTOMOBILES and the search for MENS REA: Is an Honest Mistake a Good Defence?

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The Vancouver Province recently warned its readers that so-called "beer parlour breathalyzers" are unreliable, adding that these same machines are currently being considered for use in B.C. as road-side screening devices.[1] The newspaper claimed that test results were meaningless and that the machine can be easily tricked. Much more important, however, is the fact that such devices and virtually all other products designed to assist the citizen in his efforts to stay within the law, however reliable they may be scientifically, may give persons who use them a totally false sense of legal security. In at least two provinces[2] courts have held that neither hotel breathalyzers[3] nor government alcohol charts[4] can be relied upon by an accused whose defence to a charge laid under Section 236 of the Criminal Code[5] is that he honestly believed his blood-alcohol level was below the statutory limit. This of course raises the important question of whether the courts, by restricting the defence of mistake in this way, have put a gloss on Section 236 that is inconsistent with authority and wrong in principle. In other words, irrespective of judicial protestations to the contrary,[6] is the offence created by Section 236 being treated by our courts as a special case?

It has long been established that in the absence of express statutory provisions to the contrary *mens rea* or a guilty mind must be proved by the Crown before an accused person can be convicted of a crime.[7] Hence it should have come as no surprise that in *Regina* v. *Penner*[8] the Manitoba Court of Appeal ruled that prosecutions under Section 236 do not constitute an exception to this rule. Citing *Regina* v. *King*,[9] the Court held that[10]

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2 B.C. and Manitoba

3 Regina v. Boe (1976) W.W.D. 166 (B.C. Prov. Ct.)

4 Regina v. Penner (1974) 16 C.C.C. (20) 334, Regina v. Lisinsky, unreported, June 8th, 1977 (B.C. Prov. Ct.)

5 R.S.C. 1970, C.E. -34, as amended

6 Regina v. Penner, supra footnote 4

7 See for example, Regina v. Tolson (1889) 23 Q.B.D. 168, 37 W.R. 716, 16 Cox C.C. 629; Regina v. Rees (1956) S.C.R. 649, 24 C.R.1, 115 C.C.C. 1, (1956) 4 D.L.R. (20) 406, and Beaver v. The Queen (1957) S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129, to name only a few.

8 Supra, footnote 4

9 (1962) 133 C.C.C. 1, 35 D.L.R. (2d) 386, (1962) S.C.R. 746

10 (1974) 16 C.C.C. (2d) 334, at 336

It has long been established that in the absence of express statutory provisions to the contrary mens rea or a guilty mind must be proved by the Crown before an accused person can be convicted or a crime.[7] Hence it should have come as no surprise that in Regina v. Penner[8] the Manitoba Court of Appeal ruled that prosecutions under Section 236 do not constitute an exception to this rule. Citing Regina v. King,[9] the Court held that[10]

> . . . Section 236 does not impose an absolute liability . . . *mens rea* is a necessary element of the offence, for which it's absence, based on a mistake of fact, is a defence.

Apparently this does not mean that the Crown must prove that the accused knew his blood alcohol level was or may have been in excess of the statutory limit, only that in the absence of evidence to the contrary the court may draw this inference.[11] Nonetheless, the principle referred to above[12] is preserved because the court concluded that the offence created by Section 236 is[13]

> . . . not one of strict or absolute liability in which the belief, intention or state of mind of the accused is immaterial or irrelevant, if he has committed the *actus reus* which constitutes the offence.

So far, so good. But the defence of absence of *mens rea* in the final analysis is really that of mistake of fact, and Mr. Penner contended that he had mistakenly relied upon a chart (distributed to the public by a Manitoba Government agency) which led him to expect that the amount of alcohol he had consumed was insufficient to raise his blood-alcohol level above the statutory limit. There is no suggestion in the report of the case that the honesty of Mr. Penner's reliance on the chart was in question; indeed, had the trial judge rejected his evidence the case would never have been appealed on that ground. Yet the Court confirmed the conviction:[14]

> It was the accused's duty to know his own limit and the chart — an informal and unofficial document at best — can simply be regarded as a misguided attempt to aid him in the discharge of that duty. He cannot shift his responsibility by relying on the statements or expectations of others; that is especially the case when such statements or expectations clearly leave a large area of judgment to him, with due regard to the several variables that can effect the ultimate result. having deliberately consumed alcohol in quantities sufficient to produce a reading of 120, mg., even though he expected a lower reading, he cannot in law look to the chart as negating the presence of that degree of *mens rea* required to support the defence.

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11 The King case refers to a rebuttable presumption arising upon proof of the actus reus, but in view of Regina v. Gianotti (1956) 23 C.R. 259 and Regina v. Ortt (1968) 6 C.R.N.S. 233, this manner of speaking seems inappropriate.

See text preceeding footnote 7

13 (1974) 16 C.C.C. (2d) 334 at 336

14 Ibid. at 337-38

Now this passage seems to suggest, somewhat paradoxically, that although an accused is under a duty to know his own limit he is not, in seeking to discharge that duty, permitted to seek or to rely upon the assistance of those presumably more expert. How such reliance can negatively affect the *mens rea* of an accused who is honestly mistaken about his blood alcohol content is unclear, but the gist of the court's reasoning appears to be that Mr. Penner's reliance on the chart was unreasonable, hence he could not make out a defence of absence of *mens rea*.

Now it is true that the classic cases on this defence require that the accused's mistake be reasonable as well as honest. In *Bank of New South Wales* v. *Piper*[15], for example, Sir Richard Couch provided generations of lawyers with what was long to be the definitive formulation:

> . . . the question whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depending upon different considerations. In cases when the statute requires a motive[16] to be proved as an essential element of the crime, the prosecution must fail if it's not proved; on the other hand, the absence of *mens rea* really consists in *an honest and reasonable belief* entertained by the accused of the existence of facts which if true, would make the act charged against him innocent.

But, it is submitted, the law has changed somewhat since Sir Richard wrote these words and the law reports enshrined them. In at least two important and relatively recent cases the Supreme Court of Canada has held that so long as the accused's mistaken belief was an honest one, it does not matter that it was or may have been unreasonable. In *Regina* v. *Rees*[17], Cartwright, J. (as he then was), held by way of *obiter dicta* (Nolan, J., concurring) that the real test was the accused's defence is the absence of *mens rea* is the subjective one of honesty, and his view was confirmed (3:2) in *Beaver* v. *the Queen*:[18]

> In *Regina* v.v *Tolson*, Stephen J. says at page 188:
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> > . . . I think it may be laid down as a general rule that an alleged offender is deemed to have acted under the state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.
> >
> > I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.
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> and adds at page 189:

15 (1897) A.C. 383 (P.C. at 389-390. Italics the writer's

16 It would appear that Sir Richard really means "specific intent" rather than motive, which of course is never an essential element of a crime.

17 (1956) S.C.R. 640, at 651

18 (1957) S.C.R. 531, at 538, per Cartwright, J. Of course the reasonableness of the belief, in the majority of cases, will be extremely important in assessing it's honesty.

> Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.
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> I adhere to the opinion which, with the concurrence of my brother Nolan, I expressed in The *Queen* v. *Rees*, that the first of the statements of Stephen J. quoted above should now be read in the light of the judgment of Lord Goddard C.J., concurred in by Lynskey and Devlin, JJ., in *Wilson* v. *Inyang*, which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question.

Thus the real issue to be determined by a Court when an accused raises the defence of *mens rea* or mistake of fact is whether he honestly believed in a set fo facts which, if true,[19] would make the act charged against him innocent; whether his belief was reasonable or not is relevant only to the extent that it assists the Court in determining this.[20] Moreover, it would seem to follow from this that once the Court has accepted the honesty of the belief it may not go on to reject the defence on the ground of unreasonableness. Yet this appears to be precisely what was done in *Regina* v. *Penner*. The Court stressed the fact that the chart in that case was plainly a guide only; that Mr. Penner could not shift his responsibility by relying upon such things; that the chart was a "misguided attempt" to aid citizens in the discharge of their duty under the law; and that even though Mr. Penner expected his blood-alcohol level to be below the legal limit, he could not rely on the chart to negate the *mens rea*, required to constitute the offence.[21] In other words, his honest reliance upon the chart was unreasonable.

It may be that the Court felt constrained to decide on this issue the way it did because of the manifest social evil Section 236 is designed to discourage. In any event, the argument that to hold otherwise would be to swamp the courts with such cases is a strong one, and because neither *Rees*[22] nor *Beaver*[23] appears to have been cited, it must have seemed that the way was clear. But these authorities do present a problem: the Supreme Court of Canada formulated the defence in the manner it did because to do otherwise would have been to retreat from the fundamental principle that the Crown must prove that the accused, to one

19 Strictly speaking, facts can be neither true nor false; truth or falsity can be attributed only to propositions which purport to describe sets of facts, ie. they are true if they accurately describe the facts, false if they do not. But only a pedant would complain of this, or even bring it up.

20 For a recent case on this question, see the decision of the Ontario Court of Appeal in Regina v. Couture (1977) 33 C.C.C. (20) 74, at 81-83.

21 Hall, J.A., speaks of "negating the presence of that degree of mens rea required to support the defence" (underscoring the writer's), but surely this last word is a typographical error. See footnote 10, at 338.

22 Footnote7, supra.

23 Footnote 7, supra.

degree or another, intended to do an act that constitutes the *actus reus* of a particular offence. Therefore, if an accused honestly believes in a set of facts which, if true, would render his act innocent, his state of mind cannot support a finding of criminal liability, however reasonable this belief may seem to an experienced trier of fact. The criminal law is not to be used to punish the credulous.

But quite apart from authority, it is not at all clear that Mr. Penner's defence should have been rejected on grounds of policy, either. Credibility is for the trial judge, and most accused persons putting forth such a defence would find it difficult indeed to persuade a Court that they honestly believed their blood-alcohol content was below the legal limit. And even if the number of trials under this Section did increase temporarily, such an argument is small consolation to the citizen who feels he did his best to remain within the law yet finds himself with a criminal record.[24] To be sure, such a person would be best advised to completely refrain from mixing alcohol and automobiles, but until Parliament sees fit to make drinking and driving *per se* a criminal offence, this is hardly a telling objection.

Another factor that must not be overlooked, particularly in view of the apparent acceptance of the Penner reasoning by our courts,[25] is the proliferation of the very aids described by the Manitoba Court of Appeal as "misguided". The Government of Alberta, for example, operates a "Check Stop" programme that includes the distribution of a chart remarkably similar to that relied upon by the unfortunate Mr. Penner.[26] The chart sets out a schedule for comsumption of alcohol by people of various heights, and includes a notation in small print pointing out that it is a guide only and is subject to variations. This *caveat*, which the Court in *Penner* found significant, seems to have been inserted as much for the protection of the distributor as for any other reason, and in the case of the Alberta chart is almost entirely negated by the words "Enjoy Yourself and Know Your Limit" in bold type at the top of the chart. Is it so surprising that the unsophisticated as well as the devious would rely upon such official-looking invitations to drink and drive? Indeed, is it even fair to regard such reliance as unreasonable?

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24 Particularly since it would appear, by anology, that the discharge provisions of the Criminal Code are not available to those convicted of offences contrary to Section 236: Regina v. Bradshaw (1975) 21 C.C.C. (20) 69 (S.C.C.)

25 Footnotes 3 and 4, supra

26 Information supplied to the writer by the Alberta Liquor Control Board. In Regina v. Lisinsky (footnote 4, supra) it was this Alberta Chart that the accused relied on, although the offence was committed in B.C. Moreover, it would appear that although it has been explicitly discredited by our courts, this same chart is being used by the B.C. government in the public education programme it is developing to accompany proposed changes to the Motor Vehicla Act, R.S.B.C. 1960, c. 253, lowering the blood alcohol level for 24 hour suspensions to .05: Vancouver Sun, September 17, 1977.

The question of policy raised by the *Penner* case and those following it is simply this: if Canadian citizens are permitted by by law to drink and drive so long as their ability to do so is not impaired thereby and so long as their blood-alcohol content is within the limit imposed by law, and if the courts have held that each citizen is under a duty "to know his own limit",[27] how can these same courts hold that an accused who honestly relies upon a government chart headed "Enjoy Yourself and Know Your Limit" is without a legal defence? Consider for a moment the state of mind of a typical person charged under Section 236. He knows it is against the law to drive a car with more than 80 milligrams of alcohol in each 100 millilitres of his blood; he also knows he cannot calculate this with any degree of safety; yet he cheerfully consumes alcohol and inserts his key in the ignition in the fond yet fragile hope that he has not exceeded the limit — or that if he has, the police will not be doing their duty in the vicinity of his anxious travels. His *mens rea* is hardly that of the cold-blooded violater, but to paraphrase the wording of another prohibition, he means to drive and knows he is likely over the limit but is "reckless whether he is or not".[28] This degree of *mens rea* is of course sufficient because it would be virtually impossible to prove a higher intent in most cases. But what about those whose sad stories are told in *Regina* v.v *Penner*, *Regina* v. *Boe*, and *Regina* v. *Lisinsky*?[29] What about the accused who knows he must not exceed the limit and knows he is unable to compute this limit, but who takes a hotel breathalyzer test that indicates a legal blood-alcohol content or who relies upon a scientific-looking chart that invites him to have a good time and a safe time by heeding its dictates? His state of mind as he turns on the ignition, assuming that he honestly (if somewhat naively) relied upon such a machine or chart, is not that of a person nervously gambling on his metabolism but that of one who has seen his duty and done it, according to his lights. To be sure, he may not be able to persuade His Honour that this was so, but if he does persuade him, should he be convinced nonetheless because his reliance was unreasonable?

It is submitted that the answer is no, and this raises the question of law that is the primary concern of this paper. Not only is the result in the *Penner* case bad policy, it is also inconsistent with authority and wrong in principle. If a trial judge finds as a fact that an accused person foolishly but honestly believed he had taken the proper steps to remain within the law, the authorities[30] seem clear that, so long as the mistake

27 See Regina v. Penner at 337, quoted at page. 522, supra
28 See Section 212 (a) (ii), Criminal Code
29 Footnotes 3 and 4, supra
30 Footnote 7, supra

is one of fact and not of law,[31] he has not the guilty mind required for conviction. And until governments cease publishing alcohol consumption charts[32] or prohibit hotel breathalyzers, or Parliament expands the prohibitions contained in Sections 234 and 236, those few who are unfortunate enough to rely upon such aids should not be branded criminals. Put simply, if Louis Beaver can be acquitted because he honestly believed the heroin he sold was sugar of milk, should not the next Mr. Penner, on different facts, be afforded the same defence?

31 Although, of course, if the offence charged is one requiring the Crown to prove a specific intent that may be negatived by a mistake of law, even this sort of mistake is a defence. See for example, Regina v. Howson (1968) 3 C.C.C. 348 (Ont. C.A.)

32 Whereas the indications are that, far from ceasing to publish such aids, governments are doing just the opposite; see footnote 26, supra.