

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER
ON
INTOXICATION AS A DEFENCE TO A CRIMINAL OFFENCE

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

© Copyright
First Published

The Law Reform Commission 1995
February 1995

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Professor of Law and Jurisprudence, University of Dublin, Trinity College;
Ms. Maureen Gaffney, B.A., M.A. (Univ. of Chicago), Senior Lecturer in Psychology, University of Dublin, Trinity College;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty eight Reports containing proposals for the reform of the law. It has also published eleven Working Papers, eight Consultation Papers and Annual Reports. Details will be found on pp.123-127.

Alpha Connelly, B.A., LL.M., D.C.L., is Research Counsellor to the Commission.

Ms. Nuala Egan, B.C.L., LL.M. (Lond.), Barrister-at-Law, Ms. Sarah Farrell, LL.B., LL.M. (Lond.), and Mr. Niall Fitzgibbon, B.C.L., LL.M. (Cantab.) are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2.
Telephone: 671 5699.
Fax No: 671 5316.

<i>CONTENTS</i>	<i>PAGES</i>
CHAPTER 1: INTRODUCTION	1- 20
General	1
Intoxication Offences	2
Innocent Intoxication	3
Self-Induced Intoxication	4
Intoxication And Addiction	9
Intoxication And Recklessness	9
Intoxication And Dutch Courage	11
Intoxication And Insanity	13
Intoxication And Diminished Responsibility	16
Intoxication And Automatism	18
Intoxication And Mistake	19
Conclusions	20
CHAPTER 2: THE DEVELOPMENT OF THE DEFENCE IN THE COMMON LAW	21- 32
Historical Development	21
The Twentieth Century	26
Conclusion	31
CHAPTER 3: THE LAW IN OTHER JURISDICTIONS	33- 69
Introduction	33
England And Wales	33
The specific intent/basic intent dichotomy	33
Majewski: The public policy considerations	34
Criticisms of Majewski	35
Recklessness	37
The Public Order Act, 1986	40
The special position of murder	41
Intoxication and mistake	41
Scotland	44
Acute intoxication in homicide cases	44
Acute intoxication in crimes other than homicide	46
Australia	48
General	48
The Common Law States	48

<i>CONTENTS</i>	<i>PAGES</i>
The Code States	52
General	52
Queensland and Western Australia	52
Tasmania	53
The Northern Territory	54
New Zealand	54
General	54
<i>R v Kamipeli</i>	55
Canada	56
<i>Leary v R</i>	56
Specific and general intent	59
Degree of intoxication	60
South Africa	61
<i>S v Chretien</i>	61
South African Law Commission	62
The 1988 Act	63
The United States of America	63
The Model Penal Code	63
<i>Self-induced intoxication</i>	69
<i>Innocent intoxication</i>	65
<i>Completely disregard the effect of voluntary intoxication</i>	66
<i>Intoxication as a full defence</i>	66
<i>Intoxication as a disease</i>	66
European Civil Law Jurisdictions	66
Germany	67
Switzerland	68
Austria	68
The Netherlands	69
Italy	69
CHAPTER 4: PROPOSALS FOR REFORM IN OTHER JURISDICTIONS	70-113
Introduction	70
England And Wales	70
The Butler Committee Report	70

<i>CONTENTS</i>	<i>PAGES</i>
Fourteenth Report of the Criminal Law Revision Committee	72
Law Commission's Criminal Code for England and Wales Consultation Paper on Legislating the Criminal Code: Offences against the Person and General Principles	77
The Relevant Clauses	83
Recklessness in cases of voluntary intoxication	84
Defences based on intoxicated belief	84
"Intoxicant" and "voluntary intoxication"	85
Consultation Paper on Intoxication and Criminal Liability	86
Option 1: Do nothing	86
Option 2: Codify the <i>Majewski</i> approach	86
Option 3: Disregard the effect of voluntary intoxication in any offence	87
Option 4: Disregard the effect of voluntary intoxication in any offence, subject to a statutory defence	88
Option 5: Abolish <i>Majewski</i> without replacement	89
Option 6: Abolition combined with a new offence	89
Australia	91
The Common Law States	91
<i>Law Reform Commission of Victoria, 1984 Discussion Paper</i>	91
<i>Law Reform Commission of Victoria, 1986 Report</i>	92
<i>Law Reform Commission of Victoria, 1988 Discussion Paper</i>	95
Option 1	95
Option 2	96
Option 3	96
Option 4	96
Option 5	97
<i>Law Reform Commission of Victoria, 1990 Report</i>	98
The Code States	99
Queensland Criminal Code Review Committee	99
Murray Report On The Criminal Code In Western Australia	100
Law Reform Commissioner of Tasmania	102
The Northern Territory	102
The Conclusions Of The Commonwealth Review Committee	102

<i>CONTENTS</i>	<i>PAGES</i>
New Zealand	106
The New Zealand Criminal Law Reform Committee	106
Revised New Zealand Code	108
Canada	109
Law Reform Commission of Canada, 1982	109
Law Reform Commission of Canada, 1988 Report	110
CHAPTER 5: PROVISIONAL PROPOSALS FOR REFORM	114-122
Majewski	114
Our Choice Of Approaches	114
Realities	115
A Special Offence	115
No Ideal Solution	119
Complete Exclusion	120
Sentencing	121
Involuntary Intoxication	121
Insanity	121
Conclusion	122
Submissions	122
LIST OF COMMISSION PUBLICATIONS	123-127

CHAPTER 1: INTRODUCTION

General

1.1 Intoxication as a defence to a criminal charge gradually developed as the law became more concerned with the mental element in crime. Today, while most common law jurisdictions recognise some form, albeit often limited, of intoxication defence, legislators and jurists throughout the common law world, nevertheless, have difficulty defining the appropriateness and the parameters of such a defence.

1.2 In its formative period and into the twentieth century, the defence concentrated on drunkenness rather than on the effect of other drugs on the mental process. In 1969 in England¹ it was held that the same principles apply to intoxication by drugs other than alcohol. In that case the defendant killed his companion when he was under the influence of LSD, hallucinating that he was fighting snakes in the centre of the earth. He was convicted of constructive manslaughter because he had committed an unlawful act, and sentenced to six years' imprisonment.²

1.3 Two later decisions, *Bailey*³ and *Hardie*⁴, suggest that drugs must be divided into two categories. Where it is common knowledge that a drug is liable to cause a person to become aggressive or do dangerous or unpredictable things, that drug is to be classed with alcohol. But where there is no such common

1 *Lipman* [1970] 1 Q.B. 152, [1969] 2 All E.R. 410.

2 Glanville Williams comments, *Textbook of Criminal Law*, 2nd ed., Stevens, 1983, p.469, that: 'The decision caused discomfort to commentators, but the House of Lords regarded it as authoritative in *Majewski*. It is clear from the latter case that Lipman's 'unlawful act' was in attacking his female companion. This attack was an assault, his state of confused consciousness being the result of voluntary intoxication. One may have serious doubts, however, about the severity of the sentence.'

3 [1983] 2 All ER 503, [1983] 1 W.L.R. 780.

4 [1984] 3 All ER 648, [1985] 1 W.L.R. 64.

knowledge, as in the case of a sedative drug, different rules apply.⁵ Smith and Hogan point out that there are obvious difficulties about classifying drugs in this way and, if the distinction were to survive at all, it would not be surprising if it led to further case-law.⁶ Furthermore, there is no evidence that the distinction was ever made in this jurisdiction.

1.4 Today, the defence is generally understood to encompass both alcohol and other drugs and that is the approach adopted in this Consultation Paper. While the consumption of alcohol is to a great extent socially acceptable and its use or possession not legally prohibited (or at any rate, prohibited only in conjunction with certain activities as with being in control of a vehicle while intoxicated), this is not the case with other drugs. Nevertheless, it is appropriate to consider intoxication by alcohol and other drugs as being equal for the purposes of the intoxication defence, as the relevant consideration is whether the accused had the requisite mental element for the offence charged or acted voluntarily. Where the use or possession of the substance concerned is proscribed by law, then that is a separate issue and should be dealt with in the usual way under the misuse of drugs legislation.

1.5 It is important to note at the outset of this Consultation Paper that there is no modern reported decision on the defence in this jurisdiction and one can only speculate as to how an Irish court would decide should an appropriate case arise for its consideration.

Intoxication Offences

1.6 The relationship between the defence of intoxication and offences where intoxication is an element of an offence is a further factor which must be considered. In general, these will be strict liability offences and far from providing a defence, the intoxication of the accused will be an element of the offence. It is arguable that the defence of intoxication, no matter how formulated, should not be relevant to these offences.

1.7 These offences are most commonly related to intoxicated driving or being intoxicated in a public place. For example, section 49(1) of the *Road Traffic Act, 1961* provides that a person shall not drive a mechanically propelled vehicle in a public place while under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. Similarly, section 12 of the *Licensing (Ir.) Act, 1836*, section 25 of the *Licensing Act (Ireland), 1874*, section 15 of the *Dublin Police Act, 1842* and section 59 of the *Road Traffic Act, 1968* all prohibit being intoxicated in a public place.

1.8 The imposition of strict liability in these cases, particularly in relation to driving while intoxicated and similar road traffic offences, is justified on the basis that the possible results of doing the prohibited act are well known and

5 Smith and Hogan, *Criminal Law*, 7th ed., Butterworths, 1992, p.218.

6 *Ibid*, p.219.

potentially very serious.

1.9 In the case of being intoxicated in a public place, the penalties are usually slight, involving either a fine or detention for a short time, unless associated with disorderly behaviour, for example, where, under section 12 of the 1872 Act, an offender may be liable to a month's imprisonment.

1.10 However, strict liability is not absolute liability in all cases. It does not necessarily mean that the mental element is ruled out completely. It may be necessary to prove that the accused was aware of all the circumstances of the offence except for that in respect of which liability is imposed.⁷ Again there is no reason why other defences should not be available. Indeed, there is English authority⁸ that automatism would be a defence to the offence of dangerous driving which was understood to impose strict liability.⁹ It was held that if the defendant had been in a state of automatism, then he had a defence.¹⁰ However, if the automatistic state results solely from the voluntary consumption of alcohol or other drugs, then the defence would not arise.

1.11 Charleton comments that controversy has arisen as to the extent to which evidence of consumption of alcohol is admissible on a charge of dangerous driving.¹¹ He cites *The People (A.G.) v Regan* where Griffin J. held that:

"evidence of intoxicating drink consumed by a driver should be admitted not only where it tends to show that the driver was in fact adversely affected by drink but also ... where it tends to show that the amount of drink taken was such as would adversely affect a driver."¹²

1.12 The amount of drink that would adversely affect a driver was characterised as significant and Charleton submits that evidence that the accused drove while affected by drugs would be subject to the same principle.

Innocent Intoxication

1.13 It has long been established¹³ that where one is intoxicated through no fault of one's own, either as a result of drink having been spiked or of taking medication under medical prescription, one cannot be condemned for one's actions and accordingly will have a defence to any criminal charge.¹⁴

7 Smith and Hogan, *op cit*, p.114.

8 *Hill v Baxter* [1958] 1 Q.B. 277.

9 Smith and Hogan, *op cit*, p.114.

10 The relationship between intoxication and automatism is considered *infra* at para. 1.65-70.

11 Peter Charleton, *Offences Against the Person*, Irish Criminal Law Series, The Roundhall Press, 1992, para. 3.45.

12 [1975] I.R. 367 at 373.

13 Recently, the Court of Appeal in England affirmed that involuntary intoxication could be an answer to a criminal charge saying that if there is evidence capable of giving rise to the defence of involuntary intoxication, the jury should be left to consider whether the accused's intent to commit the criminal act was induced by involuntary intoxication and thereby negated. See *Kingston*, [1993] 4 All ER 373.

14 Clarkson and Keating: *Criminal Law: Text and Materials*, 2nd ed., Sweet and Maxwell, 1990, p.394.

Evidence of innocent intoxication¹⁵ is regarded as relevant even for crimes of basic intent,¹⁶ where a distinction is made between crimes of specific intent and basic intent.¹⁷

1.14 Clearly, the drunk must be sufficiently intoxicated as to be lacking full mental faculties. Should one be in possession of one's faculties to the extent that, although the intoxication was innocent or involuntary, one still knew what one was doing or was still capable of controlling one's actions, then no defence would arise.¹⁸

1.15 It is probable that the intoxication of an addict would not be regarded as being involuntary in this jurisdiction.¹⁹

Self-Induced Intoxication

1.16 Where intoxication is self-induced or voluntary, in general, it is not an excuse for criminal misconduct. Nevertheless, where it does arise, self-induced intoxication as a defence presents certain unique problems for the criminal law. At one extreme, one finds the stance that no person should be convicted of an offence requiring *mens rea* if that person did not have the requisite intent for that offence. At the other extreme, it is argued that where a person lacks the requisite state of mind because of self-induced intoxication, that person should gain no benefit. Somewhere in between these two extremes lies the argument that while a person may be acquitted of the principal offence, he or she should nevertheless be convicted on the basis that the act of becoming intoxicated, in itself, supplied the fault element of the offence.

1.17 In our Reports on Rape²⁰ and Malicious Damage²¹ we drew attention to the fact that there is no modern Irish decision, in the context of criminal law, of which we were aware, on the question of the admissibility or materiality of evidence of intoxication to negate the mental element required for the offence charged.

1.18 In particular, in our Report on Malicious Damage we undertook an examination of how the law on this topic might be altered by legislation, and while we thought that there was much to be said for the approach adopted by the majority of the Criminal Law Revision Committee²² based on the Model Penal

15 The use of the term "innocent intoxication" is preferable to the more commonly used "involuntary intoxication" as the person may "voluntarily" but unknowingly take the intoxicant.

16 Glanville Williams, *op cit.*, p.483.

17 See *infra*, para. 1.20.

18 Perkins and Boyce, *Criminal Law*, 3rd ed., Foundation Press, University Textbook Series, 1982.

19 See *infra*, para. 1.7.

20 *Report on Rape and Allied Offences*, (LRC 24-1988).

21 *Report on Malicious Damage*, (LRC 26-1988), p.23.

22 Cmnd. 6244 (1975). See *infra*, Chapter 4.

Code,²³ we were led to the conclusion that we should defer any final recommendation on the matter of intoxication to this Paper.

1.19 In its modern manifestation, the intoxication defence has its roots in a series of nineteenth century English cases culminating in *Director of Public Prosecutions v Beard*²⁴ in 1920. *Beard* established that, in the words of Lord Birkenhead L.C.:

"[E]vidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had that intent."²⁵

1.20 *Beard* has subsequently been interpreted (in particular, by the House of Lords in *Director of Public Prosecutions v Majewski*²⁶) to have distinguished two forms of intent, specific intent and basic intent: self-induced intoxication supplies a defence to the former but not the latter. In *Majewski*, the House of Lords held that Lord Birkenhead's formulation did not apply to crimes of basic intent. Lord Simon of Glaisdale held:

"A specific intent requires something more than contemplation of the prohibited act and foresight of its probable consequences. The *mens rea* in a crime of specific intent requires proof of a purposive element."²⁷

1.21 However, in so far as a defence is provided, evidence of intoxication is not a passport to an acquittal.²⁸ Whether the evidence of intoxication leads to an acquittal, or not, depends on the circumstances and on the view taken of them by the jury.²⁹ It is not the simple fact of intoxication that absolves the defendant. The criminal law is concerned with the situation where such a large quantity of alcohol and/or other drugs is consumed that one becomes unaware of what one is doing or unable to control one's actions, and while in that state, one commits a crime requiring *mens rea*. Therefore, the law is concerned only with the more extreme state of intoxication which might have prevented the accused from having the requisite *mens rea* for the particular offence charged.

1.22 There is no rule about the degree of intoxication that is required.³⁰ Lynch distinguishes between persons who are "extremely affected" by intoxicants and those who are "mildly affected" and classifies the distinction as being between

23 (1) That evidence of voluntary intoxication should be capable of negating the mental element in murder and the intention required for the commission of any other offence; and,
(2) In offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such lack of appreciation is immaterial.

24 [1920] A.C. 479.

25 At pp.501-2.

26 [1976] 2 All ER 142.

27 At p.155.

28 Glanville Williams, *op cit*, p.467.

29 *Ibid.*

30 *Ibid.*

"completely intoxicated" and "partially intoxicated".³¹ However, Smith and Hogan comment that there are many degrees of intoxication and therefore conclude that: "the suggested distinction seems unworkable."³² Glanville Williams contends that the question for the jury is whether the evidence of intoxication negatives the capacity to form the required *mens rea*.³³ Perkins and Boyce comment that: "the intoxication must be shown to have been of such a character as to create a state of mental confusion, excluding the possibility of specific intent."³⁴ They go on to state:

"One voluntarily intoxicated to such an extent has diminished capacity because (in the absence of preconceived design) he is temporarily incapable of committing any crime which requires (1) a specific intent, (2) knowledge of some pertinent fact, or (3) any other special mental element. One whose mind is confused by liquor or drug in a slightly less degree might be capable of forming an intent to kill but unable to do so with deliberation, and even mild intoxication might result in an inadvertent act such as heedlessly carrying away the glass when leaving the bar. All such matters demand attention because the *actus reus* without the required *mens rea* is not a crime."³⁵

1.23 Throughout much of the history of the intoxication defence, there have been statements suggesting that it may only be available to a person who was intoxicated to such a degree that he or she was incapable of voluntary action or of forming the requisite *mens rea*.³⁶ However, with a declining recognition of a presumption of intention, the courts have increasingly moved towards referring to the intoxication defence arising from lack of *mens rea* rather than from lack of capacity to form *mens rea*.³⁷ The simple question is did the accused have the requisite intent?

1.24 In our Consultation Paper on Sentencing,³⁸ while considering aggravating and mitigating factors, we briefly looked at offending while under the influence of alcohol and drugs. We noted that the Council of Europe's Sentencing Committee found that among the member states of the Council of Europe there is a difference in approach in respect of offences committed under the influence of alcohol. It reported that:

"[I]n some countries it was not considered to be a mitigating factor but could mitigate the sentence so that treatment would be imposed. In other states it would block the defence of mistake of fact or would be considered to be a genuine mitigating factor. Other countries would consider that the offender could not have acted maliciously. In one state

31 A.C.E. Lynch, 'The Scope of Intoxication', [1982] Crim. L.R. 139.

32 Smith and Hogan, *op cit.*, p.221.

33 Glanville Williams, *op cit.*, p.467.

34 *Op cit.*, p.1013.

35 *Ibid.*

36 Eric Corvin, 'A Theory of the Intoxication Defence', [1981] 59 *Canadian Bar Review* 750 at 774.

37 *Ibid.*, p.776.

38 LRC 44-1992, Chapter 4.

it was made an offence to commit an offence after having been drinking. In yet another state the judge was free to decide whether it would be considered to be aggravating or mitigating depending on the circumstances."³⁹

1.25 We felt that it was important to assess the degree of intoxication. Where one is partially intoxicated and has some knowledge of one's actions, but nevertheless offends, one may be viewed as being in the same situation as an impulsive offender who realises what he or she is doing, but loses his or her inhibitions. We concluded that the fault did not lie so much in the commission of the offence as in allowing oneself to become so intoxicated as to be unable to control one's actions. One possible solution would be to sentence the offender as a reckless offender for knowingly risking harm by becoming intoxicated, whether the harm was obvious to the offender or not. However, we were of the opinion that the dilemma as to whether one really was so intoxicated as to be unable to control one's actions or was partially intoxicated and therefore closer to an impulsive offender remained. We cited Ashworth's conclusion that:

"The upshot of this argument is that intoxication is in general neither an aggravating nor a mitigating factor, and the main reason for this is that the ordinary mitigating effect of weakened self-control and less appreciation of the situation is counterbalanced by the aggravating effect of the general social propositions about the use of intoxicants."⁴⁰

We did not feel that the use of alcohol or drugs should appear in our list of aggravating or mitigating factors.

1.26 Recently, in a decision handed down in the High Court in April 1992,⁴¹ Carney J. noted in sentencing the defendant that the psychiatric report stated that he (Corbally) had consumed 15 or 16 pints of beer and had taken the drugs hash and ecstasy on the night of the rape. The judge held that this was an aggravating rather than mitigating factor in the case. However, there is no general policy on intoxication as either a mitigating or an aggravating factor.

1.27 The Commission is of the opinion that a distinction must be made between situations where intoxication should be considered as a matter relevant to sentence only; and, situations where intoxication arises for consideration as being relevant to the actual guilt of the accused.

1.28 In the former context, the accused's intoxication may be considered as either a mitigating or an aggravating factor, depending on all the circumstances of the case, at the trial judge's discretion.

1.29 In this Consultation Paper, we are concerned with intoxication in the

39 *Summary Report of the Fourth Meeting*, PC-R-SN (91) 1.

40 Ashworth, *Sentencing and Penal Policy*, Weidenfeld & Nicolson, London, 1983, p.173.

41 Reported on in *The Irish Times*, 28 April 1992.

latter context, i.e. the circumstances in which intoxication is relevant to liability, as it is in this context that the question of intoxication as a defence arises. In addition, the Commission recognises that the relationship between intoxication by alcohol and intoxication by other drugs poses an interesting dilemma; as does the relationship between offences where intoxication is an element of the offence and the intoxication defence.

1.30 Indeed it should be emphasised that to speak of intoxication as a defence is somewhat to confuse the matter. As we have indicated, what the law is concerned with is the lack of the requisite intent on the part of the offender.⁴² In the words of Lord Birkenhead L.C., the defence:

"... does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime."⁴³

1.31 Therefore, as it is clear that the requisite intent is in issue, why should lack of intent produced by intoxication not be a complete defence in all cases?⁴⁴ The obvious reason is that a defence of intoxication poses a dilemma for the criminal law: on the one hand, there is the cardinal maxim of *actus non facit reum, nisi mens sit rea*;⁴⁵ and on the other hand, there is the substantial policy consideration that the law should not condone criminal behaviour which results from self-induced intoxication. In particular, alcohol and/or drugs are significantly associated with crimes of violence, though this does not necessarily mean that they are a causal factor.⁴⁶

1.32 The social consumption of alcohol is almost universal in our society and its physiological and psychological effects known, in a general way, to even the moderate drinker.⁴⁷ As the consumption of other drugs becomes more prevalent, understanding of their effects is also growing. Glanville Williams comments regarding alcohol that:

"The effect of alcohol on the brain is depressant from the beginning. Its apparently stimulating effect is due solely to the fact that it deadens the higher control centres (and progressively the other centres as well), so weakening or removing the inhibitions that normally keep us within the bounds of civilised behaviour. It also impairs perception, reasoning, and the ability to foresee consequences."⁴⁸

1.33 Nevertheless, in behavioral terms, exactly what happens to a person when

42 Stanley M. Beck and Graham E. Parker, 'The Intoxicated Offender - A Problem of Responsibility', [1966] 44 *Canadian Bar Review* 563 at 560.

43 *D.P.P. v Beard* [1920] A.C. 479 at 499.

44 Beck and Parker, *op cit*, p.580.

45 An act does not of itself constitute guilt unless the mind is guilty.

46 F.H. McClintock and others, *Crimes of Violence*, London, 1963, p.254. Cited in Glanville Williams, *op cit*, p.464.

47 Beck and Parker, *op cit*, p.607.

48 Glanville Williams, *op cit*, p.464.

he or she becomes intoxicated is not as yet precisely known.⁴⁹ It might be possible to conclude that, because experimental psychology has not been able to identify the effects of intoxication on behaviour, the criminal law should not be expected to alter its criteria of responsibility. However, medical science does know in general terms what effects intoxicants have on the individual and might support a change in the degree of responsibility ascribed to an intoxicated offender.⁵⁰ Beck and Parker comment:

"It is certain that intoxication impairs perception, judgment and muscular coordination. Along with this impairment goes an increase in self-confidence, a lessening of inhibitions, and a release of sexual and aggressive impulses. The fact that an individual's repressed instincts may break through and manifest themselves in overt acts during intoxication has led some commentators to the incorrect conclusion that drunken offenders intend their acts in the same way as do sober men. Their argument is as follows: all men have repressed desires - repressed instincts - which they usually manage to control. The drunk is free from his inhibitions and acts out these desires. His intent while drunk is thus his real intent and his acts are purposive, or end-directed, as those of a sober man.

Psychoanalysts tell us, however, that people have repressed instincts, sexual and aggressive, not intents. Intents refer to cognitive functions. Alcohol brings about a diminution of the repressive mechanisms, allowing the instinctual to occur in behaviour. These repressive mechanisms are of emotional, not intellectual, origin. In simple terms, the emotional brakes which act as the restraint in all of us are released, and inhibited or self-controlled desires are converted into actions."⁵¹

Intoxication And Addiction

1.34 Can *addiction* to intoxicants lead to circumstances where a person can be said not to be responsible? We think not, unless, perhaps, addiction has led to the development of a non-transient form of insanity. Even the most addicted person can recover with or without treatment. Therefore, if a person is, theoretically, in a position to recover and resist the first drink or 'hit', that person's intoxication can never be truly described as involuntary.

Intoxication And Recklessness

1.35 In *R v Caldwell*⁵² a majority of the House of Lords held that evidence of intoxication would not be relevant if the offence charged was one for which recklessness would be sufficient to constitute the mental element. This

49 Beck and Parker, *op cit*, p.570.
50 *Ibid*, p.571.
51 *Ibid*, p.571.
52 [1981] 1 All ER 961.

development has not found favour in some common law jurisdictions.

1.36 The emphasis in Irish law is on a subjective standard of reasonableness and the objective nature of the decision in *Caldwell* is unlikely to find favour in Irish law.

1.37 In *People v Dwyer*⁵³ the Supreme Court held that where the defence to a charge of murder is self defence against a violent and felonious attack, the trial judge should inform the jury that if they come to the conclusion that the accused, acting in self defence, employed more force than was reasonably necessary, but no more than he or she honestly believed to be necessary, they should return a verdict of guilty of manslaughter.

1.38 Walsh J. held:

"If an accused ... only does what he honestly believes to be necessary in the circumstances, even though that involves the use of a degree of force greater than a reasonable man would have considered necessary in those circumstances, the accused has been guilty of an error of judgment in a difficult situation which was not caused by himself."⁵⁴

1.39 Walsh J. concluded that:

"Our statutory provision⁵⁵ makes it clear that the intention is personal and that it is not measured solely on objective standards. In my opinion, therefore, when the evidence of a case discloses a question of self-defence and where it is sought by the prosecution to show that the accused used excessive force, that is to say more than would be regarded as objectively reasonable, the prosecution must establish that the accused knew that he was using more force than was reasonably necessary."⁵⁶

1.40 Butler J. in his judgment, noted:

"A person is entitled to protect himself from unlawful attack. If in doing so he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he kill his assailant. If he uses more force than may objectively be considered necessary, his act is unlawful, if he kills, the killing is unlawful. His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention in doing the unlawful act was primarily to defend himself, he should not be held to have the necessary intention to kill or cause

53 [1972] I.R. 416.

54 At 423.

55 Section 4 of the *Criminal Justice Act, 1964* -

"(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."

56 [1972] I.R. 416 at 424.

serious injury."⁵⁷

1.41 Butler J. concluded that:

"The matter is one for consideration by the jury in each case and it is for them to find what was the intention of the accused at the time of the killing."⁵⁸

1.42 Charleton remarks that the finding in the *O'Connor* judgment that drunkenness could not replace the mental element by making it the equivalent of recklessness was significant, in the light of the discussion of recklessness in *The People (D.P.P.) v. Murray*, [1977] I.R. 360.⁵⁹

1.43 The Commission has previously recommended that recklessness should be defined subjectively. In our Report on Receiving Stolen Property,⁶⁰ we proposed that the formulation from the tentative draft of the Model Penal Code, approved by Henchy J. in his judgment in *Murray* should be adopted:

"A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."⁶¹

Suffice it to say at this stage that if intoxication, voluntarily brought about gives rise to recklessness and in consequence to uninhibited, (overtly) criminal acts, however remote from the original indulgence in intoxicants, society is surely not precluded from making exceptions to strict doctrines relating to intent and the guilty mind in order to address this mischief.

Intoxication And Dutch Courage

1.44 One would imagine that the situation should be more straightforward where one deliberately reduces oneself to a state of intoxication in order to give oneself 'dutch courage' to commit a crime. The intoxication will not be a defence; even to crimes that can only be committed with a specific intention.

1.45 As Lord Denning stated in *A.G. for Northern Ireland v Gallagher*:

"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it knowing it is a wrong thing to do, and then gets himself so drunk so as to give himself Dutch courage to do the killing,

57 At p.429.

58 At p.432.

59 *Op cit*, para. 4.44.

60 *Report on Receiving Stolen Property*, (LRC 23-1987).

61 [1977] I.R. 360 at 403, quoted in the Report (LRC 26-1988) at p.20.

and whilst drunk carries out his intention, he cannot rely on the self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also, when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do."⁶²

1.46 However, as Glanville Williams remarks "the majority did not express concurrence in Lord Denning's view, because they decided the case on a different point".⁶³ He explains that counsel for the defendant had argued that he was irresponsibly insane, and the majority held that the question of insanity was to be judged by reference to the time of the act and not some earlier time when he took alcohol, because at that earlier time he might not have been insane, yet he might have been insane at the time of the act. Glanville Williams remarks that "Lord Denning's opinion, on the other hand, supposed that insanity was out of the case; on that assumption, he says, it was surely right."⁶⁴

1.47 The difficulty with Lord Denning's view, according to Smith and Hogan,⁶⁵ is that an intention to do an act some time in the future is not *mens rea*. They point out that the *mens rea* must generally coincide with the conduct which causes the *actus reus*. They illustrate this with an example:

"If D, having resolved to murder his wife at midnight, drops off to sleep and, while asleep, strangles her at midnight, it is thought that he is not guilty of murder (though he may be liable for manslaughter on the grounds of his negligence). The case of deliberately induced drunkenness, however, is probably different."⁶⁶

1.48 They go on to say that:

"The true analogy, it is thought, is the case where a man uses an innocent agent as an instrument with which to commit crime.... [I]f D induces an irresponsible person to kill, D is guilty of murder. Is not the position substantially the same where D induces in himself a state of irresponsibility with the intention that he shall kill while in that state? Should not the responsible D be liable for the foreseen and intended acts of the irresponsible D? So regarded, a conviction would not be incompatible with the wording of the M^cNaughten Rules. The result, certainly, seems to be one required by policy and it is thought the courts will achieve it if the problem should be squarely raised before them."⁶⁷

62 [1961] 3 All E.R. 299 at 314.
63 Glanville Williams, *op cit*, p.468.
64 *Ibid.*
65 Smith and Hogan, *op cit*, p.229.
66 *Ibid.*
67 *Ibid.*

Intoxication And Insanity

1.49 In strict logic, it might be argued that the intoxication defence should, like insanity, preclude criminal responsibility. With acute intoxication, one may have lost one's power of self control; one's ability to make judgements may be impaired; and, one may be quite incapable of foreseeing the consequences of one's acts.⁶⁸

1.50 However, as Charleton writes:

"Since 1800, persons who have successfully pleaded the defence of insanity have not achieved their freedom. Notwithstanding the fact that the verdict is, in substance if not in form, a finding that a person did not have the capacity to commit crime, the accused is held in the Central Mental Hospital pending his recovery."⁶⁹

1.51 He indicates that where the accused is suffering from an insane delusion, but the delusion is not so complete as to render him or her insane, apparently he or she is to be judged according to the M'Naughten Rules of 1843.⁷⁰ He goes on to say, citing *Windle*⁷¹ and *Doyle v Wicklow County Council*⁷² as authority, that:

"Whereas it has been accepted in England that the Rules are of general application in deciding insanity, in Ireland they have been limited to their stated purpose of defining the law with respect to insane delusions. The result is the absence of a specific definition of insanity. The formula most usually adopted is that of *Stephen [Digest (1894 ed.) Article 28]*

No act is a crime if the person who does it, at the time when it is done, is prevented, either by defective mental power or by any disease affecting his mind (a) from knowing the nature and quality of his act, or (b) from knowing that the act is wrong,⁷³ or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default."⁷⁴

1.52 An irresistible impulse, unless it is caused by the accused's own fault, is

68 Beck and Parker, *op cit*, p.572.

69 *Op cit*, para. 4.45.

70 It was held by the Law Lords that:

"the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong". 10 CL & F at p.210.

71 [1952] 2 All E.R. 1.

72 [1974] I.R. 55.

73 Wrong in this context means wrong according to the standards adopted by reasonable persons and not legally wrong.

74 *Op cit*, para. 4.45.

also accepted as part of the insanity plea.⁷⁵

1.53 Where intoxication causes a disease of the mind, it may be sufficient to bring the defendant within the insanity rules. In such circumstances, they will be applied in exactly the same way as where insanity arises from any other cause. A person in *delirium tremens*, for example, is held to be irresponsible and insane. However, there are serious difficulties in defining a "disease of the mind" or "disease affecting the mind" and the distinction between temporary insanity induced by drink or other drugs and simple intoxication is far from clear-cut.⁷⁶ Furthermore, the term *delirium tremens* has been occasionally used to indicate a mere fit of drunken frenzy although technically it designates a mental disease⁷⁷ and it is only in this latter sense that it can relate to the insanity defence.

1.54 Glanville Williams comments that:

"This distinction between intoxication and insanity is not entirely realistic: an addict is as much in the grip of his own failing as a psychotic. Alcohol addiction causes brain damage. But courts do not draw the line as sharply as may appear. On the one hand, a person who successfully sets up a defence of insanity is not released: he goes to a psychiatric hospital for as long as he is thought to be a public danger. On the other hand, an alcoholic or drug addict who is convicted of crime need not be punished: the court may put him on probation for treatment, if considerations of deterrence are not paramount and if treatment is available.

Most drunkards who commit serious crimes are sent to prison (and on conviction of murder the court has no option); whereas an irresponsibly insane person who sets up his insanity as a defence may have a 'special verdict' (of insanity), in which case he will at least be safe from prison
....⁷⁸

1.55 There is one early English decision⁷⁹ accepting a defence of insanity based on alcoholism resulting in *delirium tremens*. However, even in this case the attitude appears to have been that an acquittal on the grounds of insanity would have been too lenient.⁸⁰ Clarkson and Keating comment that the defence is rarely successful in England.⁸¹ They cite a 1974 case, *Burns*,⁸² where a psychiatrist testified that Burns had a disease of the mind because his brain was damaged by alcohol with the result that he was suffering from "amnesia in the sense that the thing does not register at the time because the brain function is

75

Ibid.

76 Smith and Hogan, *op cit*, p.227.

77 Perkins and Boyce, *op cit*, p.1015.

78 Glanville Williams, *op cit*, p.466.

79 *Davis* (1881) 14 Cox C.C. 563.

80 Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed., The Carswell Company Limited, Toronto, p.366.

81 *Op cit*, p.395.

82 (1974) 58 Cr. App. R. 364.

impaired" which meant that Burns did not know what he was doing, or that it was wrong when he committed the alleged crime. It was accepted that this defence could result in the insanity verdict, but the jury rejected the psychiatric evidence and concluded that Burns knew what he was doing.⁸³

1.56 In *Salzman v United States*,⁸⁴ while the conviction of the appellant was confirmed (because the record was inadequate to sustain his assertion that the jury should have been allowed to consider, and acquit if so found, whether the act with which he was charged was the product of the disease from which he claimed to be suffering, namely, chronic alcoholism), Circuit Judge Skelly Wright, nevertheless, set forth his views because he considered that the problems were important. He observed that:

"The question is whether a person claiming to be a chronic alcoholic should be acquitted of any crime if the jury finds that he was suffering from a disease and that his actions were a product of that disease; whether, therefore, the proper disposition of such a person is to a treatment facility rather than to a penal institution. I think the question should be answered in the affirmative.

In the long-standing debate over criminal responsibility there has always been a strong conviction in our jurisprudence that to hold a man criminally responsible his actions must have been voluntary, the product of 'free will'. Accordingly, when there has been a consensus that in a certain type of case free will is lacking, the defendant in such a case may raise involuntariness as a defense to criminal prosecution. This has been true where various forms of automatism have been claimed, where a person has acted under external threat of compulsion and where a person has been involuntarily made intoxicated by the actions of others. And, of course, there has been the long tradition in the area of mental illness that:

'[A] person may commit a criminal act and yet not be responsible, if some controlling disease was in truth, the acting power within him which he could not resist, then he will not be responsible...'

In deciding responsibility for crime, therefore, the law postulates a 'free will' and then recognizes known deviations. Thus the postulates can be undermined in certain areas where there is a broad consensus, as in the mental illness area today, the jury is allowed to inquire whether the particular person claiming to be within that class lacked the free will necessary for criminal responsibility. No reason appears why this concept should not be applied to any disease. The question is whether society recognizes that the behaviour pattern in question is caused by the

83
84

Clarkson and Keating, *op cit*, p.395.
405 F.2d 358 (1968) (United States Court of Appeals, District of Columbia Circuit).

diseased determinants and not free will. (This approach is a recognition that notions of criminal responsibility, free will, disease, and moral culpability are community beliefs, subject to evolution and change in light of scientific advances or exposure to particular problems). If so, there should be no criminal responsibility. In determining societal recognition, four areas should be explored: (1) medical opinion, (2) the existence of treatment methods and facilities, (3) legal opinion, and (4) governmental recognition (legislative, executive and judicial). On exploration, I find sufficient consensus to hold, as a matter of law, that chronic alcoholism is a disease which in some instances may control behaviour and that in those instances where it does, criminal sanctions may not be imposed."⁸⁵

1.57 On this side of the Atlantic, Glanville Williams writes that intoxication is not in itself insanity, but that intoxication may result in what is thought of as insanity or it may be symptomatic of insanity, or bring about latent insanity. In these circumstances the ordinary defence of insanity is open and if it succeeds there will be a special verdict and the defendant will go to hospital. However, he goes on to comment that:

"From the social point of view an insanity verdict is not the preferred outcome. It is unlikely that either a special hospital or the NHS would willingly accept an alcoholic as an in-patient for any length of time, if at all. Such methods of treatment as exist require the active desire of the patient for treatment, and the problem is one of motivation. The desirable solution is some legal mechanism by which the alcoholic or drug-addict can be held to be legally responsible, and therefore punishable - not by way of retribution, but in order to induce him to accept treatment or otherwise to discontinue his habit, or in the last resort to contain him for some time for the protection of the public."⁸⁶

1.58 In general, the common law has been reluctant to take the view that intoxication should be treated like insanity and has relied on overriding policy considerations to justify this position.⁸⁷ It is also argued that public opinion would not approve of laws which would completely excuse intoxicated offenders.⁸⁸

Intoxication And Diminished Responsibility

1.59 Mention should also be made of the defence of diminished responsibility which is available in some other jurisdictions. At the moment, such a defence is not recognised in this jurisdiction. While consideration of such a defence is more appropriate in the context of a review of the law on insanity, it is relevant to

85 Quotation from Clarkson and Keating, *op cit*, p.396.

86 *Op cit.*, p.446.

87 Don Stuart, *op cit*, p.363.

88 Beck and Parker, *op cit*, p.607.

recognise that just as intoxication and insanity may overlap, intoxication and diminished responsibility may likewise overlap depending on how the defence of diminished responsibility is formulated. In general, the defence arises in the context of disease or abnormality of the mind⁸⁹ and invariably, in the context of reducing murder to manslaughter.⁹⁰

1.60 For example, section 2 of the English *Homicide Act, 1957* provides that:

- "(1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
- (2) ...
- (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

1.61 As intoxication is not recognised as a disease or abnormality of mind, it is unlikely to be included as a relevant consideration. Smith and Hogan remark that while it has been argued⁹¹ that intoxicants can produce a toxic effect on the brain which would be an injury within section 2, the court thought it was very doubtful whether the transient effect of intoxication could amount to an injury. They go on to suggest that:

"Presumably a permanent injury to the brain produced by drink would be held to be an injury within the section. Difficult questions may arise where a substantial impairment arises as a result of a combination of inherent abnormality and drink."⁹²

1.62 The English Court of Appeal, in *Tandy*,⁹³ held that intoxication may found diminished responsibility if the defendant is suffering from alcoholism which renders the taking of the first drink involuntary.⁹⁴

1.63 If this is regarded as undesirable then the alternative is expressly to exclude intoxication under the definition of the defence. This is exactly the course adopted by the Law Commission in its Draft Criminal Code for England

89 For example, see section 2(2) of the English *Homicide Act, 1957*.

90 *Ibid.*

91 *Di Duca* (1958) 43 Cr. App. Rep. 167, *Dowdall* (1960) *Times*, 22 January.

92 *Op cit.*, p.228.

93 [1989] 1 All E.R. 267.

94 Law Com. No. 177, *op cit*, para. 14.19.

and Wales.⁹⁵ Clause 56 proves that:

"(1) A person who but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is substantial enough reason to reduce his offence to manslaughter.

(2) In this section 'mental abnormality' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

(3) Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated."

Intoxication And Automatism

1.64 Charleton comments that at common law, it has always been a defence that the accused's action was involuntary.⁹⁶ He points out that the defence is often difficult to distinguish from insanity. He adds that this is compounded by the uncertain definition of insanity in Irish law.

1.65 Automatism is generally understood to provide a defence to any criminal act where the accused acted involuntarily, i.e. where it is done by the muscles without the control of the mind, such as a spasm, a reflex action or a convulsion, or an act done by a person who is not conscious of what he or she is doing, such as an act done whilst suffering from concussion or whilst sleepwalking. If automatism is successfully pleaded, the accused is entitled to a complete acquittal.⁹⁷

1.66 Automatism may be insane or non-insane, the former results in the special verdict of "guilty but insane" and the latter entitles the accused to a full acquittal. The distinction is made between automatism which results from internal factors (insane automatism), and automatism which results from external factors (non-insane automatism). Examples of insane automatism are automatism caused by a cerebral tumour, arteriosclerosis, epilepsy, diabetes and sleepwalking, though there has been some doubt regarding the latter. Examples of non-insane automatism are, automatism caused by concussion, the administration of an anaesthetic or other drug, or hypnosis.⁹⁸

1.67 In general, in common law jurisdictions, there is said to be one exception to the rule that there is no liability for an involuntary act. In jurisdictions where *Majewski* is followed this exception relates to where the act was done in a state

95 The Law Commission, *A Criminal Code for England and Wales*, Law Com. No. 1977.

96 *Op cit.*, para. 4.47. See 1 Hale P.C. 434.

97 Charleton, *op cit.*, para. 4.47.

98 Smith and Hogan, *op cit.*, p.39.

of self-induced intoxication and the offence was one of basic intent.⁹⁹ MaKay¹⁰⁰ argues that such an exception is part of the wider rule that automatism induced by the defendant's fault is no defence. However, Smith and Hogan respond that there is no case on this other than intoxication cases and that the exception is best confined to those cases.¹⁰¹

1.68 There has been some disagreement as to whether voluntariness should be treated as part of the *mens rea* or part of the *actus reus*. On the one hand, it is a mental element; while on the other hand, it is an essential constituent of the act.¹⁰² Arguably, the classification is important, because, it is suggested that, if it is part of the *mens rea*, then no defence is provided in cases of strict liability. However, this argument fails to appreciate that even in cases of strict liability, the mental element is not totally discounted. As Smith and Hogan comment:

"If the mental element is part of the *actus reus*, there is certainly no way of dispensing with it; but it does not follow that it must be dispensed with where an offence is held to be one of strict liability."¹⁰³

1.69 The Commission considers that for the purpose of this Consultation Paper, voluntariness should be considered as a question of *mens rea*.

Intoxication And Mistake

1.70 Charleton writes that the relevance of mistake of fact as a defence can only be determined by isolating and defining the elements of the offence. Thus he goes on to state that:

"Where the element in respect of which a mistake is made is one of strict liability the offence only requires that the accused should do the act which comprises that element. Hence mistake is not a defence in those circumstances. Where the mental element of an offence is negligence then a negligent mistake will not excuse. Where the mental element of an offence is criminal negligence then a genuine mistake arrived at in a criminally negligent fashion will not excuse. Where the mental element of the offence consists of knowledge or intent, then the existence of a belief by the accused which, if it were true, would mean that his act were innocent, relieves him of liability. Where the mental element of an offence consists of recklessness then wilful blindness as to the true facts will not absolve the accused of liability. Wilful blindness has also been held to be equivalent to knowledge for offences of recklessness."¹⁰⁴

99 *Ibid.*, p.37.

100 R. D. MaKay, 'Intoxication as a Factor in Automatism', [1982] *Crim. L. R.* 146.

101 *Op cit.*, p.38.

102 *Ibid.*

103 *Ibid.*

104 *Op cit.*, para. 4.38.

1.71 Thus a reasonable mistake of fact may operate as a defence to a particular offence. However, where the mistake is the result of self-induced intoxication, it would appear that the defendant should not be able to rely on his or her mistake.

Conclusions

1.72 As we shall see in subsequent Chapters, in an endeavour to reconcile the conflicting considerations which arise in the analysis of the intoxication defence, and in the absence of parliamentary intervention, many common law courts have adopted the specific intent/basic intent dichotomy.

1.73 During the twentieth century, much of the debate on the defence has centred on whether *Beard*, in particular in the light of *Majewski*, should be followed or not. Most of the common law world has accepted the basic/specific intent dichotomy.¹⁰⁵ Yet the *Beard/Majewski* approach has not gone uncriticised and some common law jurisdictions have refused to follow it.¹⁰⁶

1.74 Whether Irish courts would follow the *Beard/Majewski* model should an appropriate case arise for consideration is by no means guaranteed. It is entirely possible that the Irish courts might hold that there is no such defence as intoxication in Irish law.

1.75 The Commission regards the quest for clarity in this area as a useful starting point for a review of the law on intoxication as a defence. We consider that consideration of the defence in other jurisdictions and the proposals for reform which have been advanced elsewhere will provide useful insights into the nature of the defence, as well as highlighting possible problems and pitfalls.

1.76 With this in mind, the Commission proposes to consider the history of the defence at common law, the defence as it exists in other jurisdictions and the proposals for reform which have been put forward in those jurisdictions, so that we may learn from their experience.

105 Notably, England and Wales, the United States of America, Canada, the Australian code states.

106 Notably, the Australian common law states, New Zealand and until recently South Africa.

CHAPTER 2: THE DEVELOPMENT OF THE DEFENCE IN THE COMMON LAW

Historical Development

2.1 In its formative period the common law was little concerned with the mental processes of the offender.¹ Historically, an offender was subject to the punishment of outlawry in addition to the individual revenge of the blood feud, but these slowly gave way to a system of compensation whereby one was permitted to "buy" the peace one had broken.² By the twelfth century as the administration of the criminal law became centralised under the Crown, punishment became more common.³

2.2 Originally, intoxication was not of itself an offence under the common law, however, it was punishable in the ecclesiastical courts.⁴ The recognition of intoxication as a defence developed slowly over a number of centuries. The earliest mention of intoxication relating to criminal responsibility in English legal literature is to be found in the *Penitential of Theodore*, Archbishop of Canterbury from 668 to 690 A.D.⁵ However, it is in *Reniger v. Feogossa*,⁶ argued before the Exchequer Chamber in 1551, that one finds the first reported case containing an early statement of the law. It was held that:

"[I]f a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory, but inasmuch as that ignorance was occasioned by his own act and folly, and he might have

1 Pollock and Maitland, *History of English Law*, Vol. 2, 2nd ed., 1898, pp.448-511.
2 Stanley M. Beck and Graham E. Parker, *op cit*.
3 *Ibid*, p.564.
4 Perkins and Boyce, *op cit*, p.995.
5 R.U. Singh, "History of the Defence of Drunkenness in English Criminal Law", (1933) 49 *Law Quarterly Review* 528.
6 (1551) 1 Plowden 1, 75 E.R. 1 (ex.).

avoided it, he shall not be privileged thereby."⁷

2.3 Some early cases and authorities treated intoxication as an aggravation of the offence.⁸ For instance, in *Beverley's Case* in 1603, it was said that:

"Although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offence nor turn to his avail, but it is a great offence in itself, and, therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him."⁹

2.4 Similarly, both Coke and Blackstone were of the opinion that intoxication at the time of the commission of the crime was a matter of aggravation.¹⁰ Chitty¹¹ and Russell¹² also accepted this view.¹³

2.5 As a statement of the law, however, this view has been criticised on the grounds that as far as the common law is concerned a crime committed by an intoxicated person is not aggravated thereby.¹⁴ Singh comments that:

"It is very difficult to say if and to what extent, in actual practice of law, drunkenness was ever taken to operate as aggravation of an offence and meant infliction of a heavier sentence than would be due if the offence had been committed by a sober man. There is no English case on the point."¹⁵

2.6 Singh concludes that:

"[I]t is highly improbable that the Courts ever adopted the rule that a drunkard committing a minor offence was to be punished for an offence of a higher grade.... All that can be said is that drunkenness of the accused might have led the judge to inflict a heavier sentence than he otherwise would and that may be no less true to-day not only in cases of minor assaults and acts of violence, but also in offences like involuntary manslaughter by a drunken driver."¹⁶

7 *Ibid.*

8 See further Singh, *op cit.*

9 4 Coke 125.

10 "A drunkard", says Sir Edward Coke, "who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it." 4 Bl. Comm. *26 Blackstone has a passage to the same effect: "As to artificial, voluntarily contracted madness, by drunkenness or intoxication which, depriving men of their reason, puts them in a temporary phrenzy: our law looks upon this as an aggravation of the offence, rather than an excuse for any criminal misbehaviour." 4 Bl. Comm. *25. He also cites the Greek enactment "that he who committed a crime when drunk should receive double punishment". 4 Bl. Comm *26.

11 *Criminal Law*, vol. iii, p.725 (1816 ed.).

12 *Crimes and Misdemeanours*, vol. i, p.11 (1819 ed.).

13 See Singh, *op cit.*, p.531.

14 Perkins and Boyce, *op cit.*, p.1000.

15 Singh, *op cit.*, p.531.

16 *Ibid.*, p.532.

2.7 Nevertheless, it is true to say that prior to the nineteenth century intoxication was not a defence to a criminal charge. The view that intoxication could not excuse appears first to have been qualified by Hale.¹⁷ In accordance with the earlier authorities, he wrote that a drunken person:

"[S]hall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses".¹⁸

2.8 But he continued:

"But yet there seem to be two allays to be allowed in this case.

1. That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other phrenzy and equally excuseth him.

2. That although the *simple* phrenzy occasioned *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices an *habitual* or *fixed* phrenzy be caused though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same was contracted involuntarily at first."¹⁹

2.9 Singh comments that these allays are important in the history of the defence of intoxication as no one before that had specifically urged any modification of the general rule that intoxication did not excuse crime.²⁰ However, he observes that it is difficult to say to what extent these exceptions represent the law of Hale's time or how far they were innovations introduced by him.

2.10 By a series of cases in the nineteenth century the rigidity of the old rule that voluntary intoxication was never a defence to crime was gradually relaxed, though this mitigation could not for a long time be affiliated to a single principle.²¹ This series of cases was comprehensively reviewed by Lord Birkenhead L.C. in *D.P.P. v. Beard* in 1920.²²

2.11 The case of *R. v. Grindley*,²³ tried in 1819, seems to have been the first reported decision in which intoxication was put forward as a defence.²⁴ In that case, Holroyd J. held that although voluntary intoxication could not excuse the

17 Hale, 1 *Pleas of the Crown*.

18 *Ibid.*, p.32.

19 *Ibid.*

20 *Op cit.*, p.534.

21 (1920) A.C. 479 at 495 (per Lord Birkenhead L.C.).

22 (1920) A.C. 479.

23 *Russell on Crimes and Misdemeanours*, 2nd ed., p.8.

24 (1920) A.C. 479 at 495 (per Lord Birkenhead L.C.).

commission of any crime, yet where, as upon a charge of murder, the material question was, whether an act was premeditated or done only with sudden heat or impulse, the fact that the person was intoxicated was a circumstance that could properly be taken into consideration.

2.12 Singh comments that the language used was capable of wide application,²⁵ and in *R v. Carroll*²⁶ the case was overruled and Park J. declared that "there would be no safety for human life if it were considered law".²⁷

2.13 In *Burrow's Case*²⁸ and in *Rennie's Case*²⁹ Holroyd J. assumed that intoxication could not be taken into account as a defence to a criminal charge unless the derangement which it caused became fixed and continuous because the intoxication itself was habitual.³⁰

2.14 During the 1830s, three cases,³¹ involving apprehension in the mind of the accused of attack or the effect of a sudden provocation, recognised that the intoxication of the accused could be taken into consideration by the jury.

2.15 The first observations on the question of intoxication as affecting intent were made in *R v. Meakin*.³² Anderson B. directed the jury that:

"With regard to intention, drunkenness may perhaps be adverted to according to the nature of the instrument used...; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."

2.16 The view was that intoxication might affect the jury's view of the intent but that the use of the deadly weapon in that case showed the malicious intent so clearly that the intoxication of the accused could not alter it.³³

2.17 Two years later, in *R v. Cruse*,³⁴ Patterson J. directed the jury that although intoxication was no excuse for crime, yet it was often of very great importance in cases where it was a question of intention and that a person might be so intoxicated as to be utterly unable to form any intention at all, and yet may be guilty of very serious violence. Though agreeing with the substance of Patterson J.'s direction, the correctness of the words used was doubted by Coleridge J. in *R v Monkhouse*.³⁵ Coleridge J. further observed:

25 *Op cit.*, p.527.
26 (1835) 7 C. & P. 145.
27 *Ibid.*
28 (1823) 1 Lewin 75.
29 (1823) 1 Lewin 76.
30 (1929) A.C. 479 at 496.
31 *Marshall's Case* (1830) 1 Lewin 76; *Pearson's Case* (1835) 2 Lewin 144; and *R v Thomas* (1837) 7 C.&P. 817.
32 (1836) 7 C. & P. 297. See Singh, *op cit.*, p.539.
33 (1920) A.C. 479 at 497.
34 (1838) 8 C. & P. 546.
35 (1849) 4 Cox C.C. 55.

"Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."³⁶

2.18 Here again the appropriate question seemed to have been whether the accused was so intoxicated as to be entirely incapable of forming the intent charged, that is, the intent to murder.³⁷

2.19 Singh comments that this would be a correct statement of the law if it did not contain the words "unless the intoxication was such as to prevent his restraining himself from committing the act in question."³⁸

2.20 In *R v. Stopford*,³⁹ on an indictment for wounding with intent to do grievous bodily harm, Brett J. said:

"If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing."⁴⁰

2.21 The question was whether the accused had formed the intent to murder, and this was answered, in the opinion of the trial judge, if the jury thought the intoxicated condition rendered the accused incapable of forming the intention.⁴¹

2.22 In *R v. Doherty*⁴² Stephen J. directed the jury that:

"The general rule as to intention is that a man intends the natural consequences of his act. As a rule the use of a knife to stab or of a pistol to shoot shows an intent to do grievous bodily harm, but this is not a necessary inference. In drawing it you should consider for one thing the question whether the prisoner is drunk or sober.... But although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to commit the crime. If a sober man takes a pistol, or a knife, and shoots or strikes at someone else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his

36 Quoted by Singh, *op cit*, p.539.
37 (1920) A.C. 479 per Lord Birkenhead L.C. at 498.
38 *Op cit.*, p.539. Lord Birkenhead L.C. had passed a similar remark in *Beard*.
39 11 Cox C.C. 643.
40 *Ibid*.
41 (1920) A.C. 479 per Lord Birkenhead L.C. at 498.
42 (1887) 16 Cox C.C. 306.

drunkenness upon his intention.... A drunken man may form an intention to kill another, or do grievous bodily harm to him, he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober."⁴³

2.23 Lord Birkenhead L.C. commented that this established (except in the case of insanity):

"that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime."⁴⁴

2.24 In the 1880s the law on intoxication resulting in mental disease developed a great deal. In the early nineteenth century, in *Burrow's Case*⁴⁵ and in *Rennie's Case*⁴⁶, and as late as 1878 in *R v. M'Gowan*⁴⁷, the rule had been laid down that only habitual intoxication causing permanent insanity could be a defence to a crime. But in 1881, in *R v. Davis*,⁴⁸ Stephen J. ruled that temporary insanity induced by intoxication excused the accused. He directed the jury that:

"Drunkenness is one thing, and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary."

2.25 In *R v. Baines*,⁴⁹ decided four years later, Day J. expressly overruled *R v. M'Gowan*.

The Twentieth Century

2.26 The first important British case on intoxication in the twentieth century is *R v. Meade*.⁵⁰ In that case, the Court of Criminal Appeal laid down the following rule as to the nature of the intoxication which would be sufficient to satisfy the jury that the accused had not the relevant intent:

"A man is taken to intend the natural consequences of his acts. This

43 Quoted by Singh, *op cit*, p.540.

44 *Beard* (1920) A.C. 479 at 499.

45 (1823) 1 Lewin 75.

46 (1823) 1 Lewin 76.

47 See Singh, *op cit*, p. 541, citing Taylor and Stephenson, *Manual of Medical Jurisprudence*, 12th ed., p.797.

48 (1881) 14 Cox C.C. 563.

49 *The Times*, 25 January, 1886.

50 [1909] 1 K.B. 895.

presumption may be rebutted -(1) in the case of a sober man in many ways; (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e. likely to inflict injury. If this is proved, the presumption that he intended to do grievous bodily harm is rebutted."

2.27 Singh comments that:

"[T]his rule was unsupported by authority even in its particular application to cases where intent is an integral part of the crime and was dangerous as a rule of universal application."⁵¹

2.28 Nevertheless, *Meade's Case* was the leading British authority until 1920, when the House of Lords handed down its now famous decision in *Director of Public Prosecutions v. Beard*.⁵²

2.29 In *Beard*, on an indictment for murder, the defendant pleaded intoxication as a defence. He was convicted of murder at first instance. The Court of Criminal Appeal substituted a verdict of manslaughter on the grounds that the trial judge in his summing up was wrong in applying the insanity test to the case of intoxication holding that he ought to have directed the jury, in accordance with the rule laid down in *Meade's Case*, that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so intoxicated that he was incapable of knowing that what he was doing was dangerous. On appeal to the House of Lords, it was held that the broad proposition laid down in *Meade's Case* was not and could not be supported by authority. However, the Court did not specifically overrule *Meade's Case* in its particular application.

2.30 Lord Birkenhead L.C. made a historical survey of the way the common law from the sixteenth century dealt with the effect of self-induced intoxication on criminal responsibility. As indicated, he showed how, from 1819 on, judges began to mitigate the severity of the attitude of the common law in such cases as murder and serious violent crime where the penalty of death or transportation applied or where there was likely to be sympathy for the accused, as in attempted suicide. Lord Birkenhead L.C. concluded that (except in cases where insanity was pleaded) the decisions he had cited:

"... establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted

51 *Op cit.*, p.543.
52 [1920] A.C. 479.

of a crime which was committed only if the intent was proved.... In a charge of murder based upon the intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm ... he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter.... [T]he law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter."⁵³

2.31 However, in a later passage, he went on to say:

"I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases where it is necessary to prove a specific intent in order to constitute the graver crime -eg, wounding with intent to do grievously bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide."⁵⁴

2.32 While the former paragraph is accepted law, this latter passage has been criticised. Singh comments that:

"The suggestion is that drunkenness may affect ordinary *mens rea*. It amounts to an extension of the defence of drunkenness far beyond the limits assigned to it by common law and is opposed to the weight of authority on the point."⁵⁵

2.33 Singh concludes by saying that:

"A further decision must be awaited not only on the soundness of the *dicta* in that case but also on those points of law on the defence of drunkenness which are yet unsettled or which have yet to be adjudicated upon."⁵⁶

53 At p.499.

54 At p.504.

55 *Op cit.*, p.544. He cites the following cases as authority: *R v. Meakin*, 7 C.& P. 297; *R v. Cruise*, 8 C. & P. 546; *R v. Monkhouse*, 4 Cox C. C. 55; and *R v. Doherty*, 16 Cox C.C. 306. He comments that:

"All these decisions repeatedly emphasize the limited scope of the defence of drunkenness, and, notwithstanding a careless use of words in some of them, it can very well be said that they confine the defence to cases where specific intent is an essential element of the crime charged."

56 *Ibid.*

2.34 In *Director of Public Prosecutions v. Majewski*,⁵⁷ the House of Lords confirmed the rule, obscurely stated in *Beard*, that evidence of self-induced intoxication negating *mens rea* is a defence to a charge of a crime requiring a specific intent but not a charge of any other crime.⁵⁸ In *Majewski* the appellant was convicted on three counts of assault occasioning actual bodily harm and on three counts of assault on a police constable in the execution of his duty. He claimed that having consumed large quantities of alcohol and drugs shortly before the instances in question, he did not know what he was doing. He was a drug-addict and admitted that he had previously "gone paranoid," but said that this was the first time he had "completely blanked out." Judge Petre directed the jury to "ignore the subject of drink and drugs as being in any way a defence" to the assaults. The appeal to the House of Lords was unanimously dismissed.

2.35 Lord Elwyn-Jones L.C., in his judgment, commenting⁵⁹ on Lord Birkenhead L.C.'s latter passage quoted above, referred to Shroud who commented on the passage shortly after it was delivered. Shroud wrote:

"The whole of these observations ... suggest an extension of the defence of drunkenness far beyond the limits which have hitherto been assigned to it. The suggestion, put shortly, is that drunkenness may be available as a defence, upon any criminal charge, whenever it can be shown to have affected *mens rea*. Not only is there no authority for the suggestion; there is abundant authority, both ancient and modern, to the contrary."⁶⁰

2.36 Lord Elwyn-Jones L.C. went on to hold that:

"Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary *mens rea* has to be proved) would in my view undermine the criminal law and I do not think it is enough to say, as did counsel for the appellant, that we can rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted."⁶¹

2.37 He concluded by saying that, in the instant case, the jury could be properly instructed that they can ignore the subject of drink or drugs as being in any way a defence in the charge.⁶²

2.38 Lord Salmon commenting on the same passage from Lord Birkenhead's judgment stated:

"I am inclined to think that Lord Birkenhead LC was meaning to point

57 [1976] 2 All ER 142.
58 Smith & Hogan, *op cit.*, p.220.
59 [1976] 2 All ER 142 at 149.
60 *Ibid.*
61 [1976] 2 All ER 142 at 151.
62 *Ibid.*

out that drunkenness was relevant to all cases in which it was necessary to prove a specific intent and was not confined to those cases in which, if the prosecution failed to prove such an intent, the accused could still be convicted of a lesser offence. I confess that I find the passage somewhat obscure but I prefer the construction which makes it consistent with rather than contradictory of the first part of the speech. There can be no doubt that that is how it was understood by the judges, who continued to direct juries in the same way as they always had done and as the learned judge did in the present case. Many distinguished academic writers however, from Shroud (with disapproval) to Professor Glanville Williams (with approval), put the same construction on this passage of Lord Birkenhead LC's speech as that which counsel for the appellant contends.

If, however, Lord Birkenhead LC and the distinguished Law Lords sitting with him intended to make the suggested drastic change in the law, I feel confident that they would have made it crystal clear that they were doing so."⁶³

2.39 Glanville Williams comments that while Lord Birkenhead L.C. had not explained what he meant by "specific", it can be said that his judgment indicates that he had nothing very much in mind.⁶⁴ That he attached no particular significance to it can be demonstrated by the fact that immediately after the sentence in question he repeated it in essence but modified it by omitting the word "specific" and substituted the phrase "the intent necessary to constitute the crime". Williams adds:

"Moreover, at the end of his speech he stated expressly that his remarks were meant to apply not only to crimes requiring a 'specific intent' but also to crimes not requiring a 'specific intent,' 'for,' he said, 'speaking generally (and apart from special offences), a person cannot be convicted of a crime unless the *mens was rea*'. He could hardly have made it clearer that, whatever distinction he had in mind between specific intents and other intents, he (and therefore the House of Lords for whom he was speaking) meant his remarks to apply to all intents. That, indeed was how his opinion was understood for many years.

But judges then conceived the fear that gullible juries would turn dangerous drunks loose upon the community (there is little or no evidence that they have done so). Since so many crimes were worded to require a mental element, and since nothing was to be expected from the Government and Parliament, which do not think it an important part of their function to settle legal difficulties, the judges silently came to the conclusion that the only remedy was the accustomed one of do-it-yourself. The technique was to take Lord Birkenhead's phrase 'specific

63 [1976] 2 All ER 142 at 158.
64 Glanville Williams, *op cit.*, p.471.

intent' and to assert that what he said applied *only* to crimes having that requirement (whatever meaning might be found for it, Lord Birkenhead having assigned none). In *Majewski* the law lords were pressed with the argument that Lord Birkenhead did not mean what he was now supposed to have meant, but they brushed aside the argument with the assertion that he could not have meant what he said."⁶⁵

Conclusion

2.40 During the course of the twentieth century, the House of Lords' decision in *Beard*, in particular as it was interpreted in *Director of Public Prosecutions v. Majewski*,⁶⁶ has been adopted in many common law jurisdictions. This development has not gone uncriticised, both in Britain and in other common law jurisdictions.⁶⁷ Indeed, some jurisdictions have rejected the *Beard/Majewski* approach.

2.41 In England, as we have indicated, in *Director of Public Prosecutions v. Majewski*, the House of Lords confirmed its decision in *Beard*, and the specific intent/basic intent dichotomy that is its legacy remains the law there. In addition, in *R v Caldwell*⁶⁸ a majority of the House of Lords held that evidence of intoxication would not be relevant if the offence charged was one for which recklessness would be sufficient to constitute the mental element.⁶⁹

2.42 As we shall see in Chapters 3 and 4, the law has evolved in the following jurisdictions along somewhat disparate lines.

2.43 In the United States of America, section 2.08 of the Model Penal Code recognises that evidence of intoxication can be a defence if it negatives an element of the offence, but not in the case of recklessness.⁷⁰

2.44 In Scotland, despite initial acceptance of *Beard*,⁷¹ in 1977, the High Court in *Brennan v H.M. Advocate*,⁷² held that *Beard* did not represent the law in Scotland. The Court rejected the specific intent/basic intent dichotomy, holding, in essence, that all intent was to be regarded as basic.⁷³

2.45 Australia's eight jurisdictions are evenly divided on the issue. The common law states,⁷⁴ following the High Court decision in *R v. O'Connor*,⁷⁵ have rejected *Majewski*. Briefly, the Court held that where a person does a prohibited act while so intoxicated and there is a reasonable doubt as to whether

65

Ibid.

66 [1978] 2 All ER 142.

67 See further *infra*, Chapter 3.

68 [1981] 1 All ER 961.

69 See further *infra*, Chapter 4 under England and Wales.

70 See further *infra*, Chapter 4 under the United States of America.

71 *H.M. Advocate v. Campbell* 1921 J.C. 1 and *Kennedy v. H.M. Advocate* 1944 J.C. 171.

72 1977 S.L.T. 151.

73 See further *infra*, Chapter 4 under Scotland.

74 New South Wales, Victoria, South Australia and the Australian Capital Territory.

75 (1981) 146 C.L.R. 64.

that person acted voluntarily and intentionally, then that person should be acquitted. The Code States⁷⁶ and the Northern Territory remain unaffected by the decision in *O'Connor* and the law is substantially as stated in *Majewski*.⁷⁷

2.46 The law in New Zealand is similar to the Australian common law states. In *R v. Kamipeli*⁷⁸ the Court of Criminal Appeal rejected the specific intent theory arguing that it would amount to a situation whereby the state would be exempt from proving *mens rea*.⁷⁹

2.47 The Canadian Supreme Court followed *Majewski* in *Leary v. R*⁸⁰. This decision was confirmed in *Bernard*.⁸¹ However, in *Daviault*,⁸² a case of sexual assault, the Supreme Court held that the rule in *Leary* violated ss.7 and 11(d) of the Charter of Rights, in that a *mens rea* requirement could never be excluded, even from crimes of basic intent - a decision which has given rise to great controversy in Canada.

2.48 In South Africa, in *S v. Chretien*⁸³ the Court unanimously held that severe intoxication which rendered an accused capable of only involuntary actions, was a complete defence, as the accused had committed no *actus reus*. However, in 1988 the South African Parliament passed an Act⁸⁴ providing that though one may not be liable for the principal act, one may be found guilty of an offence and liable on conviction to the penalty, except the death penalty, which might have been imposed in respect of the commission of the principal act.⁸⁵

76 Queensland, Western Territory and Tasmania.

77 See further *infra*, Chapter 4 under Australia.

78 [1975] 2 N.Z.L.R. 610.

79 See further *infra*, Chapter 4 under New Zealand.

80 (1977) 74 D.L.R. (3d) 103, S.C.C..

81 [1988] 2 S.C.R. 833.

82 24 W.C.B.2d 586.

83 [1981] 1 S.A. 1097 (A).

84 Act No. 1 of 1988.

85 See further *infra*, Chapter 4 under South Africa.

CHAPTER 3: THE LAW IN OTHER JURISDICTIONS

Introduction

3.1 In this Chapter we propose to consider the law in other jurisdictions. We consider that such an exercise is useful from two perspectives: first, it supplies us with various models for a defence of intoxication which have been adopted elsewhere; and secondly, it serves to highlight the difficulties which have arisen in their application.

3.2 As *Majewski*¹ has been so significant to the development of the defence, we propose to consider *Majewski* and the specific intent/basic intent dichotomy in some detail. However, while *Majewski* is of considerable importance, not all jurisdictions have been persuaded by it and in considering jurisdictions other than England and Wales, we propose to concentrate on the alternative models that have been adopted.

England And Wales

3.3 As we have already indicated, the law on the intoxication defence in England and Wales is as stated in the decision in *Beard*,² but interpreted in *Majewski* so as to enshrine the specific intent/basic intent dichotomy in the law of England and Wales. The law on the intoxication defence is also subject to the additional qualification introduced in *Caldwell*³ regarding recklessness.

The specific intent/basic intent dichotomy

3.4 The nature of "specific intent" is obviously a matter of some importance,

1 [1976] 2 All ER 142.

2 [1920] A.C. 479.

3 [1981] 1 All ER 961.

however, as Smith and Hogan point out:

"[A] careful scrutiny of the authorities, particularly *Majewski* itself, fails to reveal any consistent principle. In *Majewski*, 'specific' was contrasted with 'basic intent'; but some crimes requiring no ulterior intent - conspicuously murder - are also treated as crimes of 'specific intent'. Lord Simon suggested that the distinguishing factor is that the '*mens rea* in a crime of specific intent requires proof of a purposive element:' yet there need be no purposive element in the *mens rea* of murder; and rape, which is said not to be a crime of specific intent, obviously requires a purposive element. Lord Elwyn-Jones LC suggested that the test is that crimes not requiring specific intent are crimes that may be committed recklessly. Lord Edmund-Davies, a party to *Majewski*, was dismayed to think that, as a result of *Caldwell*, this opinion has prevailed and it certainly now seems likely that any offence which may be committed either by *Cunningham* or *Caldwell* recklessness will be held an offence of 'basic' and not 'specific' intent."⁴

3.5 Glanville Williams comments that:

"The rule in *Majewski* depends upon the assumption that an intelligible distinction can be made between specific and basic intent. But the law lords in that and other cases, while unanimous that there is such a distinction, and while agreeing on some of its applications, have failed to agree on a definition of the two intents. What can be said is that the definition that best fits the actual decisions, and the one representing the dominant judicial opinion, is the one we had before for what we then preferred to call 'ulterior intent'. A specific intent is an intent going beyond the intent to do the act in question. The bodily movement is willed or intentional, and it is done with some further intent specified in the offence. In murder (the judges appear to suppose), it is an act done with intent to cause death; in the crime of wounding or causing g.b.h. with intent, an act done with intent to cause g.b.h.; in burglary, trespass with certain unlawful intents, and so on."

Majewski: The public policy considerations

3.6 It is clear that the House of Lords' decision that evidence of intoxication should not be admissible to negate basic intent was based on a number of public policy considerations. One of the recurring policy considerations is that one should not be entitled to rely by way of defence on an automatistic state brought about by one's voluntary acts. This principle is justified by Lord Elwyn-Jones in the following passage in *Majewski*:

"If a man of his own volition takes a substance which causes him to cast

4 Smith and Hogan, *op cit.*, p.221.

off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent."⁵

3.7 Protection of the community is another common consideration. Lord Simon of Glaisdale stated that:

"One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences."⁶

3.8 Closely allied to this is the consideration of general notions of justice. Lord Salmon while acknowledging that the distinction between specific and basic intent could not be justified in strict logic, argued that this was the view that had been adopted by the common law which founded on common sense and experience rather than strict logic. He held that:

"If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequences could be appalling."⁷

Criticisms of *Majewski*

3.9 The series of decisions culminating in *Majewski* has evoked much criticism from commentators.⁸ It is criticised as unethical and illogical and, in particular, that:

- (1) The rule in *Majewski* conflicts with general principles of responsibility in the criminal law;
- (2) It conflicts with the definitions of particular offences;
- (3) There is no clear and precise test for determining whether an

5 *Majewski* [1976] 2 All ER 142 at 150.

6 At p.152.

7 At p.158.

8 Glanville Williams, *op cit*, pp.471-6; Smith and Hogan, *op cit*, pp.230-1; Glanville Williams, "Intoxication and Specific Intent", [1976] 126 *New L.J.* 658; Alan Dashwood, "Logic and the Lords in *Majewski*", [1977] *Crim. L. R.* 532 at 591.

offence is one of specific intent or basic intent.⁹

3.10 In particular, it is said to be illogical because, once it is conceded that the elimination of the intent required for the particular crime by self-induced intoxication can constitute a defence in law, it should make no difference whether the intent in question is "basic" or "specific". It is said to be unethical because people should not be convicted of crimes involving a certain state of mind when they lack that guilty mind, even though that condition is the result of morally culpable behaviour, e.g. self-induced intoxication.

3.11 The law lords attempted to deal with these criticisms in *Majewski*. Lord Elwyn-Jones said:

"I do not for my own part regard that general principle as either unethical or contrary to the principles of natural justice."¹⁰

3.12 Lord Simon of Glaisdale similarly remarked that:

"[T]here is nothing unreasonable or illogical in the law holding that a mind rendered self-inducedly insensible (short of *M^cNaughten* insanity), through drink or drugs, to the nature of a prohibited act or to its probable consequences is as wrongful a mind as one which consciously contemplates the prohibited act and foresees its probable consequences (or is reckless whether they ensue)."¹¹

3.13 Lord Salmon commented:

"I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule removes undue harshness without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous master. The law is primarily concerned with human affairs. I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence."¹²

3.14 Commenting on this, Dashwood remarks that the 'stricter part of the rule,' denying that self-induced intoxication can excuse crime, is based on

9 See Dashwood *op cit*, pp.533-537.

10 [1976] 2 All ER 142 at 150.

11 At p.155.

12 At 152.

sufficient policy considerations of public security and distributive justice. However, he goes on to remark that the choice of offences which qualify for the benevolent part of the rule appears arbitrary.¹³

3.15 Lord Edmund-Davies, while acknowledging that their approach savoured unattractively of a "judge-made fiction", was prepared to defend it:

"[I]n my judgement little can properly be made out of the criticisms that a law which demands the conviction of such persons who behave as the appellant did is both illogical and unethical. It may be that Parliament should look at it, and devise a new way of dealing with drunken or drugged offenders. But, until it does, the continued application of the existing law is far better calculated to preserve order than the recommendation that he and all who act similarly should leave the dock a free man."¹⁴

3.16 Dashwood concludes that the charge of illogicality can be answered in that:

"From the point of view of formal logic, a more specific rule can be recognised as an exception to a more general rule with which it appears to conflict; while the aim of providing the criminal law with a coherent structure based upon general principles, although eminently worth pursuing, must on occasion yield place to other aspects of legal policy."¹⁵

3.17 Disquiet at the *Majewski* approach to intoxication has not been confined to academic critics. In Australia, Monahan J. said, referring to charges of assault occasioning actual bodily harm:

"Speaking for myself, I hold firmly to the view that a state of automatism, even that which has been brought about by intoxication, precludes the forming of the guilty intent which is the fundamental concept in criminal wrongdoing."¹⁶

Recklessness

3.18 Smith and Hogan explain that English law recognises two types of recklessness, which they call "Cunningham recklessness" and "Caldwell/Lawrence recklessness" after the leading cases. Put simply, the distinction is that Cunningham recklessness requires proof that the accused was aware of the existence of an unreasonable risk whereas Caldwell/Lawrence recklessness is satisfied if either (i) one was aware of the existence of the unreasonable risk, or

13 Dashwood, *op cit*, at p.597.

14 [1976] 2 All ER 142 at 170.

15 Dashwood, *op cit*, at p.596.

16 *R v Keogh* [1964] V.R. 400 at 401.

(ii) in the case of an obvious risk, one failed to give any thought to the possibility of its existence.¹⁷

3.19 In *R v Caldwell*,¹⁸ a majority of the House of Lords held that evidence of intoxication would not be relevant if the offence charged was one for which recklessness would be sufficient to constitute the mental element.¹⁹ It was held that one is "reckless" within the meaning of the *Criminal Damage Act, 1971* if:

- (i) one does an act which creates an obvious risk that property will be damaged; and,
- (ii) when one does the act one has not given any thought to the possibility of there being any such risk involved and has nonetheless gone on and done it.²⁰

3.20 While Lord Diplock (with whom Lord Keith and Lord Roskill concurred) was clearly unhappy at the attaching of "subjective" and "objective" labels to such tests, it has generally been accepted that this formulation introduced an objective criterion into the determination as to whether recklessness existed. Thus if the risk was obvious the accused will be found guilty under *Caldwell* recklessness. As to whom it should be obvious, Smith and Hogan comment that while there are passages in *Caldwell* which suggest that an individual defendant is meant, in *Lawrence* the House of Lords was clearly looking at the ordinary prudent motorist as represented by the jury.²¹ If the risk appears obvious to the ordinary prudent person, then it is immaterial that the risk did not occur to the individual defendant. In addition to this, Lord Diplock treated *Majewski* as authority for the proposition that crimes of recklessness were crimes of basic intent to which self-induced intoxication was no defence.

3.21 It follows that: first, the fact that one is unaware of a risk owing to one's self-induced intoxication is no defence if that risk would have been obvious had one been sober; and secondly, whether it would have been so obvious has to be determined by reference to what would have been obvious to the "ordinary prudent individual", i.e. objectively.

3.22 Lord Edmund-Davies (with whom Lord Wilberforce concurred) dissenting, lamented the majority decision, commenting that the prophecy of Dr Glanville Williams following *Majewski* that: "there can hardly be any doubt that all crimes of recklessness except murder will now be held to be crimes of basic

17 *Op cit.*, p.60.

18 [1981] 1 All ER 961. Judgment in *Lawrence* was given later on the same day but after, and referred to *Caldwell*.

19 In considering recklessness, three states of mind can be distinguished:

(i) where the risk is known;

(ii) where the risk was not considered, whether there was a risk or not; and

(iii) where it is considered whether there is a risk and it is decided that there is none.

The first is the state of mind required under the *Cunningham*, [1957] 2 All E.R. 412, test, but under *Caldwell*, the second state of mind is also deemed reckless. A person with the third state of mind is not reckless in either sense.

20 Smith and Hogan, *op. cit.*, pp.61-62.

21 *Ibid*, p.63.

intent within *Majewski*²², was promptly fulfilled. Given the legislative tendency to replace "maliciously" by "intentionally and recklessly" in defining statutory crimes, the implications were far-reaching, he said. He concluded that:

"The consequence is that, however grave the crime charged, if recklessness can constitute *mens rea* the fact that it was committed in drink can afford no defence. It is a very long time since we had so harsh a law in this country."²³

3.33 Two propositions thus appear clear:

"(i) If the crime can be committed recklessly, then the defendant's intoxication at the time of the crime cannot be a defence. Given the objective test of recklessness laid down in *Caldwell*, the defendant is liable if the reasonable man would have foreseen the risk as 'obvious'; it is irrelevant whether, the defendant, because of his intoxication, foresaw the risk himself. As most crimes can now be committed recklessly, it follows that intoxication is no defence to the majority of crimes in English law.

(ii) If the crime can only be committed intentionally, then it is necessary to decide whether it is a crime of basic intent or one of specific intent. Intoxication is only a defence to the latter - and it is seldom a complete defence to such crimes."²⁴

3.34 Glanville Williams comments:

"[T]he House of Lords in *Caldwell* solved the problem of the intoxicated offender by creating a kind of constructive recklessness. If the courts had begun with this solution it is unlikely that they would have felt the need for any other. But before *Caldwell* they hit on a different solution for intention, employing a totally unsound juristic construction which still remains to disfigure the law."²⁵

3.35 Smith and Hogan comment that:²⁶

"It is fatal for a person charged with a crime not requiring specific intent who claims that he did not have *mens rea* to support his defence with evidence that he had taken drink and drugs. By so doing he dispenses the Crown from the duty, which until that moment lay upon them, of proving beyond reasonable doubt that he had *mens rea*. *Mens rea* ceases

22 Glanville Williams, *op cit*, p.431.

23 [1981] 1 All ER 961 at 972.

24 Clarkson and Keating, *op cit.*, pp.380-1.

25 Glanville Williams, *op cit*, p.468.

26 Smith and Hogan, *op cit*, p.223.

to be relevant."²⁷

3.36 They go on to question whether:

"... the Crown escape from this duty by leading evidence, or extracting an admission in cross-examination, that D had taken drink?" They answer that: "according to Lord Salmon in *Majewski* the question the House was deciding was whether the accused could rely *by way of defence* on the fact that he had voluntarily taken drink. But there are other dicta which suggest that D is held liable without the usual *mens rea* because he has taken drink - the taking of the drink is the foundation of liability - a variety of *mens rea* - though not in the sense in which that term is used in this book." They conclude by saying that: "if that be right, there is no reason why the Crown should not set out to prove it instead of seeking to prove *mens rea* in the sense of intention or recklessness."²⁸

3.37 In a later passage they comment:

"Where the offence is one of *Caldwell* recklessness, the impact of *Majewski* is reduced. Where, because he was intoxicated, D gave no thought to the existence of the risk, he was reckless and is liable to conviction without the invocation of the rule in *Majewski*. This was the position in *Caldwell* itself. But *Majewski* may still have a significant sphere of operation. D might say that he did consider whether there was a risk and decided there was none. He was then not *Caldwell*-reckless. But, if he would have appreciated the existence of the risk had he been sober, he will still be liable because of *Majewski*. D, about to have intercourse with P, asks himself, 'Is she consenting' and answers the question in the affirmative because, being drunk, he fails to observe what he would have observed when sober. He is not *Caldwell*-reckless but, if rape is a crime not requiring specific intent, he is guilty."²⁹

The Public Order Act, 1986

3.38 Section 6(5) of the *Public Order Act, 1986* provides in relation to the mental element of offences under the Act that:

"(5) For the purposes of this section a person whose awareness is impaired by intoxication³⁰ shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the

27

Ibid.

28

Ibid.

29

Ibid., p.224.

30

"Intoxication" is defined in section 6(6) as meaning "any intoxication, whether caused by drink, drugs or other means, or by a combination of these means".

taking or administration of a substance in the course of medical treatment."

The special position of murder

3.39 There is no shortage of authority for the contention that intoxication is a defence to murder, the defendant will instead be found guilty of manslaughter. In that murder cannot be committed recklessly, it is consistent with the specific intent/basic intent dichotomy. However, strictly speaking, murder is not a crime of specific intent as the *mens rea* does not extend beyond the *actus reus*. Again, the fact that it has been classified by the courts³¹ as a crime of specific intent, has to be justified on policy grounds.³²

3.40 John Sellers comments:³³

"For two distinct reasons murder is in a special position. First, it is distinct in that the penalty on conviction is mandatory. Though it may be felt inappropriate to acquit the intoxicated defendant of an offence of 'basic intent,' this does not mean that it may not be appropriate to differentiate between the punishment of such a defendant and the truly deliberate wrongdoer. The fact that the penalty for murder affords no scope for such differentiation may be a good reason for allowing a conviction for manslaughter where the court does not have a discretion about sentence. ... Secondly, ... murder is distinct in that it is a rare example of an offence of 'basic intent' which has, in manslaughter, a counter-part designed to punish those who accidentally as opposed to deliberately bring about the *actus reus*. The choice in homicide therefore, has never been simply between acquittal or conviction for an offence of 'basic intent' ... there is, as an alternative, the possibility of conviction for an offence which is designed to punish a certain kind of culpable accident. Murder, therefore, is an offence of 'basic intent,' but there are special reasons, in the shape of an alternative conviction for manslaughter, which make it appropriate to allow evidence of intoxication its factual relevance to malice aforethought."³⁴

3.41 Finally, in relation to murder cases it should be noted that the defences of provocation and self defence, in particular, pose particular problems when voluntary intoxication is involved.³⁵

Intoxication and mistake

3.42 Glanville Williams states that an intoxicated person who commits a

31 *Beard* [1920] A.C. 479; *Gallagher* [1963] A.C. 349; and *Majewski* [1977] A.C. 443.

32 See Clarkson and Keating, *op cit*, p.385.

33 John Sellers, 'Mens Rea and the Judicial Approach to 'Bad Excuses' in the Criminal Law' (1978) 41 *M.L.R.* 241 at 261.

34 Quoted in Clarkson and Keating, *op cit*, p.386.

35 The relationship of voluntary intoxication and defences is considered in more detail below at 4.2.viii.

criminal act owing to a mistake of fact is the target of three rules of law:

- (1) *Majewski* may make him constructively guilty of intending the particular act;
- (2) *Caldwell* may make him constructively reckless as to it; and,
- (3) The doctrine of *Albert v Lavin*³⁶, that a mistaken belief as a matter of defence cannot be considered unless it is reasonable, may make him or her guilty of negligence even when the crime requires intention.³⁷

3.43 He goes on to explain that when evidence of a mistake caused by intoxication is given, three questions arise:

- (1) Does the offence include an element of knowledge or belief that a fact exists? If so, the court will generally give the defendant the full benefit of the requirement, interpreted subjectively.
- (2) Did the mistaken belief relate to a matter of defence? If so, it is no defence.
- (3) Other cases fall to be decided by applying the principles relating to crimes of specific intent, basic intent, and recklessness.³⁸

3.44 Recent cases, in relation to the position at common law, show that the *Majewski* rule applies even if the offence is one of specific intent.³⁹ The Law Commission comments in this regard that:

"In *O'Grady*⁴⁰ the defendant, when drunk, killed a man in the mistaken belief that he was being attacked. His appeal against conviction for manslaughter, an offence of basic intent, was dismissed. In the course of delivering the judgment of the Court of Appeal, Lord Lane CJ stated, obiter, that a defence of mistake caused by involuntary intoxication would fail even in offences (including murder) that required specific intent. That statement was adopted in *O'Connor*,⁴¹ in which the Court of Appeal held, in relation to murder, that intoxication was not relevant to the question whether the defendant believed he was acting in self-defence. However, the Court quashed the conviction on another ground - namely, that the trial judge had failed to direct the jury to take intoxication into account when considering whether the defendant had

36 [1982] A.C. 546.

37 Glanville Williams, *op cit*, pp.476-7.

38 See further Glanville Williams, *op cit*, p.476 *et seq.*

39 The Law Commission, *Intoxication and Criminal Liability*, Consultation Paper No. 127, 1993.

40 [1987] Q.B. 995.

41 [1991] *Crim. L. R.* 135.

formed the requisite intent. Thus, the jury has had to consider intoxication in relation to one subjective element of the offence, but are prohibited from considering it in relation to the other subjective element, in relation to self-defence.⁴²

3.45 Finally, it should be noted that the *Majewski* approach does not apply where statute provides that a particular belief should be a defence. In *Jaggard v Dickenson*⁴³ the defendant while drunk broke two windows and damaged a curtain in the house of a stranger. She was charged under section 1(1) of the *Criminal Damage Act, 1971*. However, as her defence,⁴⁴ she raised her honest belief that the house belonged to a friend who would have consented to her breaking in and causing damage as she had been told to use the house as if it were her own. She was convicted. The court held that as the crime was one of basic intent and as her intoxication was voluntary, *Majewski* directed that the court should ignore evidence of intoxication on the intent issue. She appealed and her conviction was quashed. The Divisional Court held that "belief" in section 5(2) remained subjective despite the decision in *Caldwell*. Mustill J. held that the House of Lords in *Majewski* had not concluded that intoxication was irrelevant to the fact of the defendant's state of mind, rather it held that regardless of the defendant's state of mind, that for policy reasons he or she should be precluded from relying on a defence of self-induced intoxication. He went on to hold that these considerations did not apply where Parliament had, as here in section 5(2), specifically isolated a subjective element.

3.46 Clarkson and Keating ask if this decision should be regarded as anomalous (according to Smith and Hogan) or as an occasion for rejoicing in a triumph for subjectivism (according to Glanville Williams)?⁴⁵ They comment that it "does seem distinctly odd" and proceed to compare section 5(3) with section 8 of the *Criminal Justice Act, 1967*. The House of Lords in *Majewski* had held that drunkenness could not be taken into account under section 8. It is difficult to accept that section 5(3) and section 8 perform different functions.⁴⁶

3.47 The Law Commission in its Draft Criminal Code for England and Wales recommends that the decision be reversed.⁴⁷ It justifies this on the grounds that the decision created an anomalous distinction between mistake as to the non-existence of an element of an offence and mistake as to the existence of a circumstance affording a defence, which it would be wrong to perpetuate in the Code.⁴⁸

42 *Op cit.*, pp.19-20.

43 [1981] Q.B. 527.

44 Section 5(2) allows a defence of belief in the existence of certain exempting facts.

45 *Op cit.*, p.590.

46 Celia Wells, "Swatting the Subjectivist Bug", [1982] *Crim. L. R.* 209.

47 In Clause 22(1)(b).

48 Law Com. No. 177, Vol. II, para. 8.41.

Scotland

3.48 The effect of the law of Scotland is to distinguish between chronic and acute alcoholism.⁴⁹ Gordon explains that the chronic alcoholic eventually drinks himself or herself to death or madness, without necessarily ever being at any time drunk in the ordinary sense of the word; whereas acute alcoholism is simply the ordinary state of drunkenness.⁵⁰ The insane chronic alcoholic is not responsible for forming an insane intention, but the acute alcoholic who forms and carries out a drunken intention is responsible. Therefore, to that extent, insanity caused by intoxication is a defence to a criminal charge.⁵¹ It is probable that if one drinks oneself into a permanent state which is classified as a state of diminished responsibility, one is treated as being of diminished responsibility without any regard to the cause of the condition, provided that one is sober at the time of the offence.⁵² However, since 1977⁵³ it is clear that acute voluntary intoxication cannot constitute diminished responsibility.⁵⁴

3.49 Under Scottish law a distinction must be made between acute intoxication in cases of homicide and acute intoxication in other cases.

Acute intoxication in homicide cases

3.50 Prior to 1921, acute intoxication could not operate as a defence even where it produced temporary insanity.⁵⁵ Gordon comments that the law on intoxication as a mitigating factor was bound up with the law on diminished responsibility and was still evolving when it was supplanted by the adoption of *Beard*⁵⁶ in *H.M. Advocate v Campbell*.⁵⁷ He writes:

"Prior to that adoption there were indications⁵⁸ that it was the law of Scotland that where acute intoxication produced a mental disease which amounted to diminished responsibility, or to actual insanity, it could reduce murder to culpable homicide, and that it might do so also on the more general grounds that it produced a condition which excluded the malice required for murder, whether or not any recognisable mental disease was involved."⁵⁹

3.51 In 1921, in *H.M. Advocate v Campbell*,⁶⁰ *Beard* was followed in the

49 Sheriff Gordon, *Criminal Law of Scotland*, p.401.

50 *Ibid*, p.400.

51 *Ibid*, p.402.

52 *Ibid*.

53 *H.M. Advocate v Brennan* 1977 S.L.T. 151.

54 Gordon, *op cit*, p.403.

55 *Ibid*.

56 [1920] A.C. 479.

57 1921 J.C. 1.

58 *Andrew Granger* (1878) 4 Couper 86; *Margaret Robertson or Brown* (1886) 1 White 93; *H.M. Advocate v McDonald* (1890) 2 White 517; *Miller and Denovan*, Criminal Appeal Court, Dec. 1960, unrep.; *H.M. Advocate v Kane* (1892) 3 White 386; *H.M. Advocate v Paterson* (1897) 5 S.L.T.13; and *H.M. Advocate v Aiken* (1902) 4 Adam 88. For a discussion of these cases see Gordon, *op cit*, pp.403-6.

59 Gordon, *op cit*, p.403.

60 1921 J.C. 1.

High Court and in 1944, in *Kennedy v H.M. Advocate*⁶¹, it was held that *Beard* represented Scottish law. Until 1977, the Scottish courts following *Beard* accepted that intoxication which prevented the formation of an intent to kill or to do serious bodily harm rendered the killing culpable homicide [manslaughter] and not murder where death resulted from an assault.⁶²

3.52 In 1977, *Brennan v H.M. Advocate*,⁶³ overruled *Kennedy*. Apart from policy considerations, it did so on the ground that *Beard* depended on the English concept of crimes of specific intent and therefore had no bearing on Scottish law.⁶⁴ In particular, the Court held that there was no discussion or examination, in the earlier cases, of the differences and distinctions between the elements which constitute the crime of murder in the criminal law of Scotland and those which constitute the crime in England.⁶⁵ Gordon writes that, in particular *Beard* had no application to a crime like murder which required only wicked recklessness and not intention for its *mens rea*.⁶⁶

3.53 Specifically, the Court held that:

- (1) In the law of Scotland a person who voluntarily and deliberately consumed known intoxicants, including drink and drugs, of whatever quantity, for their intoxicating effects, whether these effects were fully foreseen or not, could not rely on the resulting intoxication as the foundation of a special defence of insanity at the time, nor could one plead diminished responsibility; and,
- (2) It was in no way part of the law of Scotland that a person accused of murder and shown to have been incapable, by reason of self-induced intoxication, of forming the intention to kill or do serious injury to the deceased, was guilty only of culpable homicide.⁶⁷

3.54 Gray remarks:

"Unsatisfactory though the English division of intent into specific and basic, which has been heavily criticised by academic writers, may be, it is hard to see the decision in *Brennan* as a move in the right direction. It is not self-evident that the High Court came down on the right side of the fence when, in quite rightly refusing to entertain the distinction, it decided, in effect, that in Scotland all intent is to be regarded as basic and not specific. Had they come to the opposite conclusion (if one takes the view that it is socially undesirable that people should be able

61 1944, J.C. 171.

62 J.W.R. Gray, 'The Expulsion of *Beard* from Scotland: Murder North of the Border', [1979] *Crim. L. R.* 369.

63 1977 S.L.T. 151.

64 Gordon, *op cit*, p.407.

65 1977 S.L.T. 151 at 157.

66 *Op cit.*, p.407.

67 1977 S.L.T. 151. (Headnote).

to take advantage of their voluntary intoxication to secure an acquittal), the case for a new statutory offence under which voluntary inebriates could be punished for getting into that condition then seems unanswerable."⁶⁸

3.55 Gordon comments that the finding "that voluntary intoxication, far from being a defence, may itself constitute the *mens rea* of murder is probably easier to accommodate in Scots law than in English, because the former does not regard recklessness as wholly subjective and does not require proof of a particular mental element at the time of the crime."⁶⁹

Acute intoxication in crimes other than homicide

3.56 Gordon comments that there are few Scottish cases on the point whereby an offender may be exculpated, but one reported case, *Jas. Kinnison*,⁷⁰ does support something similar to *Beard* in cases other than homicide.⁷¹ While there are no reported cases after *Beard*, in the unreported case of *Alex. Winchester*,⁷² the jury was directed that if the defendant had been too intoxicated to form the intention of assaulting the victim, he must be acquitted of the assault.⁷³ Gordon observes that it is not entirely clear how the decision in *Brennan* affects this. He states that:

"The distinction between crimes requiring intention and crimes requiring only wicked recklessness is not the same as that between crimes of basic intent and crimes of specific intent. It is therefore not easy to apply the statement in *Brennan* that, 'We have only to add that in crimes of 'basic intent' we understand the law of England to be at one with the law of Scotland in refusing to admit self-induced intoxication as any kind of defence'. It is fairly plain that *Brennan* accepts that even voluntary intoxication can be a defence to a crime which requires a particular intention, such as theft, where it will be a defence to show that the accused was so drunk that the inference that he intended permanently to deprive the owner of his property cannot be drawn. *Brennan* clearly intended the law regarding assault to be the same as in England; it disapproved *Aiken*, albeit on the defence of insanity, and it approved *Majewski*, albeit without noting that it dealt with assault on a police officer in the execution of his duty; and the court specifically said that self-induced intoxication was an integral part of the *mens rea* of 'any crime of violence'. The only problem is that there is still some authority that assault in Scotland requires intention and not merely recklessness, and more authority that e.g. assault on a police officer requires

68 J.W.R. Gray, *op cit.*, p.379.

69 *Op cit.*, p.408.

70 (1870) 1 Couper 457.

71 *Ibid.*, p.411.

72 Glasgow High Court, October 1955.

73 Gordon, *op cit.*, p.411.

knowledge of the character of the victim."⁷⁴

3.57 There are two old cases in which intoxication was treated as mitigating an offence other than murder.⁷⁵ Although *Brennan* repudiated the view that intoxication could ever amount to diminished responsibility, a plea which in any event it described as limited to murder, it did not prevent any judge from treating involuntary intoxication as a mitigating factor.⁷⁶

3.58 Referring to involuntary intoxication, Gordon comments that addiction creates a special problem.⁷⁷ He notes that although it would probably be held by the court to be voluntary, there is much to be said for the view that as it is compulsive and the result of mental illness, it should be regarded as involuntary. But, he argues, whether or not one's drinking is regarded as involuntary there is much to be said for the view that the addict should receive special treatment.⁷⁸

3.59 Gordon concludes that:

"The major theoretical problem posed by intoxication which deprives a person of *mens rea* is to reconcile the demands of public policy, public security and public indignation with the axiom *actus non facit reum nisi mens sit rea*. *Brennan* reduces the scope of the problem for at least some cases of crimes whose *mens rea* is wicked recklessness, but the problem remains for other cases. It is submitted that one way of solving the problem, of squaring the circle, so to speak, is as follows. Where a crime is wholly the product of intoxication, i.e. where it can be shown that the accused's mind was so affected by drink or drugs that he lacked the capacity to appreciate or control his actions, or that his behaviour was involuntary, he should be acquitted of that crime, even if he formed some sort of insane or intoxicated intention to act, as where in his drugged state he thought he was being attacked. Where a man is very drunk and his criminal actions have been influenced by drink to a great extent although he has not completely lost control of himself, it should be open to the judge or jury to treat this as an element in mitigation, if in the whole circumstances it seems just to do so."⁷⁹

3.60 He suggests that the public interest would be protected in a number of ways:

- (1) By making it an offence, along the lines of the Butler Committee,⁸⁰ for one to drink oneself into a state of irresponsibility and then commit a crime while in that condition.

74 *Ibid*, p.411.

75 *Jas Ainslie* (1842) 1 Broun 25 and *James Alves* (1830) 5 Deas and Anderson 147.

76 Gordon, *op cit*, p.412.

77 *Ibid*, p.412.

78 *Ibid*, p.413.

79 *Ibid*, pp.413-4.

80 Discussed *infra*, Chapter 5, under England and Wales.

- (2) By making it a crime to be "drunk and dangerous", a solution suggested by Glanville Williams.⁸¹ However, he notes that such a crime would be difficult to enforce because of the difficulty of proving that the offender was dangerous.
- (3) By including alcoholism among the conditions for which a hospital order can be made in lieu of passing sentence.⁸²

Australia

General

3.61 There are eight jurisdictions in Australia and they are equally divided in their approach to the issue of intoxication as a defence to a criminal charge.⁸³ In four jurisdictions (the Code States of Queensland, Western Territory and Tasmania and, it would appear, the Northern Territory) the principles in force are substantially those stated in *Majewski*.⁸⁴ In the other four jurisdictions (New South Wales, Victoria, South Australia and the Australian Capital Territory, the Common Law States) the principles in force are those stated in *R v O'Connor*.⁸⁵ The decisions on the common law distinguish between voluntary and involuntary intoxication, while some of the Codes distinguish between intentional and unintentional intoxication and these concepts are not entirely similar.⁸⁶

The Common Law States

3.62 The principle stated by the majority judges in the Australian High Court in *R v O'Connor* laid down the law in all Australian jurisdictions⁸⁷ except the Code States and the Northern Territory.

3.63 Fisse writes that the rule in *Majewski* suffers from three major defects of principle and that these defects led to the majority decision in *O'Connor*.⁸⁸ These defects he lists as:

"First, the effect of intoxication on capacity is the same whether self-induced or not, so that the question whether the intoxication was self-induced is logically irrelevant to D's capacity to form an intention at the time when he committed the act charged. Secondly, concentrating on D's state of mind when he took his first drink or drugs instead of when he committed the acts charged departs from the requirement of criminal law that act and intent should coincide. And thirdly, the distinction

81 Glanville Williams, *Criminal Law, The General Part*, 2nd ed., para. 183.

82 *Ibid.*, p.414.

83 *Review of Commonwealth Criminal Law*, Interim Report, Principles of Criminal Responsibility and Other Matters, July 1990, Australian Government Publishing Service, Canberra, para. 10.24.

84 *Ibid.*, para. 10.5.

85 (1981) 146 C.L.R. 64.

86 *Review of Commonwealth Criminal Law*, para. 10.3.

87 New South Wales, Victoria, South Australia and the Australian Capital Territory.

88 *Howard's Criminal Law* (5th ed.) by Brent Fisse, The Law Book Company Limited, 1990, p.439.

between specific and basic intent lacks any defensible conceptual basis; murder, so it is said, is an offence of specific intent but the intent required is no more specific than required for assault, an offence of so-called basic intent.⁸⁹

3.64 In *O'Connor* the High Court of Australia, by a majority, ruled that evidence that the defendant acted involuntarily or unintentionally as a result of gross, self-induced intoxication (by drugs, alcohol or a combination of both) might properly be considered by a jury in determining whether the prosecution had proved beyond reasonable doubt that a person charged with a criminal offence acted voluntarily and intended to commit that offence.⁹⁰ On this basis, a person who does a prohibited act while so intoxicated that there is a reasonable doubt whether that person acted voluntarily and intentionally, then that person should be acquitted. By so doing, the High Court rejected the line of House of Lords' authorities from *Beard* to *Majewski* and instead, confirmed two decisions of judges at first instance in Victoria.⁹¹

3.65 The trial judge in *O'Connor* had relied on *Majewski* and had directed the jury accordingly. However, *O'Connor* successfully appealed to the Victorian Court of Criminal Appeal which unanimously held that if there was evidence which raised a substantial doubt whether the act in question was a voluntary and intentional one, then that evidence should be left to the jury. It further held that it made no difference that the alleged lack of voluntariness or intent was in fact due to self-induced intoxication.⁹² The prosecution applied for leave to appeal to the High Court where by a majority of four to three, the Court upheld the decision of the Victorian Court of Criminal Appeal and held that *Majewski* should not be followed in Australia.⁹³

3.66 In the High Court, the majority judgements⁹⁴ emphasised the basic common law principle that criminal liability should not be imposed on an accused person unless that person was shown to have acted consciously, voluntarily and with "a blameworthy state of mind"⁹⁵ and that although intoxication was not of itself a defence, evidence that the accused was grossly intoxicated, albeit that the intoxication was self-induced, might be relevant to those questions.⁹⁶ They felt that it was not logical to distinguish between offences of specific intent and those of basic intent.⁹⁷ Nor could evidence of intoxication, however gross, be acceptable as equivalent to proof of a blameworthy state of mind, to justify the imposition of criminal liability.⁹⁸ If criminal liability was imposed without proof that the defendant acted voluntarily and intentionally, but merely on proof of

89 *Ibid.*

90 Law Reform Commission of Victoria, *Criminal Responsibility: Intention and Gross Intoxication*, Report No. 6, November 1988, para. 4.

91 *R v Keogh* [1984] V.R. 400; *R v Haywood* [1971] V.R. 755.

92 Law Reform Commission of Victoria, Report No. 6, para. 12.

93 *Ibid.*, para. 14.

94 Chief Justice Barwick, Justices Aickin, Murphy and Stephen.

95 *R v O'Connor* (1981) 146 C.L.R. 64 at 96 (Stephen J).

96 Law Reform Commission of Victoria, Report No. 6, para. 15.

97 *Ibid.*

98 *Ibid.*

intoxication, that would be constructive criminal liability.

3.67 Barwick C.J. commented upon the elements of the defence in the following passage:

"In my opinion, evidence of the state of the body and mind of an accused tendered to assist in raising a doubt as to the voluntary character of the physical act involved in the crime charge is admissible on the trial of an accused for any criminal offence, whether an offence at common law or by statute. Further, in my opinion, such evidence tendered to raise a doubt as to the actual intention with which the physical act involved in the crime charged, if done, was done, is admissible on the trial of the accused for any offence, whether at common law or by statute, with the exception of such statutory offences as do not require the existence of an actual intent, the so-called absolute offences.

As I have earlier indicated, however, the jury needs careful and special instruction. If the evidence, if accepted, is not such as to be capable of raising a doubt as to either of the basic elements, voluntariness or actual intent, there being no other material to suggest a lack of voluntariness or actual intent, that evidence can be withdrawn from the jury's consideration. It will have no more than a tendency to establish that though the accused acted voluntarily and with the requisite intent, he was influenced in what he did by a state of insobriety. They should be told that if evidence does not raise in their minds a doubt as to voluntariness or actual intent they may put that evidence out of their minds in considering the accused's guilt or innocence. But if the evidence is capable of raising a doubt either as to voluntariness or actual intent, it is for the Crown to remove that doubt from their minds and to satisfy them beyond reasonable doubt that the accused voluntarily did the act with which he is charged and that he did so with the actual intent appropriate to the crime charged. They should be instructed as to the meaning and scope of voluntariness and as to the precise intent which the crime charged requires. It would be proper in these cases to tell the jury that the fact that a man does not later remember what he did does not necessarily indicate that his will did not go with what he did or that he did not have the necessary intent."⁹⁹

3.68 The minority judgments¹⁰⁰ were based on precedent and policy.¹⁰¹ They stressed the persuasive force of *Majewski* as a unanimous decision of seven judges of the House of Lords upholding a unanimous decision of the Court of Appeal which also accorded with the settled rules of common law and with the

99 *R v O'Connor* (1980) 26 A.L.J.R. 448 at 466-7. Cited in Gillies, *op cit*, p.268.
100 Justices Gibbs, Mason and Wilson.
101 Law Reform Commission of Victoria, Report No. 6, para. 20.

law in other common law jurisdictions, notably Canada and the United States.¹⁰² Furthermore, they argued that *Majewski* did not conflict with any Australian authority except for a few decisions of judges sitting at first instance in the Supreme Court of Victoria.¹⁰³ Finally, they approved the policy principles underlying the decision in *Majewski* and they argued that there were good reasons for treating self-induced intoxication as capable of negating criminal responsibility in offences of specific intent but not in other offences.¹⁰⁴ They suggested that the difficulty in distinguishing between crimes of specific intent and those of basic intent had been exaggerated. Public policy, they said, required that intoxicated offenders should not be totally acquitted. As Gibbs J. said:

"Crimes of violence committed by persons while intoxicated have never been uncommon, and the increase of drug-taking in the community today has made the problem even more serious. The law would afford quite inadequate protection to the individual, and would rightly be held in contempt, if persons completely under the influence of drinks or drugs could commit crimes with impunity."¹⁰⁵

3.69 In addition, the minority indicated that the law should play a more protective role and that less freedom should be allowed to juries to "reconcile the felt needs of the community with the law".¹⁰⁶

3.70 The effect of *O'Connor* is summarised by Gillies, as follows:

"Where the offence charged is one not requiring mens rea (an offence of strict liability, or one of negligence), D may only defeat the prosecution case by pleading intoxication at the most basic level - D must (assuming that the prosecution has otherwise proved its case) cast reasonable doubt upon the voluntariness of the act, that is, allege that there is no actus reus. Where the offence charged is one of mens rea, then, assuming again that the prosecution has proved its case, D may seek to defeat this case by relying upon evidence of intoxication to cast reasonable doubt upon the existence either of the actus reus or mens rea. (If D succeeds in doing this in respect of actus reus, it is unnecessary to consider the issue of mens rea.) Where the procedural rules allow it, D may be acquitted of the offence charged by reference to evidence of intoxication, but convicted of a lesser offence sharing the same actus reus, on the basis that D's degree of intoxication was not such as to involve that the conduct did not disclose the element of this

102

Ibid.

103

R v Keogh [1964] V.R. 400; *R v Haywood* [1971] V.R. 755. Judgments in New South Wales and South Australia stated the law in similar terms to *Majewski*: *R v Menniss* [1973] 2 N.S.W.L.R. 113; *R v Fahey* (1978) 19 S.A.S.R. 577. Cited in Law Reform Commission of Victoria Report, Report No. 6, para. 20.

104

Law Reform Commission of Victoria, Report No. 6, para. 20.

105

R v O'Connor (1981) 146 C.L.R. 64 at 93, cited in Victorian Law Reform Commission Report, Report No. 6, para. 20.

106

O'Connor, at p.139 (Wilson J). Cited in Victorian Law Reform Commission Report, No. 6, para. 21.

offence."¹⁰⁷

3.71 Fisse comments on the law following *O'Connor*, as follows:

"Although the law is now clear, the question remains whether it provides a sufficient degree of social protection. It has been argued that the decision in *O'Connor* may lead to the acquittal of violently dangerous persons without adequate control over the hazard they present to the community. This concern is understandable but should be kept in perspective. Few defendants are acquitted by reason of the effect of the intoxication although, as *O'Connor* itself indicates, acquittals do occur. The prospect of completely acquitting accused despite their proven violence has led many to suggest that it should be made an offence of strict responsibility to act in a dangerous way while intoxicated. This hardly resolves the controversy surrounding the *Majewski* rule; on the contrary, it represents a transparent attempt to evade principle. A less drastic proposal is that acquittals by reason of intoxication be qualified so as to require that D be subjected to mandatory measures of rehabilitation or supervisory control. A more commendable solution lies in the use of civil powers of commitment or supervision under legislation dealing with alcohol and drug addicts. The problem of control of dangerous intoxicated persons is hardly confined to those who happen to be prosecuted, and considerations of efficiency as well as justice suggest that the same regime of control shall apply to all."¹⁰⁸

The Code States

General

3.72 *O'Connor* is no authority on the effects of the Codes.¹⁰⁹ Therefore, the law in the Code States and the Northern Territory remains unaffected by the *O'Connor* decision. The distinction remains between offences of specific intent and offences of basic intent and the law is similar to that stated in *Majewski*.¹¹⁰ However, while the Codes are derived from the common law, effect is given to the actual wording of the Code rather than the underlying common law principles.¹¹¹

Queensland and Western Australia

3.73 Section 28 of the Criminal Codes of Queensland and Western Australia states:

"Intoxication

107 Peter Gillies, *Criminal Law*, 2nd ed., The Law Book Company Limited, 1990, p.271.

108 *Op cit.*, pp.446-7.

109 *R v Kusu* [1980] Qd. R. 136. Cited in *Review of Commonwealth Criminal Law*, para. 10.7.

110 Law Reform Commission of Victoria, Report No. 6, para. 23.

111 Information supplied by the Queensland Law Reform Commission.

28. The provisions of the last preceding section¹¹² apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor, or by any other means.

They do not apply to the case of a person who has intentionally caused himself to become intoxicated or stupefied, whether in order to afford an excuse for the commission of an offence or not.

When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed."

3.74 The law in this section is similar to that stated in *Majewski*, except that the section addresses intention rather than self-induced intoxication.¹¹³

Tasmania

3.75 Section 17 of the Tasmanian Criminal Code¹¹⁴ provides that evidence of intoxication is only admissible as relevant to *mens rea* in crimes requiring a specific intent to be proven. It provides:

"Intoxication

17 -(1) The provisions of section 16¹¹⁵ shall apply to a person suffering a disease of the mind caused by intoxication.

112 [Insanity] 27. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on a specific matter or matters, but who is otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things has been such as he was induced by the delusions to believe to exist.

113 *Review of Commonwealth Criminal Law*, para. 10.9.

114 *Criminal Code 1924 (Tas)*.

115 16 -(1) A person is not criminally responsible for an act done or an omission made by him-

(a) when afflicted with mental disease to such an extent as to render him incapable of-

(i) understanding the physical character of such act or omission; or

(ii) knowing that such act or omission was one which he ought not to do or make;

or

(b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

(2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.

(3) A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.

(4) For the purposes of this section the term "mental disease" includes natural imbecility.

(2) Evidence of such intoxication as would render the accused incapable of forming the specific intent essential to constitute the offence with which he is charged shall be taken into consideration with the other evidence in order to determine whether or not he had that intent.

(3) Evidence of intoxication not amounting to any such incapacity as aforesaid shall not rebut the presumption that a person intends the natural and probable consequences of his acts."

3.76 It had been held that this section states the law in accordance with *Majewski*.¹¹⁶

The Northern Territory

3.77 The Criminal Code of the Northern Territory of Australia in section 7 provides:

"7. INTOXICATION

(1) In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty of an offence -

- (a) it shall be presumed that, until the contrary is proved, the intoxication was voluntary; and
- (b) unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct."

3.78 Section 36 of the Code provides that:

"section 35¹¹⁷ applies also to a person who is in a state of abnormality of mind caused by involuntary intoxication."

New Zealand

General

3.79 There is no statutory provision in New Zealand dealing with the extent to which intoxication may found a defence to a criminal charge. Thus the position depends on the common law developed through the decisions of the New Zealand courts.¹¹⁸ The law now is that while intoxication is no defence *per se*, it should be considered to ascertain whether the accused had the required

116 See *Palmer* (1985) 21 A. Crim. R. 1, following *Snow v The Queen* [1962] Tas. S. R. 271. Cited in *Review of Commonwealth Criminal Law*, para. 10.8.

117 Which deals with insanity.

118 *Report on Intoxication as a Defence to a Criminal Charge*, Criminal Law Reform Committee, New Zealand, March 1984, para. 10.

mens rea. If the accused has not, then he or she should be acquitted, whether the alleged offence required a specific or basic intent.¹¹⁹

R v Kamipeli

3.80 The law in New Zealand has developed in a similar manner to the Australian common law states. The leading case is *R v Kamipeli*.¹²⁰ The case concerned a murder charge, but, nevertheless, has been accepted as authority for the proposition that evidence of gross intoxication is relevant to voluntariness and general intent and so might result in an acquittal, i.e. the accused would be acquitted not only of murder but also of manslaughter.

3.81 In *Kamipeli* evidence that the accused was intoxicated was relied on in support of his defence, but the trial judge directed the jury that intoxication could exclude the required intent only if the accused had been so intoxicated that his mind had "ceased to function", so that he was "acting as a sort of automaton without his mind functioning."¹²¹ The Court of Appeal held that it was the fact of intent rather than capacity for intent that was in issue, and that the trial judge's direction was wrong because, even if the evidence fell short of establishing the degree of intoxication he described, it remained open to the jury to conclude that the prosecution had failed to discharge the burden of proving the requisite intent.¹²²

3.82 The New Zealand Criminal Law Reform Committee comments that:

"In a case such as *Kamipeli* a drunken offender might have known what he was doing when he attacked the victim, and he might have intended such an attack, but his intoxication remains relevant to the further question whether he meant to kill or foresaw the risk of causing death."¹²³

3.83 The Court rejected the specific intent theory by saying that it would amount to a situation whereby the State was exempted from proving *mens rea*.

3.84 Although it is open to the Court of Appeal to reject *Kamipeli* and adopt *Majewski* it is generally accepted that unless or until it does that the lower courts are obliged to apply the law as stated in *Kamipeli*.¹²⁴ The result has been that there have been occasional cases where defendants have been acquitted of crimes of so-called basic intent on the grounds that the evidence of self-induced intoxication raised a reasonable doubt whether the required intent to commit the offence was present.¹²⁵

119 Law Reform Commission of Victoria Report, No. 6, para. 22.

120 [1975] 2 N.Z.L.R. 610.

121 *Report on Intoxication as a Defence to a Criminal Charge*, Criminal Law Reform Committee, para. 14.

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*, para. 24.

125 *Ibid.*

Canada

3.85 Criminal law is under federal jurisdiction in Canada. The Provinces can, nevertheless, create offences under provincial legislation under which these 'quasi-criminal' offences, as they are known, are prosecuted.¹²⁶ The Canadian Criminal Code has never contained provisions on intoxication as a defence¹²⁷ and the position is covered by common law.

Leary v R.

3.86 Although the decision in *Director of Public Prosecutions v Beard* has been criticised, the Canadian Supreme Court had been content to follow it.¹²⁸ In a majority decision in *Leary*,¹²⁹ the Canadian Supreme Court followed the House of Lords' decision in *Majewski*. More recently, there have been signs that the Canadian courts are questioning the structure and details of the *Beard* decision.¹³⁰ However, at present, the Canadian law is that involuntary intoxication may excuse criminal liability, but voluntary intoxication is no excuse unless it causes a disease of the mind or prevents the defendant from forming the specific intent required to commit an offence where such a specific intent is an element of the offence.¹³¹

3.87 In *Leary*¹³² the trial judge charged the jury that "drunkenness is no defence to a charge of this sort". On appeal to the British Columbia Court of Appeal, the accused argued that this constituted a misdirection, but the appeal was dismissed. On further appeal by the accused to the Supreme Court of Canada it was held (Laskin C.J.C., Spence and Dickson, JJ., dissenting) that the appeal should be dismissed.¹³³

3.89 Pigeon J. (Martland, Judson, Ritchie, Beetz and de Grandpre, JJ. concurring) held that a distinction should be drawn between offences of general intent and those requiring a specific intent. Intoxication, he argued, could only be a defence to the latter offences and rape was a crime of general intent.¹³⁴ However, he continued, even if intoxication constituted a defence there was no evidence that the accused was drunk to such a degree as to be incapable of forming the intent to commit rape.¹³⁵ Finally, he held that even if there was some slight evidence of absence of intent due to impairment of the mind by intoxication, no miscarriage of justice had resulted.¹³⁶

126 Information provided by New Brunswick Attorney General's Office.
127 Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed., The Carswell Company Ltd., Toronto, 1987, p.365.
128 Don Stuart, *op cit*, p.365. See *MacAskill* [1931] S.C.R. 330; *George* (1960) 128 C.C.C. 289 (S.C.C.); *Perrault* [1971] S.C.R. 196.
129 (1977) 74 D.L.R. (3d) 103, S.C.C.
130 Don Stuart, *op cit*, p.365.
131 Law Reform Commission of Canada, Working Paper No. 29: *Criminal Law - The General Part: Liability and Defences* (1982).
132 (1977) 74 D.L.R. (3d) 103.
133 *Ibid.* (Headnote.)
134 *Ibid.*, p.112.
135 *Ibid.*, p.113.
136 *Ibid.*

3.90 Dickson J. (Laskin C.J.C. and Spence J. concurring) wrote a strong dissent. He held that intoxication as such was not a defence to a charge of rape, but evidence of intoxication should be considered by the jury, together with all relevant evidence, in determining whether the prosecution had proved beyond all reasonable doubt the *mens rea* required to constitute the crime.¹³⁷

3.91 Having reviewed the relevant caselaw, he suggested that subsequent courts had misinterpreted *Beard* and noted that:

"[T]he irrational 'specific intent-basic intent' dichotomy has presented difficulty ever since, for there are not and never have been, any legally adequate criteria for distinguishing the one group of crimes from the other."¹³⁸

3.92 He maintained that the distinction between specific intent and general intent crimes was no longer necessary or desirable to maintain. Furthermore, the concern should be with the mental state in fact of the accused rather than merely with his or her "capacity" to have the necessary mental state, and that intoxication was one factor which should be taken into account in determining the presence or absence of the requisite mental element.¹³⁹

3.93 He rejected the proposition embraced in *Majewski* that public policy demands retention of the specific intent concept regardless of how illogical or difficult the application of this concept might be.¹⁴⁰ If sanctions against becoming excessively intoxicated were thought necessary, he recommended that such sanctions should be introduced by legislation, as in the crime of being drunk and dangerous, and:

"not by adoption of a legal fiction which cuts across fundamental criminal law precepts and has the effect of making the law both uncertain and inconstant."¹⁴¹

3.94 Finally, he urged that intoxication should be taken into account in determining the presence or absence of the requisite mental element and that if that element is absent, the fact that it is absent due to intoxication is no more relevant than the fact of intoxication giving rise to a state of insanity.¹⁴²

3.95 For the Canadian Bar Association, Committee of Criminal Code Reform, Hamilton¹⁴³ highlights some of the shortcomings of the present Canadian law, in particular, that it is, at present, unprincipled and arbitrary. He goes on to state that:

137 *Ibid.*, p.115.

138 *Ibid.*, p.120.

139 *Ibid.*, p.121.

140 *Ibid.*, p.123. See Keith R. Hamilton, Canadian Bar Association, National Criminal Justice Section, Committee on Criminal Code Reform, *Drunkness*, Working Paper No. 5, August 27, 1991, p.6.

141 (1977) 74 D.L.R. (3d) 103 at 125. See Hamilton, *op cit.*, p.6.

142 (1977) D.L.R. (3d) 103 at 125.

143 *Op cit.*, p.18.

"The heart of the problem lies with the Courts' creation of an artificial distinction between crimes of specific intent and general intent....

The greatest injustice resulting from this artificial dichotomy is that it imposes an objective standard of liability; an accused can be found guilty, not for the state of mind he or she actually had, but for the state of mind which the accused would have had (or might have had), if sober.

This violates the most fundamental principle of criminal responsibility, that an accused is culpable only if the Crown proves beyond reasonable doubt that the accused committed the *actus reus* with the state of mind requisite for that offence."¹⁴⁴

3.96 Hamilton argues that both arguments advanced for attaching criminal liability in such circumstances (i.e., first, that the accused was morally blameworthy for getting drunk and second, that to allow evidence of intoxication for all crimes would be to set "dangerous" criminals free) are equally unconvincing.¹⁴⁵ Furthermore, he maintains that the present law obliges the defendant to raise a reasonable doubt as to his or her capacity to form the specific intent required, regardless of what the defendant's actual intent was, if any. Finally, he argues that it would be a logical extension of the law, as stated in *Leary*, for Canadian courts to follow *Caldwell* in precluding evidence of intoxication in cases of recklessness.¹⁴⁶

3.97 In *Leary* the Supreme Court was called on to resolve a conflict of opinion between the courts of British Columbia, which held that rape was a crime of basic intent,¹⁴⁷ and those of Ontario which held that the offence required specific intent.¹⁴⁸ Therefore, voluntary intoxication could ground a defence to a rape charge in Ontario, but not in British Columbia. This dispute neatly defines the problem with the specific intent/basic intent dichotomy. Stuart comments that Mr Justice Pigeon, for the majority, in defending the basic intent classification, resorted to a highly technical examination of precedent in order to refute the Ontario view.¹⁴⁹ Subsequently, in *Pappajohn*¹⁵⁰ the Supreme Court defined the *mens rea* of rape as an intent to have sexual intercourse with knowledge or recklessness as to non-consent.¹⁵¹ However, in *Regina v Moreau*, the Ontario Court of Appeal, dealing with the issue of mistake of fact in a general intent offence when intoxication was alleged to be the cause of the mistake, ruled, notwithstanding *Pappajohn*, that:

"An honest but mistaken belief that the complainant consents negatives

144 *Ibid.*
145 *Ibid.*
146 *Ibid.*, pp.16-7.
147 *Broucher* [1963] 2 C.C.C. 241 (B.C.C.A.).
148 *Vandervoort* (1961) 130 C.C.C. 158 (Ont. C.A.).
149 Don Stuart, *op cit*, p.368.
150 (1979) 14 C.F. (3d) 243 (S.C.C.).
151 Don Stuart, *op cit*, p.369.

recklessness unless it is precluded by wilful blindness. However, where the mistake is induced by voluntary intoxication, the mistake on policy grounds does not exempt an accused from liability for an offence of general intent."¹⁵²

3.98 In 1991, the House of Commons of Canada in a Bill to amend the Criminal Code¹⁵³ outlined that it would not be a defence to a charge under the relevant sections¹⁵⁴ that the accused believed that the complainant consented to the activity that formed the subject matter of the charge, where:

- "(a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or
- (b) the accused did not take all reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

3.99 The Bill goes on to state¹⁵⁵ that no consent would be obtained for the purposes of the relevant sections¹⁵⁶ where, *inter alia*:

"the complainant is incapable of consenting to the activity by reason of intoxication or other condition".

3.100 In 1987 Stuart wrote that since *Leary*, Canadian judgments generally reach the pragmatic conclusion that specific intent is required when there is an express mention of a particular intent.¹⁵⁷ Voluntary intoxication negating a specific intent usually results in a conviction for a lesser included offence, but sometimes there will be an acquittal.¹⁵⁸ In 1988, the Supreme Court of Canada was invited to reconsider its decision in *Leary* in *Bernard v The Queen*¹⁵⁹. Hamilton comments that *Bernard* has firmly entrenched the specific intent/general intent dichotomy in Canadian law, but that there has been some continuing debate about the issue of capacity.¹⁶⁰

Specific and general intent

3.101 Knoll lists the following offences as some of the offences considered to require proof of a specific intent: assaulting a peace officer; attempted murder; being unlawfully in a dwelling house; breaking and entering with intent to commit

152 (1986) 51 C.R. (3d) 209. See Hamilton, *op cit*, p.8.
153 The House of Commons of Canada, Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, tabled on December 12, 1991.
154 Sections 271, 272 and 273.
155 Section 273.2.
156 Sections 271, 272 and 273.
157 *Op cit.*, p.369.
158 *Ibid.*
159 [1988] 2 S.C.R. 833.
160 *Op cit.*, pp.9-10.

an indictable offence; breaking and entering and committing an indictable offence; breaking and entering and committing an indictable offence (of specific intent); causing bodily harm with intent; murder; offering a bribe; possession of stolen property; public mischief; robbery; and theft.¹⁶¹ He lists the following offences as some of the offences considered to require proof of a general intent only: aggravated assault; assault; assault causing bodily harm; breaking and entering and committing an indictable offence (of general intent); careless handling of a firearm; dangerous driving; manslaughter; mischief; pointing a firearm; possession of a weapon; sexual assault; and sexual assault causing bodily harm.

Degree of intoxication

3.102 Where there is evidence of some degree of intoxication it is for the trier of fact to decide whether on all the evidence there is any reasonable doubt that the defendant had the capacity to form, or had, the requisite intent.¹⁶² Where the trier of fact is a jury, then it is for the judge to decide whether or not there is any evidentiary basis for the intoxication defence. If such exists, then it is for the jury to weigh such evidence.¹⁶³

3.103 The *Majewski* approach to intoxication was not as firmly entrenched in Canadian law by the *Leary* and *Bernard* decisions as Hamilton thought. In the case of *Daviault*,¹⁶⁴ a chronic alcoholic, 72 years old, was accused of sexual assault on a 65 year old woman who was partially paralysed and confined to a wheelchair. *Daviault*, who was found not guilty, admitted that he had got drunk, having consumed a quantity of alcohol sufficient to give him a level somewhere between 400 and 600 milligrams of alcohol per 100 millilitres of blood, but said he had no recollection of the incident. On appeal, the Quebec Court of Appeal ordered that a guilty verdict should be entered as self induced intoxication was not a defence to a general intent offence such as sexual assault.

Daviault appealed to the Canadian Supreme Court which, by a majority of 4 to 3, held that he was entitled to a new trial. The Court decided that the rule of law established in *Leary*¹⁶⁵ (i.e., that even in a situation where the level of intoxication reached by the accused was sufficient to raise a reasonable doubt as to his capacity to form the minimal mental element required for a general intent offence, this should not result in an accused's acquittal) violated ss.7 and 11(d) of the Canadian Charter of Rights. *Mens rea* as an integral part of crime was a fundamental concept in criminal law and, while minimal in general intent offences, nevertheless existed. The requisite mental element for the offence of sexual assault was an intention to commit it, or recklessness as to whether the actions would constitute an assault, and the substituted *mens rea* of an intention to become drunk could not establish the *mens rea* to commit the assault. In

161 Patrick Knoll, *Criminal Law Defences*, 1987, p.114.

162 *Ibid*, p.116.

163 *Ibid*, p.117.

164 24 W.C.B. 2d 586.

165 (1977) 74 D.L.R. (3d) 103.

particular, the consumption of alcohol simply could not lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime, so that the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault, thereby depriving an accused of fundamental justice. If the rule in *Leary* was strictly applied, an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence. The mental element of voluntariness was a fundamental aspect of the crime which could not be taken away by a judicially developed policy. It could not be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication would lead to the commission of the offence.

Not surprisingly, this decision had led to considerable controversy in Canada.

South Africa

S v Chretien

3.104 Previously, the law in South Africa was similar to that of the common law states in Australia as stated in *O'Connor*. In the leading case of *S v Chretien*,¹⁶⁶ it was held, by a unanimous Court, that severe intoxication which rendered the accused capable of only involuntary actions, was a complete defence, as the accused committed no *actus reus*.¹⁶⁷ Rumpff C.J. held that a person who was "dead drunk" and could only carry out involuntary muscular movements committed no *actus reus* in the juridical sense of the word as the person's acts were not governed by his or her mind.¹⁶⁸ On the other hand, a person who had imbibed only a small quantity of liquor that had no noteworthy effect on his or her mental faculties should be fully punishable.¹⁶⁹ Between these two extremes lay, he said, a large variety of cases where a person had acted in a juridical sense but where the question arises as to what extent his or her inhibitions were diminished.¹⁷⁰ Rumpff C.J. laid down the following criterion regarding criminal capacity:

"Only then when a person who commits a consequential act (sic) is so drunk that he does not realise that what he is doing is unlawful, or that his inhibitions have broken down substantially, can he be deemed to be not criminally responsible."¹⁷¹

3.105 Regarding the specific intent doctrine and the defence of drunkenness in the case of crimes requiring negligence, he held:

166 [1981] 1 S.A. 1097 (A).
167 Law Reform Commission of Victoria Report, No. 6, p.9.
168 See the South African Law Commission, *Report on Offences Committed Under the Influence of Liquor or Drugs*, Project 49, January 1986, para. 4.4.6(i), Ch.4.
169 *Ibid.*, para. 4.4.6(ii), Ch.4.
170 *Ibid.*, para. 4.4.6(iii), Ch.4.
171 *Ibid.*

"So far as our law is concerned, the whole idea of 'specific intent' in respect of liquor, as it occurs in English law, should be regarded as unacceptable. There is no place for that particular approach in a proper application of our law. Obviously, a court may, under our law, find that, owing to the influence of liquor, a person did not foresee a certain consequence which he would have foreseen had he been sober, and that he is therefore guilty of a less serious crime."¹⁷²

3.106 Regarding the application of the defence, Rumpff C.J. warned that if a court was lightly to accept that an intoxicated person was not criminally responsible, the administration of justice would be brought into disrepute.¹⁷³ Therefore, the Court laid down the following guideline:

"But I repeat that a court will come to the conclusion, or reasonable doubt, only on the grounds of evidence that justifies it that, when a person has in fact committed an act (or omission) which constitutes a crime, he was so drunk that he was not criminally responsible."¹⁷⁴

South African Law Commission

3.107 This decision of the Appellate Division sparked off a lively controversy and led ultimately to the South African Law Commission investigating offences committed under the influence of liquor and drugs in 1986. The Commission was of the opinion that public opinion was not disposed to allow an offender to shield behind his or her voluntary intoxication in order to escape criminal liability.¹⁷⁵ It concluded that although very few cases occur where an accused is acquitted by reason of intoxication, the present law in this regard called for legislative intervention and therefore recommended that legislation should be passed.¹⁷⁶ A draft bill appeared in Schedule A of the Report. Schedule A provided:

- "1. (1) Any person who voluntarily consumes liquor or any drug or substance which affects his mental faculties, knowing that such liquor, drug or substance has that effect, and who, while his mental faculties are thus affected, commits an act for which he would have been criminally liable had his mental faculties not been thus affected, shall be guilty of an offence and shall be liable on conviction to any punishment, except the death penalty, which could have been imposed on him had he been held criminally liable for such act.
- (2) If, in a prosecution on a charge of any offence, it is found that the accused is not criminally liable for the

172 *Ibid.*, para. 4.4.6(iv), Ch.4.

173 *Ibid.*, para. 4.4.7, Ch.4.

174 *Ibid.*

175 *Report on Offences Committed Under the Influence of Liquor or Drugs*, para. 4.4.12(b), Ch.4.

176 *Ibid.*, para. 2.2, Ch.9.

offence charged, owing to the fact that his mental faculties had been affected by liquor or any drug or other substance, the accused may be found guilty of the offence in subsection (1) if the evidence proves such offence."

The 1988 Act¹⁷⁷

3.108 An Act of Parliament was passed in 1988. The Act states:

"1.(1) Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, except the death penalty, which may be imposed in respect of the commission of that act.

(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

2. Whenever it is proved that the faculties of a person convicted of any offence were impaired by the consumption or use of a substance when he committed that offence, the court may, in determining an appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that his faculties were thus impaired."

The United States of America

The Model Penal Code

Self-induced intoxication

3.109 In the United States there have been a number of different solutions to the problems posed by the intoxication defence. Primary among these has been the approach adopted by the 1962 Model Penal Code.

3.110 The Model Penal Code recognises that evidence of intoxication can be a defence if it negatives an element of the offence,¹⁷⁸ but not in the case of

177 Act No. 1 of 1988.
178 Section 2.08(1).

recklessness. The rationalisation for this approach to recklessness in the case of an intoxicated offender relies on the assertion that voluntarily getting intoxicated is sufficiently morally blameworthy to deny a defence to a crime committed while under the influence of such intoxicant.¹⁷⁹ This approach recognises the social dangers of ruling otherwise and identifies alleged practical difficulties.

3.111 Section 2.08 of the Model Penal Code provides:

- "(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
- (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial.
- (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.¹⁸⁰
- (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.
- (5) Definitions. In this Section unless a different meaning plainly is required:
 - (a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances to the body;
 - (b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;
 - (c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant,

179 Don Stuart, *op cit.*, p.379.

180 Section 4.01 of the Model Penal Code provides:

'(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct'.

to which the actor does not know he is susceptible."

3.112 Perkins and Boyce comment that in general the Model Penal Code follows the accepted common law position.¹⁸¹ They argue that while the use of the term "self-induced" intoxication is an improvement on "voluntary intoxication", it would, nevertheless, be more satisfactory to speak of "culpable intoxication" and "innocent intoxication".¹⁸² They further comment that it is consistent with the prevailing position regarding specific intent and that it is in line with the existing law on the relationship between intoxication and insanity.¹⁸³

3.113 The Model Penal Code approach has been adopted in fourteen jurisdictions in the United States, most notably New York.¹⁸⁴ However, this approach has not been free from criticism.¹⁸⁵ As Perkins and Boyce have indicated, it differs little from the traditional specific intent/basic intent rule. Furthermore, the widening of the concept of recklessness has been criticised. It has been suggested that it is wrong in principle and in policy and that it may in fact be unconstitutional.¹⁸⁶

Innocent intoxication

3.114 Perkins and Boyce remark that in so far as criminal responsibility is concerned, since the refusal to place intoxication and insanity on the same basis is due to the fact that the former is usually voluntarily incurred madness, it follows that they should be dealt with in a similar manner when intoxication is innocent, and that that is the law (section 2.08(4) of the Model Penal Code¹⁸⁷).¹⁸⁸ Intoxication will be presumed to be voluntary unless some special circumstance is established to remove it from that category.¹⁸⁹ These special circumstances are: intoxication by mistake; intoxication under duress; intoxication from medicine; and other nonculpable intoxication.¹⁹⁰ Regarding the effect of innocent intoxication, Perkins and Boyce state that:

"The fact that one is in a state of involuntary intoxication does not necessarily establish criminal incapacity on his part; it establishes only that his derangement is without culpability and hence it is dealt with the same as if it were a mental disease or defect. He does not have criminal capacity if his mind is so deranged for the moment that he is unable 'to know what he is doing and that it is wrong', and if the particular jurisdiction goes beyond the right-wrong rule in dealing with insanity it

181 Perkins and Boyce, *op cit.*, p.1015.
182 *Ibid.*
183 *Ibid.*
184 *McKinney's Consolidated Laws of New York*, Vol. 39 (Penal Law).
185 The Law Commission, Consultation Paper No. 127, p.42.
186 See *ibid.*, pp.43-46.
187 See *infra*, para. 4.8.iii.
188 Perkins and Boyce, *op cit.*, p.1001.
189 *Ibid.*, p.1001.
190 *Ibid.*, pp.1002-5.

should do likewise in cases of involuntary intoxication."¹⁹¹

Completely disregard the effect of voluntary intoxication

3.115 This more radical approach, similar to the approach adopted in Scotland, has been adopted in nine states in the United States, namely, Arkansas,¹⁹² Delaware,¹⁹³ Pennsylvania,¹⁹⁴ Virginia,¹⁹⁵ Missouri, Georgia,¹⁹⁶ Texas,¹⁹⁷ South Carolina and Mississippi.¹⁹⁸ The essence of the approach is an expansion of *mens rea* to include cases where intoxication is substituted for any intent required for an offence.

Intoxication as a full defence

3.116 Finally, Hawaii allows evidence of intoxication to negate the mental states of intention and recklessness.¹⁹⁹ Recently, the Supreme Court of Indiana has made a similar decision.²⁰⁰

Intoxication as a disease

3.117 In considering more recent development in the United States, Perkins and Boyce comment that the fact that alcoholism (*dipsomania*) is a disease has not received due attention in the enforcement of justice and while society's right to protect itself against such persons is beyond dispute, arrest without therapeutic treatment is not the solution. However, in considering the decisions in *Robinson v California*,²⁰¹ *Easter v District of Columbia*,²⁰² *Driver v Hinnant*,²⁰³ and *Powell v Texas*,²⁰⁴ they concentrate on cases where intoxication, possession or use was an offence rather than the case of an accused pleading intoxication as a defence to another crime.²⁰⁵

European Civil Law Jurisdictions

3.118 In Germany, Switzerland and Austria intoxication is allowed as a defence to criminal liability in appropriate circumstances. This defence is treated as an aspect of voluntariness or liability. However, the self-induced condition that

191 *Ibid*, p.1005.
192 Arkansas Statutes Annotated, §41-207 (1977).
193 *Wyatt v State* 519 A.2d 649 (Delaware 1986).
194 *Pennsylvania Statutes Annotated*, title 18, §.00308 (Purdon, 1983) and *Commonwealth v Rumsey* 454 A.2d. 1121 at 1122 (1983).
195 *Chittum v Commonwealth* 174 SE.2d. 779 (1970).
196 See McCord, (1990) *Journal of Legal History* 372 at 388.
197 Texas Codes Annotated, Title 2, §8.04 and accompanying Practice Commentary by Searcy and Paterson p.233 (Vernon 1974).
198 The Law Commission, Consultation Paper No. 127, pp.49-50.
199 Hawaii Revised Statutes, §702-230 (1980).
200 *Terry v State*, 465 N.E. 2d 1085 (1985) at 1088. See further the Law Commission, Consultation Paper No. 127, p.63.
201 370 U.S. 660, 82 S.Ct. 1417 (1962).
202 361 F.2d 50 D.C.Cir. (1966).
203 356 F.2d 761 4th Cir. (1966).
204 392 U.S. 514, 88 S.Ct. 2145 (1968).
205 Perkins and Boyce, *op cit*, pp.1015-18.

excludes criminal capacity is made punishable as a matter of legal policy.

3.119 In the Netherlands and Italy self-induced intoxication is not recognised as a defence.

Germany

3.120 In German law an act is punishable only if it is voluntary. Intoxication may exclude this requirement if it results in a condition of unconsciousness and in that condition the perpetrator commits an "act" which would otherwise be regarded as a crime.²⁰⁶

3.121 An act is punishable only if the accused has criminal capacity at the time he or she committed the crime. Section 52 of the *Penal Code* provides that:

"(1) There shall be no punishable act if the perpetrator at the time of the act, by reason of the unconsciousness, or a morbid mental disorder, or a mental defect, was not capable of appreciating the wrongfulness of the act or of acting in accordance with such appreciation.

(2) If the capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation was at the time of the act materially diminished by one of the above-mentioned factors, the punishment may be mitigated in terms of the provisions with regard to punishment of attempt".²⁰⁷

3.122 If it is found that the accused's "act" lacked volition or criminal capacity and if it is further found that this condition was due to his or her own fault, section 323 of the *Penal Code* applies. Section 323 reads as follows:

"s330a.(1) Whoever intentionally or negligently becomes intoxicated through the use of alcohol or other intoxicating substances is punishable up to five years in prison, if while in that intoxicated condition he commits a wrongful act and if by virtue of the intoxication is not responsible for that act (or his non-responsibility is a possibility).

(2) In no event may the punishment be greater than that for the wrongful act committed in the state of intoxication".²⁰⁸

3.123 The concept of negligence underlying the provision is negligence as to the risk of committing a crime while intoxicated. If the offender takes adequate precautions against committing a crime while intoxicated, there is no

206 See the South African Law Commission, *Report on Offences Committed Under the Influence of Liquor or Drugs*, para. 3.1.2, Ch.6.

207 *Ibid*, para. 3.1.3, Ch.6.

208 Translation in George P. Fletcher, *Rethinking Criminal Law* (1978), pp.846-52.

negligence.²⁰⁹

Switzerland

3.124 The Swiss law adopts the same approach as the German law. Section 10 of the *Swiss Penal Code* provides that:

"Any person who, because of mental disease, mental deficiency or serious mental disturbance, was not at the time of the act capable of appreciating the wrongfulness of his act or of acting in accordance with his appreciation of the wrongfulness of his act, shall not be punishable".²¹⁰

3.125 Again intoxication, if it excludes criminal capacity, is made punishable as a matter of policy. Section 263 of the *Swiss Penal Code* provides for punishment as follows:

"Any person who is in a condition of criminal incapacity on account of self-induced drunkenness or intoxication and in this condition commits an act which is a punishable crime or offence is liable to a penalty of imprisonment not exceeding six months or with a fine".²¹¹

Austria

3.126 The same approach is adopted in Austria. Section 11 of the *Penal Code* provides that:

"Any person who at the time of the act is incapable of appreciating the wrongfulness of his act or of acting in accordance with such appreciation on account of mental disease, mental deficiency, severe disturbance of consciousness, or any other severe mental disorder similar to any of these conditions, shall not be guilty".²¹²

3.127 Gross intoxication is regarded as a disturbance of the consciousness. Again punishment is provided for. Section 287 of the *Penal Code* provides that:

"Any person who, even negligently, by the use of alcohol or any other intoxicating substance, inebriates himself to such an extent that he is criminally incapable, if he commits an act in this condition which would have been a crime or offence were it not for this condition, shall be liable to imprisonment not exceeding three years or a fine not exceeding 360 units of the daily tariff. The penalty shall not however in nature or measure exceed the penalty prescribed by law for the act committed

209 *Ibid.*
210 See the South African Law Commission, *op cit*, para. 3.2.1, Ch.6.
211 *Ibid.*
212 *Ibid*, para. 3.3.1, Ch.6.

during drunkenness".²¹³

The Netherlands

3.128 A completely different approach is adopted under Dutch law - voluntary intoxication is no defence. However, criminal capacity is required for criminal liability and the absence of criminal capacity may lead to a finding of not guilty. Section 37(1) of the Dutch Penal Code provides that:

"A person is not punishable who commits an act which cannot be imputed to him because of defective development or morbid disturbance of his mental faculties".²¹⁴

3.129 It is clear that only a morbid mental disorder or deficiency will lead to non-liability. Intoxication will be included only in very exceptional cases, i.e. in the case of the insane drunk. Voluntary intoxication is therefore not included.²¹⁵

3.130 The Dutch approach represents an exception to the general requirement of *mens rea* in criminal law, because it excludes the *mens rea* requirement in the case of intoxication. This is clearly a policy decision and has been criticised on jurisprudential grounds.²¹⁶

Italy

3.131 The Italian approach is similar to the Dutch one, but is far more detailed. Section 85 of the *Codice Penale* expressly lays down that criminal capacity is required for criminal liability. However, section 87 excludes self-induced criminal incapacity as a defence. Furthermore, section 92 provides:

"Drunkenness not caused fortuitously or by *force majeure* shall not exclude or diminish criminal capacity".²¹⁷

3.132 The Code also distinguishes between occasional and habitual intoxication. The latter is punished more severely than the former.²¹⁸ Regarding occasional intoxication, the Code distinguishes between intoxication with intent to commit a crime (which is punishable more severely),²¹⁹ involuntary intoxication (which leads to a finding of not guilty)²²⁰ and voluntary intoxication (which is punished *normaliter*).²²¹

213 *Ibid.*
214 *Ibid.*
215 *Ibid.*
216 *Ibid.*
217 *Ibid.*
218 *Codice Penale*, section 94.
219 *Codice Penale*, section 92(2).
220 *Codice Penale*, section 91.
221 See the South African Law Commission, *op cit*, para. 3.5, Ch.6.

CHAPTER 4 : PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

Introduction

4.1 In this Chapter we propose to consider the recommendations for reforming the intoxication defence which have been advanced in other jurisdictions. While there is a plethora of proposed reforms, our interest will be concentrated on three approaches in particular, the introduction of, or recognition of, intoxication as a full defence to a criminal charge where the defendant can show that he or she lacked the requisite intent for the offence charged or acted involuntarily, the creation of a specific offence of intoxication, and the abolition of intoxication as a defence in any circumstance.

4.2 The Commission considers it appropriate to examine these proposals in some detail as valuable insights may be gleaned from such consideration. In particular, we consider that such an appraisal will highlight possible difficulties which either have arisen or may arise under the particular models which have been adopted elsewhere.

England And Wales

The Butler Committee Report¹

4.3 The Report of the Butler Committee on *Mentally Abnormal Offenders* recommended the creation of a strict liability offence whereby the courts should be given, by statute, clear power to convict those who become violent when drunk. The object was not necessarily to punish them.² It was argued that these provisions would mean that the offence would be one of strict liability in respect of the objectionable behaviour, but would require the fault element of becoming

¹ *Report of the Committee on Mentally Abnormal Offenders*, Cmnd. 8244 (1975).

² *Ibid.*, para. 18.53.

voluntarily intoxicated. A mistaken belief in a circumstance of excuse (such as that the victim was about to attack so that the force was necessary by way of defence, or that the victim consented) would not be a defence unless a sober person might have made the same mistake.³

4.4 It was proposed that:

"[I]t should be an offence for a person while voluntarily intoxicated to do an act (or make an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for such offence. The prosecution would not charge this offence in the first instance, but would charge an offence under the ordinary law. If evidence of intoxication were given at the trial for the purpose of negating the intention or other mental element required for the offence, the jury would be directed that they may return a verdict of not guilty of that offence but guilty of the offence of dangerous intoxication if they find that the defendant did the act (or made the omission) charged but by reason of the evidence of intoxication they are not sure that at the time he had the state of mind required for the offence, and they are sure that the intoxication was voluntary."⁴

4.5 A dangerous offence was defined as one involving injury to the person, or death, or consisting of a sexual attack on another, or involving the destruction of or causing damage to property so as to endanger life.⁵ Voluntary intoxication was defined as intoxication resulting from the intentional taking of drink or a drug knowing that it was capable in sufficient quantity of having an intoxicating effect; provided that intoxication was not voluntary if it resulted in part from a fact unknown to the defendant which increased his or her sensitivity to the intoxicant.⁶

4.6 Regarding the appropriate penalty, it was recommended that on conviction on indictment of dangerous intoxication the defendant should be liable to imprisonment for one year for a first offence or for three years on a second or subsequent one.⁷ On summary trial the maximum sentence of imprisonment should be six months. In considering the scale of punishment, the Committee explained that it was not proposing an arrangement whereby intoxicated offenders obtain the benefit of a reduced punishment.⁸ It argued that the new offence would be needed only where the defendant had been acquitted of the offence originally charged. There would be no injustice to the defendant in providing for the possibility of conviction of dangerous intoxication as an alternative charge, because the evidence of intoxication would be provided by the

3 *Ibid.*, para. 18.57.

4 *Ibid.*, para. 18.54.

5 *Ibid.*, para. 18.55.

6 *Ibid.*, para. 18.56.

7 *Ibid.*, para. 18.58.

8 *Ibid.*

defendant at the trial in answer to the main charge.⁹

4.7 Commenting on the proposals, in particular, that they related to dangerous offences only and that the new offence should be charged only where the accused was acquitted of the dangerous offence because of intoxication, Gray remarked:

"Unfortunately, the proposals of the Butler Committee relate to dangerous offences only This appears undesirably restrictive. Moreover, the proposal is that the new offence should be charged only where the accused is acquitted of the dangerous offence because of intoxication. Again, while *Majewski* stands as a decision, the effect of the provision would be confined to dangerous offences requiring specific intent. Sound though the proposals are in principle, there is a case for an enactment of wider scope."¹⁰

Fourteenth Report of the Criminal Law Revision Committee¹¹

4.8 A minority of the Criminal Law Revision Committee in its Fourteenth Report proposed an amended version of this approach. It was explained that Professors Smith and Glanville Williams supported the proposal of a separate offence because, first, they considered it to be a fundamental principle that one should not be convicted of an offence requiring recklessness when one had not in fact been reckless.¹² Secondly, they thought it important that the verdict of the jury should distinguish between an offender who was reckless and one who was not because it was relevant to the question of sentence.¹³

4.9 Their proposal was set out in the following proposition:

- "(1) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed an intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (2) Where a person is charged with an offence and he relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he was not aware of a risk where awareness of that risk is, or is part of, the mental element required for conviction of the offence, then, if:
 - (a) the jury are not satisfied that he was aware of the risk, but

9 *Ibid.*
10 J.W.R.Gray, "The Expulsion of Beard from Scotland: Murder North of the Border", [1979] *Crim.L.R.* 369 at 379.
11 Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*. Cmnd. 7844 (March 1980).
12 At para. 262.
13 *Ibid.*

- (b) the jury are satisfied
 - (i) that all the elements of the offence other than any mental element have been proved, and
 - (ii) that the defendant would, in all the circumstances of the case, have been aware of the risk if he had not been voluntarily intoxicated,

the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.

- (3) Where a person charged with an offence relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he held a belief which, in the case of a sober person, would be a defence to the offence charged, then, if:

- (a) a jury are of opinion that he held that belief or may have held it, and

- (b) are satisfied that the belief was mistaken and that the defendant would not have made the mistake had he been sober,

the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.

- (4) Where the offence charged consists of an omission, the verdict under (2) and (3) above shall be making the omission while intoxicated.

- (5) A person convicted under (2) or (3) above shall, where the charge was of murder, be liable to the same punishment as for manslaughter; and in any other case shall be liable to the same punishment as that provided by law for the offence charged."¹⁴

4.10 It was agreed that if there was to be a separate offence of doing the *actus reus* of an offence while voluntarily intoxicated that this proposal was to be preferred to that of the Butler Committee.¹⁵

4.11 Smith and Hogan commenting on alternatives to *Majewski* remark:

"There is no obviously right solution; but the minority proposal of the CLRC has the great virtue that it requires the jury to declare the facts as they find them, so giving the judge the best opportunity to impose the

¹⁴ *Ibid*, para. 263.

¹⁵ *Ibid*, para. 264.

right sentence; which after all is the object of the exercise."¹⁶

4.12 The majority, however, preferred an approach which avoided the complications which they saw inherent in the creation of a new offence. In essence, their recommendation would have given legislative form to the statement of the law in *Majewski*, but without the additional elements introduced by *Caldwell*, which was not, of course, decided by the House of Lords until the following year. Their formulation, which was based on the U.S. Model Penal Code, was as follows:

"(1) The common law rules should be replaced by a statutory provision on the following lines:

- (a) Evidence of voluntary intoxication should be capable of negating the mental element in murder and the intention required for the commission of any other offence;¹⁷ and,
- (b) In offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication has no appreciation of a risk which he would have appreciated had he been sober, such lack of appreciation is immaterial.¹⁸

(2) Voluntary intoxication should be defined on the lines

16 Smith and Hogan, *op cit*, p.232.

17 They explained that this provision: "is intended to make evidence of voluntary intoxication admissible for the purpose of negating any intentional element in an offence which is required to be proved by the prosecution. Murder, however, has to be specifically mentioned because, if our recommendation is adopted, it would be murder if a person, with intent to kill, causes death or if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death ... On the second limb of our definition, therefore, the prosecution may be required to prove both intention and recklessness, but we consider that a defendant who, owing to voluntary intoxication, failed to appreciate that by his act or omission there was a risk of causing the death of another should not be subject to the mandatory penalty. In murder, therefore, even though an element of the definition may require a type of recklessness, we consider that if the prosecution fail to prove that element of recklessness owing to evidence adduced by the defendant of voluntary intoxication, the offence should be reduced to manslaughter; but when the offence is so reduced, [(1)(b)] below will apply and lack of appreciation of the risk of causing death will be immaterial." Fourteenth Report, para. 268.

18 Under this provision they explained that: "even where the defendant is able to show that he did not intend the unlawful conduct (for instance in assault, to strike or frighten his victim) if in law the offence in question is capable of being committed recklessly, as in assault, he may nevertheless be found guilty. In such cases the defendant can adduce the evidence of intoxication for the purposes of mitigation." *Ibid*, para. 269.

They went on to explain: "The test in [(1)(b)] above is formulated in such a way as to require the court to take into consideration any particular knowledge or any other personal characteristics of the defendant, as for example backwardness. Thus in a case where a gun is discharged killing or injuring another a jury might consider that many people could have made a mistake about the risk. But if the defendant was familiar with firearms the jury may find that he would have appreciated the risk if sober. For similar reasons it would be unjust that a subnormal person should be judged on the same basis as one of average intelligence." *Ibid*, para. 270.

Also, "where a defendant was unaware of an element in an offence as to which the law imposes strict liability his lack of awareness will be no defence when it arises through drunkenness." *Ibid*, para. 271.

recommended by the Butler Committee.¹⁹

- (3) In murder or in any other offence in which intention is required for the commission of the offence, a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However, in offences in which recklessness constitutes an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial.²⁰
- (4) Our recommendations on voluntary intoxication should be applicable to criminal offences generally.²¹

4.13 The majority recognised that in making their proposals that in a few rare cases, mostly sexual offences committed while under the influence of hallucinatory drugs, that it might be possible to take advantage of the defence under (1)(a) above. For example in the case of rape, if the accused alleged that he thought that the victim was consenting when she was not, this would come within (1)(b) because recklessness as to whether she was consenting would be a sufficient mental element and evidence of voluntary intoxication would not be admissible as a defence, but if he had said that, because of his hallucinations, he did not appreciate that he was having sexual intercourse at all, he might have a defence under (1)(a) because he must intend to have sexual intercourse; recklessness not being a sufficient mental element for that part of the offence. However, they felt, that the likelihood of the jury believing his story seemed remote.²²

4.14 Subsequently, Dr. Ashworth commenting that the majority implied that intoxication alone should not attract criminal liability, asked:

"Set against the widely-held view that intoxication is the source of much avoidable violence and damage, the Committee's declaration seems unduly lenient. After all, many people drive whilst intoxicated without infringing any other rules of the road, and yet the criminal law does not hesitate to strike at the risk-creation involved in drunken driving, without waiting for the risk to materialise. Indeed for that offence complete intoxication is not required and a certain blood/alcohol concentration suffices, and for controlled drugs mere possession attracts criminal

19 "Voluntary intoxication" should be defined "to mean intoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect, provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug." Butler Committee, *op cit.*, para. 18.56.

20 Fourteenth Report, paras. 276-278.

21 *Ibid.*, para. 279.

22 *Ibid.*, para. 272.

liability. A prohibition on alcohol would be unworkable; yet, since drinking oneself into a state of intoxication involves voluntarily casting off 'the restraints of reason and conscience,' should not the law go further than the summary offences of public drunkenness and make intoxication itself a serious crime, as a kind of inchoate offence?"²³

4.15 He identified the following arguments against this as:

"First, it might be possible to construct a statistical argument that only a minority of totally intoxicated persons actually cause harm whilst in that condition. Secondly, the social effects of criminalising intoxication would be more widely resented than the prohibition on driving with excess alcohol. But thirdly, when an intoxicated person does cause harm, the balance is tilted in favour of criminal liability. Whilst it might be oppressive to punish all intoxicated persons (even though no harm is caused) on the basis that they have voluntarily created a risk, a law which reserves that punishment for those intoxicated persons who do cause harm cannot be reproached with sacrificing individual liberty to a statistical possibility. If he has caused harm, the risk has materialised. Thus the higher value we set upon popular conceptions of liberty (perhaps because alcohol fulfils a social want, and because wider criminalisation might bring a style of law enforcement which would unduly infringe other liberties) than upon the benefits to society in general and to victims in particular of a peremptory requirement that citizens should not intoxicate themselves as to lose control over their behaviour."²⁴

4.16 While the Criminal Law Revision Committee agreed that a principal defect of the Butler recommendation was the proposed label of the new offence - a single offence of being dangerously intoxicated would lump together the intoxicated child killer and the intoxicated brawler²⁵ - he went on to question why the Committee objected to this. What, he asked, was the nature of "the offender's fault" in intoxicated harmdoing? He responded that "his fault lies in rendering himself insensible and uncontrolled."²⁶

4.17 Dr. Ashworth argued that both the majority and minority, whilst apparently concerned that the label of the offence should be appropriate, appeared to view appropriateness more in terms of unargued assumptions about public opinion rather than of accurately reflecting the offender's fault.²⁷ He concluded:

"The Committee's recommendations on voluntary intoxication are strongly pragmatic, so far as they go, but weakly argued. The existing

23 Andrew Ashworth, *'Intoxication and General Defences'*, [1980] Crim.L.R. 556 at 558-9.

24 *Ibid.*

25 Criminal Law Revision Committee, paras. 259 and 261.

26 Ashworth, *op cit*, p.560.

27 *Ibid.*, p.560.

law may also be applauded as strongly pragmatic, and indeed the Committee find fault with it only in one respect - that some offences cannot readily be classified in terms of basic or specific intent, and the uncertainty generates avoidable legal argument. The Committee's recommendation succeeds in removing that uncertainty, but their dismissal of the Butler proposal cannot satisfy anyone who believes (as the Committee apparently do when they are discussing murder and manslaughter) that the label of the offence should reflect the offender's fault and not the unforeseen consequences of his actions

The Committee's pragmatism stops at the point of conviction. Sentencing policy, which is clearly vital to the achievement of their aim that intoxicated harmdoers should be properly dealt with, is simply not discussed Undoubtedly the proper approach to sentencing intoxicated harmdoers is a complicated issue. If there is alcoholism or drug addiction, a predominantly curative sentence may be passed. In other cases there will be a difficult equation between the degrees of intoxication, and the nature of the harm caused²⁸

Law Commission's Criminal Code for England and Wales²⁹

4.18 More recently, the Law Commission in its Criminal Code for England and Wales comprehensively dealt with the issue in clause 22 which reads as follows:

- "(1) Where an offence requires a fault element of recklessness (however described), a person who was voluntarily intoxicated shall be treated -
 - (a) as having been aware of any risk of which he would have been aware had he been sober;
 - (b) as not having believed in the existence of exempting circumstances (where the existence of such a belief is in issue) if he would not have so believed had he been sober.
- (2) Where an offence requires a fault element of failure to comply with a standard of care, or requires no fault, a person who was voluntarily intoxicated shall be treated as not having believed in the existence of an exempting circumstance (where the existence of such a belief is in issue) if a reasonable sober person would not have so believed.
- (3) Where the definition of a fault element or of a defence refers,

28
29

Ibid., pp.562-3.
The Law Commission, *A Criminal Code for England and Wales*, Law Com. No. 177, Vols. I and II, 1989.

or requires reference, to the state of mind or conduct to be expected of a reasonable person, such person shall be understood to be one who is not intoxicated.

- (4) Subsection (1) does not apply -
 - (a) to murder (to which section 55 applies); or
 - (b) to the case (to which section 36 applies) where a person's unawareness or belief arises from a combination of mental disorder and voluntary intoxication.
- (5)
 - (a) "Intoxicant" means alcohol or any other thing which, when taken into the body, may impair awareness or control.
 - (b) "Voluntary intoxication" means the intoxication of a person by an intoxicant which he takes, otherwise than properly for a medical purpose, knowing that it is or may be an intoxicant.
 - (c) For the purposes of this section, a person "takes" an intoxicant if he permits it to be administered to him.
- (6) An intoxicant, although taken for a medical purpose, is not properly so taken if -
 - (a)
 - (i) it is not taken on medical advice; or
 - (ii) it is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice; and
 - (b) the taker is aware that the taking, or the failure, as the case may be, may result in his doing an act capable of constituting an offence of the kind in question;

and accordingly intoxication resulting from such taking or failure is voluntary intoxication.

- (7) Intoxication shall be taken to have been voluntary unless evidence is given, in the sense stated in section 13(2) that it was involuntary.³⁰

4.19 In its commentary,³¹ the Law Commission indicated that the aim of the

30 Law Com. No. 177, Vol. I, Clause 22.

31 Law Com. No. 177, Vol. II.

clause was to reintroduce the present law on the topic with modifications recommended by the Criminal Law Revision Committee.³² Therefore, the distinction between crimes of specific and basic intent would be preserved. That it is a somewhat complex clause was justified on the ground that it restated relatively complex law.³³

4.20 It commented that, in so far as the proof of the fault element of an offence was concerned, the law at present has a special rule for the effect of voluntary intoxication where the offence charged is one of basic intent. Agreeing with the Criminal Law Revision Committee and the American Model Penal Code relating to any offence requiring a fault element of recklessness, subsection (1)(a) provides that a person who is voluntarily intoxicated is to be treated, for the purposes of such an offence, as having been aware of any risk of which he or she would have been aware had he or she been sober.³⁴

4.21 Subsection (1) applies to an offence requiring a fault element of recklessness even where it also requires, expressly or by implication, an element of intention or knowledge.³⁵

4.22 The Commission offered two examples to illustrate the effect of its proposal in practice:

- (i) D, who was voluntarily intoxicated, tried unsuccessfully to have sexual intercourse with P, who did not consent. D was treated as having been aware of the risk had he been sober. He might therefore be convicted of attempted rape. If D succeeded in having intercourse with P believing, wrongly, that she was consenting, he would be treated as not having held that belief if he would not have held it had he been sober, and accordingly he may be convicted of rape.
- (ii) D was charged with intentionally causing serious personal harm to P. He testified that he was drunk and that he intended to break a window but was not aware of any risk that he might cause personal harm to any person. If it was found that this story might reasonably be true he must be acquitted of the offence charged; but, if he would have been aware of a risk of causing personal harm to a person had he been sober, he may be convicted of recklessly causing personal harm to P.³⁶

32 See *supra*, para. 4.12.

33 Law Com. No. 177, Vol. II, para. 8.33.

34 *Ibid.*, para. 8.35.

35 *Ibid.*

36 Law Com. No. 177, Vol. I, Appendix B, Examples 22(i) and (ii).

4.23 Clause 33(1)(b)³⁷ makes it clear that an offender cannot rely on his or her drugged condition as a "state of automatism" if it arose from voluntary intoxication.³⁸

4.24 Where intoxication is voluntary, its effects depend on the fault element of the offence charged. Subsection (1)(b) again follows the recommendation of the Criminal Law Revision Committee.³⁹

4.25 The Commission went on to argue that a slightly stricter rule must apply to offences not requiring a fault element of recklessness and subsection (2) provided for this. In *Jaggard v Dickinson*⁴⁰ the defendant was allowed to rely on a drunken belief that she was damaging property belonging to a person who would have consented to her so doing. The effect of subsection (1)(b) is to reverse that decision.⁴¹

4.26 The Commission contended that the same anomaly would be introduced if the Code were to adopt a *dictum* of the Court of Appeal in *O'Grady*⁴² to the effect that a defendant, on a charge of an offence of "specific intent" equally with one of "basic intent", would not be able to rely upon evidence of an intoxicated mistaken belief in an occasion for self-defence.⁴³ In all the circumstances the Commission was satisfied that the *dictum* referred to must be ignored in framing the clause. The result is consistent with the view of the Criminal Law Revision Committee⁴⁴ on this topic.⁴⁵

4.27 The Commission went on to state:

"It would seem obvious that, when the law prescribes a standard of reasonable behaviour, this must relate to the standard to be expected of a sober person. But the fact that the point has been argued in the Court of Appeal in two modern cases⁴⁶ suggests the desirability of including in the Code the principle that those two cases establish, to avoid the matter being reopened."⁴⁷

4.28 The principle is stated in subsection (3).

4.29 Subsection (4) covers exceptions to subsection (1). If murder were not

37 "33.-(1) A person is not guilty of an offence if-

(a) ...

(b) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication."

38 Law Com. No. 177, Vol. II, para. 8.37.

39 See *supra*, para. 4.12.

40 [1981] Q.B. 527.

41 Law Com. No. 177, Vol. II, para. 8.40.

42 [1987] Q.B. 995 at 999.

43 See *infra*, para. 4.31 & 41.

44 Fourteenth Report, paras. 276-278.

45 Law Com. No. 177, Vol. II, para. 8.42.

46 *Woods* (1981) 74 Cr.App.R. 312; *Young* [1984] 1 W.L.R. 654, [1984] 2 All E.R. 164.

47 Law Com. No. 177, Vol. II, para. 8.43.

exempted, a person, who, because of intoxication, was unaware that he or she might kill, might be treated as being aware of that risk and so liable to conviction of murder. The Commission argued that this would be a departure from the long established law and from the recommendation of the Criminal Law Revision Committee.⁴⁸ Secondly, the courts having accepted that a person's unawareness or mistaken belief might be due to a combination of voluntary intoxication and mental disorder, a mental disorder verdict would be returned (so long as subsection (1) did not apply) where the defendant was suffering at the time of the act from "mental disorder" as defined in clause 34.⁴⁹ The kind of mental disorder relevant in practice, according to the Commission, would be a state of automatism (not resulting only from the intoxication itself) that is associated with an underlying condition and likely to recur. A mental disorder verdict would, it maintained, be more satisfactory than an "insanity" verdict under the present law because the court would have wide powers of disposal under the recommendations of the Butler Committee instead of being obliged to order indefinite detention of the offender.⁵⁰

Consultation Paper on Legislating the Criminal Code: Offences against the Person and General Principles⁵¹

4.30 In 1992, the Law Commission returned to the question of intoxication in its Consultation Paper on *Legislating the Criminal Code: Offences against the Person and General Principles*. The Law Commission stated:

"We would ideally have wished to include in the Bill a statement of the law that we could recommend as to the effect on criminal liability of the intoxication of the accused, since such issues very frequently arise in connection with offences against the person. However, the Draft Code provisions as to intoxication, set out in clause 22 thereof, seek broadly to reproduce the common law; and further study of the present law since the Code was published has led us to doubt whether we can properly recommend the adoption of that law without further consideration of whether the law should be reformed. That consideration would cause unwarranted delay if it took place as part of the present exercise. The Commission has therefore instituted a full review of the law as to the effect of intoxication on criminal liability, in order to formulate proposals for the future law on the subject. It is accordingly not possible to formulate proposals for the reform of that law in the present Bill."⁵²

48 *Ibid.*, para. 8.44.

49 "34. 'Mental disorder' means -

- (a) severe mental illness; or
- (b) a state of arrested or incomplete development of mind; or
- (c) a state of automatism (not resulting from intoxication) which is a feature of a disorder, whether organic or functional and whether continuing or recurring, that may cause a similar state on another occasion.

50 Law Com. No. 177, Vol. II, para. 8.45.

51 The Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles*, Consultation Paper No. 122, 1992.

52 At para. 2.15.

4.31 It listed some of the more important reasons for this view as:

- "(a) Although evidence of intoxication may be admitted in defence of a charge based upon the accused's 'specific intent', in cases where recklessness or so-called 'basic intent' is in issue existing English law requires that the accused be judged as if he had not been intoxicated. This important rule is highly controversial and has been questioned in a number of other jurisdictions.
- (b) Identification of cases where intoxication can, and cannot, be taken into account under the foregoing rules is a difficult and controversial matter and the terminology used by the courts has been subjected to severe criticism.
- (c) Recent cases [*O'Grady*, [1987] Q.B. 995; *O'Connor* [1991] Crim. L.R. 135] suggest that where an accused sets up a defence based on a mistaken belief (e.g. that he is about to be attacked and must defend himself), he cannot rely on that belief if it was induced by voluntary intoxication. That view is contrary to the recommendation of the CLRC [paras 276-278], who considered that such a belief should be able to found a defence where the fault element of the offence charged is intention as opposed to recklessness. The recent cases, however, give no clear guidance as to the principle on which a person is denied the benefit of a drunken mistake; which leads us to think that it would be desirable for the whole issue of the effect of intoxication upon defences to be considered afresh.
- (d) As we explained in paragraph 2.19 above, and as clause 22 of the Draft Code demonstrates, the present law is extremely complex, and thus difficult to apply with accuracy. We consider that at least an attempt should be made to produce a simpler and more practical solution."⁵³

4.32 The Law Commission accepted that by proposing a thorough review of the law, it was differing from the majority of the CLRC who considered that no such review was required; and also to some extent from the view which the Law Commission had itself taken in the Code Report. However, on reconsidering the matter it was persuaded that, especially in the light of recent developments in the law of intoxication, that it could not recommend the simple adoption of the present common law without further review.⁵⁴

4.33 The Law Commission, nevertheless, went on to say that this decision that the law of intoxication required further study raised questions in relation to the treatment of intoxication in its present Bill. It stated that at the moment

53 At para. 21.1
54 *ibid.*

intoxication was almost entirely a matter of common law and that its two most important effects upon criminal liability, stated broadly, were that: (1) where recklessness on the part of the offender could be established, one who was voluntarily intoxicated would be treated as having been aware of the risk of which one would have been aware had one not been intoxicated; and, (2) where a defence was based upon a belief held by a voluntarily intoxicated offender, he or she will be treated as not having held a belief that one would not have held had one not been intoxicated.⁵⁵ The Law Commission went on to say that these two rules had important implications for many matters which were dealt with in the Bill.⁵⁶

4.34 In respect of these matters the Law Commission stated that its intention should be read subject to the present law of intoxication, pending its full review of intoxication.⁵⁷ Accordingly, it concluded that specific provision should be made to reproduce in the Bill the common law on intoxication,⁵⁸ insofar as it affected matters dealt with in the Bill. The formulation draws heavily on clause 22 of the Draft Code.⁵⁹

4.35 Finally, it reiterated that the clauses in question did not necessarily represent the Commission's views of what the criminal law should ideally say in respect of intoxication and, in the event of any proposals for the reform of the present law on intoxication finding acceptance, these clauses would be replaced.⁶⁰

The Relevant Clauses

4.36 Clause 1(5)(a)⁶¹ is concerned with the relevance of voluntary intoxication where a person is charged with an offence under the Bill involving recklessness; and clauses 1(5)(b)⁶² and 23(3)⁶³ with its relevance where an

55 At para. 2.16.
56 *Ibid.*
57 At para. 2.17.
58 Clauses 1(5), 23(3) and 29.
59 Consultation Paper No. 122, 1992, para. 2.18.
60 At para. 2.19.
61 "1. -(5) A person who is voluntarily intoxicated when the offence requires reference to his state of mind shall be treated-

(a) as having been aware of any risk of which he would have been aware had he not been intoxicated; and
(b)

and this Part has effect, in such cases, subject to those rules."

62 "1. -(5) A person who was voluntarily intoxicated when the offence requires reference to his state of mind shall be treated-

(a) ...
(b) as not having believed in any circumstances which he would not have believed in had he not been intoxicated,

and this Part has effect, in such cases, subject to those rules.

63 "23.(3) A person who was voluntarily intoxicated when the offence requires reference to his state of mind shall be treated as not having believed in any circumstances which he would not have believed in had he not been intoxicated, and this Part has effect, in such cases, subject to that rule.

accused claims to have acted on the basis of a mistaken belief that might afford a defence provided under the Bill. Clause 29⁶⁴ is concerned with the definition of the terms "intoxicant" and "voluntary Intoxication".

Recklessness in cases of voluntary intoxication

4.37 Where an offence requires for its commission an intention to cause a specified result, or knowledge of or belief in the existence of some circumstance, the fact that the offender was voluntarily intoxicated at the time of the commission of the relevant act raises the following question: did the defendant act with the intention, knowledge or belief required for commission of the offence? At common law an important specialised rule applies to offences which may be committed recklessly and clause 1(5)(a) is designed to avoid any doubt that the rule applies to offences committed recklessly under the Bill.⁶⁵

4.38 The effect of clause 2(b)⁶⁶ of the Bill is that, for the purpose of offences under the Bill, one acts recklessly, with respect to a circumstance or a result, when one is aware that the circumstance exists or will exist or that the result will occur and it is unreasonable to take that risk. Therefore, the *Caldwell* rule applies to offences under the Bill.⁶⁷

4.39 The Law Commission went on to say that it might be thought arguable that the rule stated in *Caldwell* would apply to offences created by the present Bill even without clause 1(5)(a). It remarked that the terms in which the rule was stated were certainly apt for the purpose. However, it recognised that there was a strong argument to the contrary. Hitherto the rules of the common law relating to the effect of intoxication had not been applied to the offences of recklessness expressly defined (as in the present Bill) in terms of an actual awareness of the relevant risk. It concluded that the argument to be avoided was that the statutory requirement of awareness of a risk precluded application of a common law doctrine that would treat unawareness of that risk as immaterial.⁶⁸

Defences based on intoxicated belief

4.40 Similar considerations justified clauses 1(5)(b) and 23(3) which provide that a person who was voluntarily intoxicated "shall be treated as not having believed in any circumstance which he would not have believed in had he not

64 See *infra*.

65 Consultation Paper No. 122, para. 21.4.

66 *2. For the purposes of this Part of this Act a person acts-

(a) ...

(b) 'recklessly' with respect to-

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur; and it is, in the

circumstances known to him, unreasonable to take that risk; and cognate words shall be construed accordingly.'

67 Consultation Paper, No. 122, para. 21.5.

68 At para. 21.7.

been intoxicated".⁶⁹ It argued that common law defences based on mistaken belief appeared to be subject to such a qualification. Again it was necessary to make special provision to this effect because it would be doubtful, in the absence of a special provision, whether any such rule could be held to apply "where Parliament has specifically required the court to consider the accused's actual state of belief",⁷⁰ as in the case of the relevant defences created by the present Bill.⁷¹

4.41 In considering clause 23(3), the Law Commission explained that it prevented reliance on certain beliefs caused by voluntary intoxication and made no exception for the most serious offences requiring a so-called "specific intent". It therefore gave effect to the opinion of the Court of Appeal in *O'Grady* in relation to self defence that no distinction should be drawn in relation to this aspect of the defence "between offences of what is called specific intent ... and offences of so called basic intent, such as manslaughter". In the Code Report⁷² the Law Commission had treated this option as unsupportable, at least in so far as it denied a defence to murder to one who, albeit due to intoxication, thought that she was acting to protect her life from an aggressor. However, the difficulty of distinguishing in satisfactory terms between offences of specific intent and basic intent, and the uncertainty as to the policy governing the law's response to a defence based on an intoxicated mistake were among its reasons for deciding not, without further consideration, to advance the Draft Code's solutions to these problems. In the meantime, pending its consideration of the subject, it felt it would be preferable to state a single rule applying to all offences.⁷³

"Intoxicant" and "voluntary intoxication"

4.42 These matters are dealt with in clause 29 which reads as follows:

- (1) Whether a person is 'voluntarily intoxicated' or not is to be determined in accordance with the following provisions of this section.
- (2) A person is voluntarily intoxicated if he takes an intoxicant, otherwise than properly for a medical purpose, being aware that it is or may be an intoxicant and takes it in such a quantity as impairs his awareness or understanding.
- (3) A person shall be treated as taking an intoxicant when he permits it to be administered to him.
- (4) An intoxicant, although taken for a medical purpose, is not properly so taken if-

69

Ibid.

70

Jaggard v Dickinson [1981] Q.B. 527 at 531.

71

Consultation Paper, No. 122, para. 21.8.

72

Law Com. No. 177, para. 8.42.

73

Consultation Paper, No. 122, para. 21.9.

- (a) the intoxicant-
 - (i) is not taken on medical advice; or
 - (ii) is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice; and
- (b) the taker is aware that the taking, or the failure, as the case may be, may result in his doing an act capable of constituting an offence of the kind in question;

and accordingly intoxication resulting from such taking or failure is voluntary.

- (5) In this section 'intoxicant' means alcohol, drugs or any other thing which, when taken into the body, may impair awareness or understanding.
- (6) Intoxication is to be presumed to have been voluntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that the intoxication was involuntary."

Consultation Paper on Intoxication and Criminal Liability⁷⁴

4.43 Most recently, in 1993, the Law Commission again looked at this troubled question and in its Consultation Paper sought views on various questions. The options considered by the Commission are set out below.

Option 1: Do nothing

4.44 This approach was rejected as unsatisfactory, in that the present state of the law is too complex and obscure, erratic in operation and difficult to apply.⁷⁵

Option 2: Codify the *Majewski* approach

4.45 This option took three possible forms:

- (i) Codify the present law without amendment;⁷⁶
- (ii) Adopt the proposals of the Criminal Law Revision Committee and the rule in the American Model Penal Code to apply *Majewski* only to issues of recklessness;⁷⁷

74 The Law Commission, *Intoxication and Criminal Liability*, Consultation Paper No. 127, 1993.

75 See paras. 4.1-4.7.

76 See paras. 4.8-4.10.

77 See paras. 4.11-4.30.

- (iii) Adopt a simplified version of (ii), under which a state of voluntary intoxication would itself constitute recklessness in law.⁷⁸

Option 3: Disregard the effect of voluntary intoxication in any offence

4.46 The effect of this would be that the defendant could in no case rely on voluntary intoxication to negate *mens rea*.⁷⁹

4.47 One can oppose *Majewski* as affording an escape route to those guilty of crimes of specific intent. This option would close off this route completely.

4.48 The Law Commission puts forward the following in favour of this option:

"This approach is admittedly severe, but it represents a clear and uncompromising policy to deal with the problem of intoxication-related crime. By *never* allowing defendants to rely on voluntary intoxication to help their case, an unequivocal deterrent message is given: that all who take intoxicants to excess do so entirely at their own legal risk, and are fully responsible for whatever harm they do once intoxicated. Moreover, this approach is less susceptible than others to misapplication by jurors. As we have pointed out, it seems likely that the vast majority of intoxicated offenders possess some form of awareness or intent, even if it is transient and subsequently forgotten. If that view is correct, a rule that *never* allowed a defendant to rely on intoxication to negate *mens rea* would eliminate the risk of acquitting any intoxicated defendants who had in fact formed the requisite mental element: albeit at the possible price of convicting the very few (if any) defendants who cause harm while lacking even momentary awareness or intention."

4.49 Against this option they reiterate the arguments which cite the harshness of the approach on basic intent offenders and see force in the following observations from an American commentator:

"Complete elimination of the mental element would not work too badly with some specific *mens rea* crimes ... It would not be patently unfair to punish a drunken defendant for robbery who takes property by violence or intimidation from the person or presence of another without regard to the defendant's intent. Even though he may lack one of the usual requisites for robbery, a specific intent to rob or steal, the residual conduct of the 'robber' entails substantial harm and danger. Punishment would serve a retributive function, would get an individual who appears dangerous - at least when drunk - off the streets, and might deter others ...

78 See paras. 4.31-4.33.

79 See paras. 4.38-4.46.

Elimination of the mental element, however, would work very badly with many other specific *mens rea* crimes ... The gravamen of burglary is the specific intent to commit a crime when the building is entered. If this element were eliminated our defendant would be punished without having the contemporaneous blameworthy mental state or culpability ordinarily required for true crimes ... His only real blameworthiness would be the relatively minor defect of getting drunk some time earlier. There is little culpability, harm or danger inherent in a simple entry into a building ... Subjecting an individual who has not really been proven to be anything but a drunken trespasser to the stigma and potential sanctions of a [conviction for burglary] would not be appropriate under any conventional theory of penology."

4.50 The Commission comments:

"These observations show in fact that it is not merely odd, but wholly inappropriate, to convict of burglary one who drunkenly enters another's premises, without it been shown that the "burglar" had an intent to commit an offence therein. The essence of the offence of burglary, in those cases where a crime is not actually committed in the premises entered, is indeed the intention with which the entry is made: otherwise, there is nothing to distinguish the defendant's conduct from a non-criminal trespass. Opinions may differ as to the degree of culpability, harm or danger inherent in a (drunken) entry upon another's premises: but where the entrant's drunkenness prevents the formation of an ulterior intent, it is simply impossible to characterise the entry as a burglary, and thus similarly impossible to use a conviction for burglary as a sanction against such entry.

The present option also continues, but in an acute form, the difficulties as to punishment that we have referred to above. The gravamen of the charge against a defendant caught by this option will simply be that he became intoxicated and, without the normally required mental state, committed a criminal harm. He will, however, be convicted of the offence for which he did not have that normally required mental state, but for which the range of punishments assumes that he did. The possibility of convicting of and thus punishing for burglary one who merely drunkenly enters another's property is but an extreme illustration of the difficulties that would be caused by the present option."

4.51 We will return to these arguments later.

Option 4: Disregard the effect of voluntary intoxication in any offence, subject to a statutory defence

4.52 Under this option it would be open to the defendant to prove, on the

balance of probabilities, that he lacked the *mens rea* for the offence.⁸⁰

Option 5: Abolish *Majewski* without replacement

4.53 This would mean that the defendant's intoxication would be taken into account with all other relevant evidence in determining whether he has the prescribed *mens rea* for the offence.⁸¹

Option 6: Abolition combined with a new offence⁸²

4.54 This would involve the introduction of a new offence of "criminal intoxication". The Commission indicated that it would particularly welcome comment on this option.

4.55 Under this option it was suggested that a person who committed the *actus reus* of one of the listed offences⁸³ would be guilty of the new offence if the person so acted when their awareness, understanding or control was substantially impaired by reason of deliberate intoxication.⁸⁴ In particular, it was suggested that a person would not be deliberately intoxicated unless aware when taking the intoxicant that, in the amount that the person knowingly took, it would or might cause him or her to become intoxicated. Furthermore, that in adjudicating upon the question whether the defendant's intoxication was deliberate, there should be at least an evidential burden upon the defendant. An intoxicated person would not be deliberately so intoxicated if the person did not take the intoxicant of his or her own will or if the intoxication was caused by an intoxicant taken solely for medical, sedative or soporific purposes.⁸⁵ It would be immaterial to the question of liability for the offence whether the defendant did or did not form the mental element of the underlying listed offence or was in a state of automatism when causing the harm proscribed by the listed offence.⁸⁶

4.56 It was suggested that the proposed new offence could be charged alone, but that further there should be specific provision that a defendant charged with a listed offence might instead be convicted of the new offence.⁸⁷ The maximum punishment for the proposed offence should be less than, but proportionate to, that for the underlying listed offence.⁸⁸

80 See paras. 4.47-4.50.

81 See paras. 5.8-5.25.

82 See pp.36-95.

83 The provisionally proposed listed offences were: homicide; bodily harm; carnal knowledge; rape; indecent assault; buggery; assaulting a constable, and resisting or obstructing a constable, in the execution of his duty; the offences under the *Public Order Act, 1986* of violent disorder, affray and putting in fear of, or provoking, violence; and finally, causing danger to road-users.

84 This would be the only requirement of the new offence subject only to a special rule relating to mistake. The Commission suggested that an intoxicated person could rely on a mistake that, objectively viewed, it would have been reasonable for a sober person to have made in the same circumstances. See paras. 6.62-6.65.

85 The meaning of 'deliberate' is considered at paras. 6.52-6.61.

86 See paras. 6.76-7.77 and para. 6.80.

87 See paras. 6.81-6.83.

88 See paras. 6.42-6.47.

4.57 As a corollary of the introduction of the proposed new offence, the present *Majewski* approach would, of course, be abolished with the effect that in assessing the defendant's intention or subjective recklessness for the purpose of deciding his or her guilt of an existing offence, the jury would take into account the intoxication, together with all other factors, in assessing the defendant's actual subjective state of mind.⁸⁹

4.58 The Commission commented that it saw the following advantages to this approach:

- "(i) Defendants will not be liable to be convicted of offences when, in law, they did not have the required mental state for guilt of that offence.
- (ii) At the same time, the criminal law will be able to intervene in cases where the defendant, although not fulfilling the requirements for conviction of a specific crime, committed socially dangerous acts in a state of substantial intoxication.
- (iii) This objective will be achieved by allowing the court and jury to apply a set of clear rules, that require them to consider factual and not abstract or hypothetical questions; that clearly identify where the defendant has been convicted on grounds of intoxication rather than of actual intention or recklessness; and which accordingly give positive guidance to the sentencing tribunal as to the grounds of his conviction."⁹⁰

4.59 While the Commission commented that it was not possible to state with confidence how the practical effect of the new offence would differ from the effect of the present *Majewski* approach, it remarked that it should indicate the extent to which, if at all, the new offence would or might produce convictions in cases in which, under *Majewski*, evidence of intoxication would be taken into account in determining the defendant's guilt. Thus, the Commission commented that:

"First, offences that have, to date, been identified as offences of 'basic intent', to which the *Majewski* approach applies, would be covered by the new offence, in the sense that the harm prohibited by each of them is included in the proposed list of harms covered by the new offence. Second, however, that list of harms does not include the harm covered by the actus reus of any present offence identified as one of specific intent, and in particular does not extend the intoxication offence to theft, deceit or handling. Third, the only exception to the immediately foregoing statement is in the case of offences of specific intent where in the present law there is, by chance, another offence, though of basic

89
90

See para. 6.85.
The Law Commission, *Intoxication and Criminal Liability*, para. 6.86.

intent, involving the same actus reus, that can be applied under *Majewski* to convict the offender of *some* offence. The most obvious examples, and perhaps the only, examples of this process ... are conviction of manslaughter in the case of intoxicated murder, and conviction of an offence under section 20 of the Offences against the Person Act 1861 in the case of an intoxicated commission of the actus reus of the offence under section 18 of the Act. In such cases the new offence aims directly at the fact of the commission of the type of harm prohibited, death or serious bodily harm."⁹¹

Australia

The Common Law States

*Law Reform Commission of Victoria, 1984 Discussion Paper*⁹²

4.60 In 1984, Mrs. Loane Skene, researching for the Commission, recommended that a strict liability offence of "criminal intoxication" be introduced which should not be limited to dangerous offences but should cover any criminal act committed while voluntarily intoxicated. The proposed offence would carry the same maximum penalty as the principal offence charged. Again, the offence would be a fall-back offence, relevant only where the defendant had been acquitted of another charge by reason of his or her intoxication.⁹³ The writer suggested that the following section be inserted in the *Crimes Act (Vic.) 1958*:

"421.A.(1) Where a person is charged in the Supreme Court or the County Court with an indictable offence or offences or is charged in the Magistrates' Court with an indictable offence or offences triable summarily or with a summary offence and upon the trial of that person, the court is not satisfied that he is guilty of the offence or offences charged against him and the sole reason why the court is not so satisfied is that the person due to the result of self-induced intoxication, was not culpable of the offence or offences with which he is charged the court may find that he is not guilty of the offence charged but is guilty of the offence of Criminal Intoxication. Thereupon he shall be liable to be punished in the same manner as if he had been convicted of the offence charged;

(2) In subsection (1) 'intoxication' means any intoxication, whether caused by drink, drugs or other means, or by a combination of means.

(3) Such intoxication shall be presumed to be self-induced unless the accused person shows

91 *Ibid*, para. 6.87.

92 Law Reform Commission of Victoria, *Discussion Paper on Intoxication and Criminal Responsibility*, June 1984.

93 At p.31.

- (a) that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake; or
- (b) that his intoxication was caused solely by the taking or administration of a substance in the course of medical treatment; or
- (c) that his intoxication was grossly excessive in degree, given the amount of the intoxicant, which is caused by an abnormal bodily condition not known to the accused person.⁹⁴

*Law Reform Commission of Victoria, 1986 Report*⁹⁵

4.61 Nevertheless, the Law Reform Commission of Victoria reporting in 1986, unanimously supported *O'Connor*. It held that the principle stated in *O'Connor* was correct and should not be altered. It argued that the principle accorded with the fundamental doctrine of the criminal law that a person is not guilty of a crime unless the act was done voluntarily and intentionally.⁹⁶ It went on to say:

"If, for whatever reason, including self-induced intoxication, there is no *mens rea*, the accused should be acquitted. The *O'Connor* principle focuses on the intention of the particular accused and does not impose objective or constructive liability. It is free of the practical and jurisprudential difficulties that have arisen in the attempts of other jurisdictions to distinguish between crimes of specific and general intent or those which may or may not be committed recklessly. The public policy considerations which have led to a different conclusion from the *O'Connor* principle in other jurisdictions are not persuasive.

The attempts that have been made in other jurisdictions to ensure that intoxicated offenders are not totally acquitted have met with difficulties. The categorisation of offences into those of general and those of specific intent, or into offences in which recklessness is or is not sufficient to constitute *mens rea*, have led to illogical and inconsistent results. They have also enabled liability to be imposed objectively or constructively. If intoxication is held not relevant to awareness of risk, the issue is whether a reasonable sober person would have appreciated the risk, in which case the liability is objective and unacceptable; or alternatively whether the accused, when sober, would have appreciated the risk, which is an unduly difficult question for the judge to explain to the jury and for the average juror to understand."⁹⁷

94 At pp.32-3.

95 Law Reform Commission of Victoria: *Criminal Responsibility: Intention and Gross Intoxication*, Report No. 6, November 1986.

96 At para. 39.

97 At paras. 39 and 40.

4.62 The Commission concluded that *O'Connor* had presented few problems in practice and that there had been few acquittals due to gross intoxication of the defendant and, in particular, such acquittals were rare in serious cases.⁹⁸

4.63 The Commission then went on to consider whether some consequential change to the law should be made in respect of dangerous acts which are involuntary or unintentional because of gross intoxication.⁹⁹ It identified three possible courses of action:

- (i) Option A - Make no consequential changes;¹⁰⁰
- (ii) Option B - Provide for detention of "offenders" for treatment;¹⁰¹ and,
- (iii) Option C - Enact a strict liability offence of committing a dangerous or criminal act while intoxicated.¹⁰²

4.64 The Commission concluded that the choice between the three options should not be made in isolation as there were other involuntary or unintended, apparently purposeful acts, which result from factors, other than gross intoxication, some of which were subsumed under the heading of insanity, others under the heading of automatism. It felt that to deal with the broad issue of intoxication and criminal responsibility separately from such cases would be "unproductive and would lead to moral and legal dilemmas and confusion."¹⁰³

4.65 The Commission went on to say that it was arguable that people who are acquitted of a criminal offence due "to mental abnormality should be detained for treatment both for the health of the offender and in order to protect society from further offences".¹⁰⁴ It suggested that one way to achieve this result would be:

"[T]o conflate the defences of insanity and automatism and to provide an appropriate range of measures to deal with 'offenders', varying from committal to hospital, at one extreme, to unconditional acquittal at the other. Measures for behavioural control between those extremes might include an order that the defendant receive medical treatment or medical supervision, or that the defendant be hospitalised without being declared insane."¹⁰⁵

4.66 The new combined defence might include within its scope situations currently dealt with by the *O'Connor* doctrine.¹⁰⁶ It felt, however, that:

98 At para. 43.
99 At paras. 44-83.
100 Considered at paras. 55-61.
101 Considered at paras. 62-65.
102 Considered at paras. 66-80.
103 At para. 81.
104 At para. 82.
105 At para. 82.
106 *Ibid.*

"Such an approach would require more detailed consideration, particularly in relation to its implication for civil liberties, than was possible within its terms of reference and in the present study."¹⁰⁷

4.67 It concluded that the anomalies were sufficiently grave to justify a separate reference on this subject.¹⁰⁸

4.68 Finally, the Commission was evenly divided on what should be done if it was decided that such a reference should not be made. Half of the members urged that a new statutory offence should be created which would consist of committing a dangerous act while grossly intoxicated. The new offence should be a lesser included offence of which the accused could be convicted if acquitted of the principal offence charged. This would not lead to undue complication of court cases and the possibility of compromise pleas and verdicts could be overcome. The other members believed that the adoption of Option C would itself be inconsistent with the principle stated in *O'Connor* which the Commission had unanimously approved. It would involve the imposition of serious criminal liability for involuntary and unintentional acts and would lead to complications and difficulties in the administration of criminal justice which were not justified by the small number of acquittals.¹⁰⁹

4.69 The Victorian Law Reform Commission's recommendations did not meet with unanimous approval. In particular, *The Financial Review*, in an editorial, was quick to criticise the Commission's recommendations:

"It appears that not only can the law be an ass, but so can a Law Reform Commission ... The football louts who destroy holidays for thousands of ordinary Australians, the drunken revellers who exploit a new-found freedom to drink in public at every New Year's celebration or every special public occasion, the crude neo-intellectuals who flaunt what they call 'freedom' and what is actually 'licence' will all benefit ..."¹¹⁰

4.70 The Chairperson of the Victorian Law Reform Commission¹¹¹ responded in a letter to the Editor:

"The editorial speaks of the report and the issues it dealt with as if they were concerned with 'drunkenness'. That is quite wrong. The Commission was dealing with a tiny number of cases where a jury is satisfied that the accused was so intoxicated whether by alcohol or drugs that a fundamental change took place in his mental state, which prevented him from acting voluntarily or intentionally. The closest analogy is with a person suffering from an epileptic fit or from gross

107 At para. 83.
108 *Ibid.*
109 *Ibid.*
110 5 March, 1987.
111 David StL Kelly.

concussion. The fact that a person is drunk is, and will continue to be, quite irrelevant to general criminal responsibility ... Your suggestion that [football] louts and drunken revellers will be readily acquitted is not only false: it is dangerously irresponsible. The Commission's Report offers no solace at all to football louts and drunken revellers."¹¹²

*Law Reform Commission of Victoria, 1988 Discussion Paper*¹¹³

4.71 The Law Reform Commission of Victoria again considered this issue in 1988. The Commission referred to the conclusion in its earlier Report and remarked that, while it had recommended that the law remain as stated in *O'Connor*, it had left unresolved the issue whether some special legislative measures should be taken to deal with dangerous acts which were involuntary or unintentional because of gross intoxication.¹¹⁴ It proceeded to consider several options, namely:

- Option 1: Provide for detention and treatment;
- Option 2: Enact a strict liability offence of "Criminal Intoxication";
- Option 3: Enact legislation which presumes that individuals who were voluntarily intoxicated were reckless;
- Option 4: Make no special provision and allow liability for criminal negligence to be imposed where appropriate;
- Option 5: Exclude automatism in cases of voluntary intoxication; and,
- Option 6: Make no change.¹¹⁵

Option 1

4.72 The Commission concluded that, in general, criminal sanctions should not be used as a pretext for treatment¹¹⁶ and recommended that legislation providing for a form of qualified acquittal in cases where the accused was intoxicated at the time of the alleged offence should not be introduced.¹¹⁷

112 6 March, 1987. See The Law Reform Commission (New South Wales) *Report*, April 1987, No. 46, p.91.
113 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No. 14, August 1988.
114 At para. 226.
115 *Ibid.*
116 At para. 229.
117 Recommendation 34.

Option 2

4.73 The Commission concluded that a strict liability offence should not be introduced. The argument for an equivalence of penalties was in effect an abandonment of the original proposal, it said. Finally if the penalties were no different from the basic offence, it was unnecessarily confusing to provide two offences where one would suffice.¹¹⁸ It recommended, therefore, that a special offence of criminal intoxication should not be introduced.¹¹⁹

Option 3

4.74 The Commission concluded that the proposal to equate voluntary intoxication with recklessness was even less acceptable than the expedient suggested by the Butler Committee.¹²⁰ It commented that:

"Conduct which may involve no serious fault, or mere negligence, will be treated as the equivalent of the most serious offences in the criminal calendar".¹²¹

4.75 Consequently, it recommended that legislation which would presume recklessness in the case of voluntarily intoxicated people should not be enacted.¹²²

Option 4

4.76 The Commission concluded that the argument that voluntary intoxication was, in itself, a sufficiently blameworthy state of mind to attract criminal liability rested on nothing more than forceful assertion. It commented:

"In societies like our own, where moderate degrees of intoxication are common and an accepted part of social life at all levels of respectability, the truth of the assertion is far from self evident."¹²³

4.77 However, it continued by recognising that:

"The remaining objection is more formidable. There is a possibility that individuals who are grossly intoxicated at the time of the alleged offence will escape conviction because the 'mind did not go with the deed'. So long as juries are instructed that the prosecution must prove that the crime was done voluntarily, *as well as* consciously and intentionally, that possibility cannot be excluded. One cannot rely absolutely on the common sense of juries to reject such claims if the trial judge's direction amounts to an authoritative invitation to take them seriously. The

118 At para. 237.
119 Recommendation 35.
120 At para. 345.
121 *Ibid.*
122 Recommendation 36.
123 At para. 254.

objection does not show, however, that we should invent new offences of dangerous intoxication, or count voluntary intoxication as the equivalent of recklessness. The more direct and obvious course of action is to omit the reference to voluntariness."¹²⁴

4.78 Accordingly, the Commission concluded that the offence of causing serious bodily harm by grossly negligent act or omission should be extended to a statutory provision. It suggested that the provision should have the following effect:

"Charges of causing serious injury intentionally, or of causing serious injury by recklessness, should include the lesser charge of negligently causing serious injury;

Consistent with Recommendation 33,¹²⁵ in the case of a defendant who pleads gross intoxication to a charge of gross negligence, the direction for the jury should not include a requirement that the act was voluntary but simply that it was intentional."¹²⁶

Option 5

4.79 The Commission concluded that, in the absence of an intention to act, no person should be convicted of a criminal offence. Therefore, it went no further in relation to intoxication than its earlier recommendation to remove the term voluntariness from the directions given to juries. Juries should continue to be directed that criminal liability requires proof of an intention to act. It remarked that:

"Gross intoxication should not be treated differently from other situations - like sleepwalking, and so on - in this respect. People should only be punished for intentional actions. Therefore intoxication ought to be allowed to rebut the claim that the defendant intended to do the prohibited act. As in the other cases, he or she is not entitled to an additional direction that the act has to be voluntary as well as intentional."¹²⁷

4.80 Consequently, it recommended, again consistently with recommendation 33,¹²⁸ that in the case of a defendant who pleads gross intoxication, the direction to the jury should not include a requirement that the act was voluntary

124 At para. 255.

125 Recommendation 33 provides that:

"The jury should not be asked to determine whether the defendant's act was conscious or voluntary. For all offences, including offences of strict liability, the question should be either: Has the defendant performed an intentional act? or, in the case of an offence based on omission: Was the defendant physically incapable of performing the act required?"

126 Recommendation 37.

127 At para. 260.

128 See *supra*, footnote 112.

but simply that it was intentional.¹²⁹

*Law Reform Commission of Victoria, 1990 Report*¹³⁰

4.81 The intoxication defence was considered again in relation to automatism in 1990 in the context of mental malfunction. The Commission considered gross intoxication and the capacity to act voluntarily.¹³¹ It noted the various ways in which intoxication can affect criminal responsibility. First, regarding awareness, it stated that many offences require proof of intention, knowledge, belief, reckless, or other 'advertent' state of mind, and that evidence of intoxication could lead credibility to a denial of the relevant state of mind. It declared that the judge must direct the jury to take account of intoxication when determining the defendant's state of mind.¹³² Secondly, regarding negligence, the Commission remarked that in the case of the more serious negligence-based offences where death or serious injury has resulted, the prosecution must prove that there was 'gross' negligence, i.e. conduct falling short of a reasonable standard of care; in these circumstances intoxication does not assist the defendant. The standard is that of a reasonable sober person.¹³³ Finally, in relation to defences, the Commission remarked that the standard for the defence of self-defence was that of a reasonable sober person and that intoxication was expressly excluded under the defence of provocation.¹³⁴

4.82 The Commission concluded that:

- (1) In the absence of intent to act, no person should be convicted of a criminal offence.¹³⁵
- (2) The majority concluded that dispositional options should not be attached to automatism verdicts generally.¹³⁶
- (3) Equating voluntary intoxication with recklessness was even less acceptable than the option suggested by the Butler Committee.¹³⁷

4.83 Finally, it recommended that:

- (1) A plea of automatism based on gross intoxication should continue to be

129 Recommendation 38.

130 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No. 34, October 1990.

131 At para. 205.

132 At para. 206.

133 At para. 208.

134 *Ibid.*

135 The Commission commented that in the Discussion Paper No. 14, it had suggested that the direction of voluntariness in automatism should be abolished, but that it had decided against such a recommendation: para. 221.

136 In this context it should be noted that the Commission was not in favour of dispositional options for automatism generally: para. 226.

137 It argued that such a proposal breached the principle that people should only be punished for voluntary actions and that conduct which might involve no serious fault, or mere negligence, should be treated as the equivalent of some of the most serious offences in the criminal calendar, including murder: para. 241.

available.¹³⁸

- (2) If the accused intends to raise a plea of automatism based on gross intoxication, he or she should give 14 days notice to the prosecution of that fact.¹³⁹
- (3) The offence of causing serious bodily harm by grossly negligent act or omission should be a lesser included offence to a charge of causing injury intentionally, or of causing injury by recklessness.¹⁴⁰

The Code States

Queensland Criminal Code Review Committee¹⁴¹

4.84 The Queensland Criminal Code Review Committee recently recommended changes in this area. Commenting on section 28 of the present Code, the Committee recognised that there is an anomaly in the present section which, it recommended, should be removed.¹⁴² It relates to the first two paragraphs of section 28 which deal with unintentional and intentional intoxication respectively. It would appear that successful reliance on unintentional intoxication gives the accused only the benefit of the verdict appropriate to the present section 27, i.e., not guilty on the ground of unsoundness of mind. This means detention during Her Majesty's pleasure. This, it observed, would appear to be an unjust and anomalous result where, for example, the accused only became intoxicated because, unknown to him or her, his or her drinks had been "laced". It recommended that the present first paragraph be changed along the lines recommended by Murray¹⁴³ in relation to the Western Australian Code. This provided that self-induced intoxication should be an exception to the application of the present section 23,¹⁴⁴ but allowed the excuse in the case of involuntary intoxication. Finally, the Committee commented that the term "stupefaction" was antiquated and that the generic term "intoxicate" was adequate.

4.85 Regarding intention/motive, the Committee proposed that subject to the provision of the Code relating to negligent acts and omissions, a person should be criminally responsible for an act or omission which occurs independently of the exercise of his or her will, or for an event which occurs by accident.¹⁴⁵ Unless the intention to cause a particular result was expressly declared to be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission was immaterial, it held.

138 Recommendation 35.

139 Recommendation 36.

140 Recommendation 37.

141 First Interim Report of the Criminal Code Review Committee to the Attorney General, March 1991.

142 At p.92.

143 Murray, *The Criminal Code, A General Review*, Vol. 2 (June 1983), p.544.

144 Section 23 exempts a person from criminal responsibility if the act 'occurs independently of the exercise of his will'.

145 Report, section 27.

Unless otherwise expressly declared, the motive by which a person was induced to do or omit to do an act, or to form an intention, was immaterial so far as regards criminal responsibility. Specifically with regard to intoxication it provided:

"32. **Intoxication.** (1) The provisions of section 27¹⁴⁶ of this Code do not apply to a person by reason of his or her intoxication to any degree by alcohol or drugs or both or by any other means, unless that state of intoxication results from acts or omissions which occur independently of the exercise of his or her will.

(2) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed."¹⁴⁷

Murray Report On The Criminal Code In Western Australia¹⁴⁸

4.86 In considering criminal responsibility it was recommended that the operation of the rules in cases of automatism resulting from disease¹⁴⁹ and in cases of intoxication by the consumption of alcohol and drugs¹⁵⁰ should be clarified. Specifically regarding section 28 of the Criminal Code, it was recommended that a direct link should be created between sections 28 and 23.¹⁵¹ It was argued that this would create a sensible result in each of the five classes of cases for which the law on the defence of intoxication should cater, namely:

"(a) 'Dutch courage' cases where the person deliberately seeks to become intoxicated in order to enable him to break down his inhibitions to the extent that he may commit a crime. Such a person would have induced his state of intoxication by his own voluntary acts and his case would therefore be an exception to the operation of Section 23 so that he could not argue that his acts were nonetheless involuntary when he committed the offence.

146 *'Insanity.* A person is not criminally responsible for an act or omission if at any time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist".

147 Report, section 32.

148 Murray, *The Criminal Code, A General Review*, Vol. 2 (June 1983).

149 At section 23.

150 At section 28.

151 Section 23 deals with a number of topics. Murray describes the section as follows: 'The first part of the section negates criminal responsibility in cases where the accused's conduct has been involuntary or has produced accidental results subject to the rules relating to recklessness and negligence. The second paragraph deals with the relevance of intention and the third deals with the relevance of motive.' Murray Report, p.39.

- (b) Cases where an individual drinks or consumes intoxicating drugs deliberately and knowing from past experience that if he becomes intoxicated he may commit a crime. This class of offender also would not be entitled to the benefit of Section 23 and in this and the preceding case, it seems that the offender's state of intoxication would be properly considered during the sentencing process as an *aggravating* circumstance.
- (c) Cases where an offender deliberately drinks or consumes deleterious drugs, but with no knowledge or reason to anticipate that their effect on him might be the commission of a crime by him. This class of person would remain criminally responsible, but in his case, intoxication could be relevant to sentence.
- (d) Cases of involuntary intoxication where intoxication is not in any real sense of the word self-induced. In these cases, Section 23 would continue to apply and the person concerned would not be criminally responsible for acts or omissions which occurred independently of the exercise of his will except in the context of criminal negligence.
- (e) Habitual voluntary intoxication reaching disease proportions. In such a case, although the state of intoxication would be self-induced and therefore the benefit of Section 23 would not be available to entitle the offender to a complete acquittal, nonetheless if it could be demonstrated that his alcoholism was at such proportions as to lead to the conclusion that it had achieved the status of a 'mental disease' in the sense that it was a disease of physical origin which had impaired the functioning of the mind sufficiently to deprive the accused of any of the capacities referred to in Section 27,¹⁵² then the offender would be entitled in the normal course of events to the operation of that section and to an acquittal on the grounds of unsoundness of mind. That being so, he would of course be liable to indefinite detention under the provisions of Section 653 and by that means could be made amenable to treatment and rehabilitation while at the same time ensuring that he did not continue to be a danger to the community."¹⁵³

4.87 Finally, it was recommended that the thrust of section 28 regarding crimes of specific intent should not be altered.¹⁵⁴

152 Section 27 deals with the substantive rules on unsoundness of mind.

153 Murray Report, pp.45-6.

154 *Ibid*, p.46.

Law Reform Commissioner Of Tasmania

4.88 The Law Reform Commissioner of Tasmania, reporting in 1989, recommended that section 17 of the Tasmanian Criminal Code, 1924 should be repealed. The Commissioner stated:

"I am of the opinion that intoxication should be subsumed under the heading of insanity. If there is evidence that the behaviour of the intoxicated person indicates the existence of a 'condition recognised by medical science' which should include hyper-sensitivity or unusual reaction to drugs, including alcohol, or organic brain disturbance then a holding order should be made in respect of the acquitted person, so that he can be examined under the civil law - the Mental Health Act. If there is no evidence of such a condition, then the acquittal should take full effect. It is my opinion that there will be few acquittals on the intoxication ground where there is evidence of organic brain disturbance or the like."¹⁵⁵

The Northern Territory

4.89 The Northern Territory Law Reform Committee has not undertaken any studies on intoxication as a defence, but the law in the Northern Territory was recently considered by the Review Committee on the Commonwealth Criminal Law.¹⁵⁶ It commented that the law in the Northern Territory seemed to achieve a result similar to *Majewski*.¹⁵⁷ Finally, the Review Committee remarked that the Code, like that of Tasmania, had not managed to escape from the now discredited notion that a person is presumed to intend the natural consequences of his or her acts.¹⁵⁸

The Conclusions Of The Commonwealth Review Committee

4.90 The Review Committee stated that it saw no difficulty in deciding what the law should be regarding the effect of intoxication in certain situations. It continued:

"If the intoxication causes mental illness the ordinary law regarding mental illness should be applicable. If the intoxication was involuntary, evidence of the effect of intoxication may be relevant to the question whether the actions of the accused were voluntary and whether he or she acted with the requisite degree of fault. If the intoxication was voluntary, evidence of its effects may be relevant to the question whether the accused had an intention to cause a specific result. The question whether evidence of voluntary intoxication should be admissible to show that the accused lacked any fault, or acted involuntarily, is a more

155 Law Reform Commissioner of Tasmania: Report No. 61, *Insanity, Intoxication and Automatism, 1989*, p.14.

156 *Review of the Commonwealth Criminal Law*, para. 10.9.

157 *Ibid.*

158 *Ibid.*

difficult one. There is a great deal of force in the view of the Canadian Law Reform Commission¹⁵⁹ that logically the evidence should be relevant but that, as a matter of policy, a person who commits criminal acts while intoxicated should not escape conviction. The problem, as seen by the Review Committee, is not that evidence of intoxication may lead a jury wrongly to acquit, but that a jury might consistently with the law acquit an accused who, for example, killed another person by acts obviously likely to cause death, if those acts were done when the accused, being under the influence of drink or drugs voluntarily self-administered, had no knowledge of what he or she was doing and no intention to harm the victim - cf. *Reg. v Lipman*.¹⁶⁰

4.91 Further to the argument that *O'Connor* had raised no problems in practice and that there were in any event very few convictions, the Review Committee remarked that:

"Thirty acquittals can hardly be regarded as insignificant and the possibility exists that as time goes on the defence, particularly if incorporated in a statute, will prove more popular and that defendants will exaggerate the extent of their intoxication in order to avail themselves of it."¹⁶¹

4.92 The Review Committee pointed out that a further practical objection to *O'Connor* was that self-induced intoxication would in some cases have the result that an offender would be entitled to an acquittal even to an offence of strict liability of which intoxication was an element.¹⁶²

4.93 Having briefly discussed the creation of an alternative offence as advocated by the Butler Committee and the minority of the Criminal Law Revision Committee,¹⁶³ it observed that nowhere in the common law had such an alternative offence been created. It concluded that because of this and the danger that the creation of such an offence would lead to compromise verdicts, it could not, it said, recommend the creation of such an offence.¹⁶⁴

4.94 Therefore, the Review Committee reached the conclusion that while the principle as stated in *O'Connor* might have the advantage of logic, it was open to some objection on the ground of public policy.¹⁶⁵ It argued that the principle as stated in *Majewski* was free from those objections and corresponded broadly to those in force elsewhere in the common law world. Thus, the Review Committee was led to the conclusion that the law should be stated as it presently exists in the Code States.¹⁶⁶

159 Law Reform Commission of Canada, Recodifying Criminal Law, Report No. 31. See *infra*, para 4.112.

160 *Review of Commonwealth Criminal Law*, para. 10.18.

161 At para. 10.19.

162 At para. 10.20.

163 At paras. 10.21 and 10.22.

164 At para. 10.23.

165 At para. 10.24.

166 *Ibid.*

4.95 As a matter of policy, the Review Committee considered that it would be unacceptable for one who has reduced oneself to a state of impaired consciousness by reason of the consumption of alcohol or drugs to be able to claim that the condition was one of automatism which would absolve one from any criminal responsibility, and considered further that no distinction could be drawn between that situation and that in which the question was whether the intoxicated person had intended to do the act which in fact was done.¹⁶⁷

4.96 The Review Committee considered that negligence should be judged according to the standards of a reasonable person, that is, a sober person, so that intoxication would in general not tend to exculpate an accused charged with negligence - rather it may likely aggravate the offence.¹⁶⁸

4.97 The Review Committee considered further that it was desirable that the law should expressly provide that a person who becomes intoxicated with a view to committing an offence and who commits the offence should be treated as having done it intentionally: this might be achieved by provisions in the terms of paragraph 29(2)(b)¹⁶⁹ of the New Zealand *Crimes Bill*.¹⁷⁰

4.98 Accordingly, the Review Committee recommended that:

- "(a) the proposed consolidating law should contain provisions (similar to those contained in paragraph 29(2)(b) of the New Zealand *Crimes Bill*) to the effect that where intention to cause a specific result is an element of an offence, intoxication, voluntary or involuntary, may be considered in determining whether the accused had the requisite specific intention, but where intention to cause a specific result is not an element, intoxication may be considered in determining whether the accused had any relevant fault only if the intoxication was involuntary;
- (b) the provisions of the proposed consolidating law with regard to mental illness should extend to mental disease or defect caused by the use of intoxicants; that is, not to a temporary disturbance of mind caused by present intoxication but to a condition (such as brain damage) caused by the previous abuse of the intoxicant; and
- (c) the proposed consolidating law should further contain a provision that where a definition of an offence refers expressly or by implication to the state of mind of a reasonable person, such person should be understood to be one who is not

167 At para. 10.25.

168 At para. 10.26.

169 See *infra*, para. 4.107.

170 At para. 10.27.

intoxicated."¹⁷¹

4.99 With regard to the significance of intoxication in cases where one's acts were alleged to be beyond one's control, or where the accused was physically incapable of acting in a way required by law, because of intoxication, the recommendation regarding responsibility in general should be applied.¹⁷² In this regard, the Review Committee recommended that the proposed consolidating law should provide that:

- "(a) a person is not criminally responsible for doing any act involuntarily or for omitting involuntarily to do any act;
- (b) without limiting the generality of the foregoing, a person does an act involuntarily if the act -
 - (i) was caused by the application of physical force by another person;
 - (ii) was a spasm or convulsion; or
 - (iii) was done while he or she was in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him or her of control of the action;
- (c) the foregoing provisions do not apply to involuntariness caused by anything done or omitted with the fault element of the offence or by voluntary intoxication; and
- (d) if the accused did an act involuntarily or omitted involuntarily to do an act, because of mental illness or a combination of mental illness and intoxication, he must be acquitted by reason of mental illness."¹⁷³

4.100 Finally, division 8 of the Draft Bill to amend the *Crimes Act, 1914* attached to the Report, provides:

"Intoxication

- 3T. (1) Subject to subsection (2), where intention to cause a specific result is an element of an offence, evidence that the person was intoxicated whether voluntarily or involuntarily, at the time of the relevant act may be taken into account in determining whether the person had the necessary intention.

171 At para. 10.28.
172 At para. 10.29.
173 At para. 4.17.

- (2) Subsection (1) does not apply where the person charged:
 - (a) had resolved before becoming intoxicated to do the relevant act; or
 - (b) became intoxicated in order to strengthen his or her resolve to do the relevant act.
- (3) Where intention to cause a specific result is not an element of an offence, evidence that the person was intoxicated at the time of the relevant act may be taken into account in determining whether the person had any requisite fault only if the intoxication was involuntary.
- (4) Where, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the conduct or state of mind of the person with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the person and that of a reasonable person who is not intoxicated".

New Zealand

The New Zealand Criminal Law Reform Committee¹⁷⁴

4.101 The New Zealand Criminal Law Reform Committee reported on this area in 1984. The Committee commented on the absence of a comprehensive code in New Zealand. In particular, it stated, that the *Crimes Act, 1961*, commonly regarded as a Criminal Code, does not contain a comprehensive General Part dealing with such matters as the need for voluntary conduct or criminal intent, or such defences as automatism and mistake.¹⁷⁵ It further remarked that while the judgment in *Kamipeli*¹⁷⁶ suggests that any truly criminal charge may be defended on the ground that a state of mind required for criminal liability was absent as a result of intoxication, in practice such a defence was seldom raised and if raised, it was unlikely to succeed.¹⁷⁷

4.102 Regarding intoxication as a defence, the Committee was of the opinion that there was no doubt that the present rule that mere intoxication was not a defence to any crime was right in principle and was essential for the effective

174 Criminal Law Reform Committee of New Zealand, *Report on Intoxication as a Defence to a Criminal Charge*, March 1984.

175 At para. 34.

176 [1975] 2 NZLR 610.

177 Report, para. 36.

operation of the criminal law.¹⁷⁸ Furthermore, the Committee commented that it was not aware of any practical difficulties arising from the relationship between intoxication and insanity.¹⁷⁹

4.103 The Committee stated that it seemed to be clear that one would have a defence to any charge if, as a result of involuntary intoxication, one did not have the state of mind required by the definition of the offence.¹⁸⁰

4.104 Regarding involuntary intoxication, the Committee said that, in view of the difficulties arising from the absence of a comprehensive Criminal Code and the limited practical importance of the defence, it had concluded that the degree of uncertainty which existed did not justify legislation.¹⁸¹ But it was, it said, also necessary to consider whether public policy might require or justify statutory intervention designed to restrict the scope for pleas founded on voluntary intoxication.¹⁸² It argued that a decision as to whether such a moral judgment might justify legislation to prevent such acquittals required an examination of the different forms such legislation might take.¹⁸³ Having considered the specific intent rule,¹⁸⁴ intoxication and recklessness,¹⁸⁵ a special offence,¹⁸⁶ special verdicts,¹⁸⁷ manslaughter,¹⁸⁸ cases where intoxication was an element of the offence,¹⁸⁹ and burden of proof,¹⁹⁰ it concluded that, with one exception,¹⁹¹ the law should remain as stated in *Kamipeli*.¹⁹² The law as stated in *Kamipeli*, it argued, was consistent with general principles of criminal liability.¹⁹³

4.105 Specifically, regarding sentencing, the Commission commented that in some cases voluntary intoxication might aggravate the offence and justify a more severe penalty than would have otherwise be appropriate.¹⁹⁴ More commonly, intoxication would be put forward in mitigation of sentence, for it would often support a claim that an offence was out of character or was unpremeditated. It went on to say that in England in the context of serious crimes it had been said that voluntary intoxication "is rarely recognised as a substantial mitigating factor when standing alone",¹⁹⁵ although it might add some weight to other factors such as the absence of recent offending or provocation; and if it appeared that

178 At para. 40.

179 At para. 41.

180 At para. 42.

181 At para. 43.

182 *Ibid.*

183 At para. 47.

184 At paras. 48-55.

185 At paras. 56-60.

186 At paras. 61-70.

187 At para. 71.

188 At para. 72.

189 At paras. 73 and 74.

190 At para. 75.

191 The exception related to cases where intoxication is an element of the alleged offence, and here it recommended that statutes creating such offences should provide that the effects of voluntary intoxication should not be capable of providing a defence to a person proved to have been guilty of the prohibited conduct: para. 6.

192 At para. 76.

193 *Ibid.*

194 At para. 32.

195 D.A. Thomas, *Principles of Sentencing*, 2nd ed., pp.209-211.

the defendant suffered from alcoholism or drug addiction, the court might order treatment rather than a punitive sentence.¹⁹⁶

Revised New Zealand Code

4.106 In April 1989, in fulfilment of its election manifesto, the New Zealand Government introduced legislation revising the *Crimes Act, 1961*. For the first time the intoxication defence was codified.¹⁹⁷ The law was drafted to reflect the present law and substantive changes to existing provisions were minimal.¹⁹⁸

4.107 Clause 29 of the New Zealand draft *Crimes Bill* provides:

"29. Intoxication. (1) In determining whether any person is criminally responsible for any offence involving intention, knowledge or recklessness in respect of any act done or omitted to be done, evidence that the person was, at the time of the act or omission, intoxicated, whether voluntarily or involuntarily and whether by alcohol or any other substance, may be taken into account in deciding whether or not that person had the necessary intention or knowledge or was reckless.

(2) Subsection (1) of this section does not apply where -

- (a) Intoxication is an essential element of the offence charged; or
- (b) The person charged -
 - (i) Had already resolved before becoming intoxicated to do or omit to do the act; or
 - (ii) Consumed or otherwise used any intoxicant to strengthen his or her resolve to do or omit to do the act."

4.108 The draft makes no distinction between voluntary and involuntary intoxication and it deals with the effect of intoxication on the mental state of the accused, but not with the question whether the acts of the accused were voluntary.¹⁹⁹

4.109 It should be noted that on introduction of the Bill, it was referred to one of the Parliament's permanent standing committees which invited submissions and that the timetable was to return the Bill to the house before the end of 1990. However, by the end of 1989, "attacked from all sides", the Government invited

196 Report, para. 32.

197 Simon France, "Reforming Criminal Law - New Zealand's 1989 Code", [1990] *Crim.L.R.* 827.

198 At p.835.

199 *Review of Commonwealth Criminal Law*, para. 10.12.

the Select Committee to refer the Bill to a consultative committee for further consideration.²⁰⁰ At the time of writing that is where the Bill lies and when, if ever, it will re-emerge for a second Reading remains open to question.

Canada

Law Reform Commission of Canada, 1982²⁰¹

4.110 The Law Reform Commission of Canada, when considering reform of the law in this area in 1982,²⁰² noted that three problems arise under the present law. The first related to the difference between intoxication and mental disorder, the second concerned the nature of involuntary intoxication and the third related to the effect of voluntary intoxication in cases of specific intent offences.²⁰³ However, it concluded that:

"The present rule attempts to serve the public interest in protection from harm. Whatever the defendant's intent, no one who allows himself to be a source of danger to others should be let off scot-free

One solution to this conflict between logic and justice would be to follow existing law: subordinate logic to public safety and allow intoxication to excuse in crimes of specific intent but not in those of general intent. Alternatively the law could provide that in any offences intoxicated offenders should be acquitted if they lack the requisite intent, whether specific or general, and instead should be convicted of that for which they are really to blame - getting so intoxicated as to be dangerous to others²⁰⁴

4.111 Therefore, in order to obtain the assistance of considered commentaries, it suggested two possible alternatives: either to codify the present law clearly indicating which offences require proof of specific intent or alternatively, to introduce a new statutory offence of criminal intoxication among the inchoate offences. These propositions were set out as follows:

"Alternative (1)

6. (1) Every one is excused from criminal liability for an offence committed by reason of intoxication by alcohol or other drugs, unless such intoxication was self-induced.
- (2) Where the intoxication is self-induced no one shall be excused from criminal liability for an offence unless

200 France, *op cit*, p.828.

201 Law Reform Commission of Canada, *The General Part: Liability and Defences*, Working Paper 29, 1982.

202 *Ibid.*

203 At pp.56-8.

204 At p.58.

such an offence requires a purpose on his part and he [proves that] he lacked such purpose.

Alternative (2)

6. (1) Unless otherwise provided, every one is excused from criminal liability by reason of intoxication by alcohol or other drugs.

(2) Every one excused under sub-section (1) of this section shall be convicted of Criminal Intoxication under Part ... of this *Code* unless he proves that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake."²⁰⁵

It proposed that a new offence of criminal intoxication similar to that proposed by the Butler Committee in 1975, be introduced. The new offence would be defined as:

"Any one committing what would, but for his intoxication, constitute an offence is guilty of Criminal Intoxication unless he proves that his impairment was due to fraud, duress, physical compulsion or reasonable mistake."

It explained that this proposed offence would cover intoxicated persons who under the present law would be acquitted of "specific intent" crimes but convicted of "general offence" crimes. They would be acquitted of any offence committed by reason of intoxication but would be guilty of the new offence unless they could show that their intoxication was involuntary.

Law Reform Commission of Canada, 1988 Report²⁰⁶

4.112 The Law Reform Commission of Canada gave the area further consideration in 1988²⁰⁷ and recommended that, as a general rule, lack of culpability owing to intoxication would exclude liability, with the proviso that where the intoxication was the accused's fault, he or she would be, with one exception, liable for committing that crime while intoxicated. The exception related to killing and provided that anyone killing another while intoxicated would be liable for manslaughter.²⁰⁸ This proposition was set out as follows:

"3(3) *Intoxication*

(a) General Rule. No one is liable for a crime for which,

205 At p.59.

206 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (1988).

207 *Ibid.*

208 At p.31.

by reason of intoxication, he fails to satisfy the culpability specified by its definition.

- (b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2) and 3(3)(a), unless the intoxication is due to fraud, duress, compulsion or reasonable mistake,
 - (i) everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of causing death, for committing that crime while intoxicated; and
 - (ii) everyone under clause 3(3)(a) who causes the death of another is liable for manslaughter while intoxicated and subject to the same penalty for manslaughter.²⁰⁹

4.113 This proviso is an extension of the suggestion of the Butler Committee that a new offence of dangerous intoxication should be created.²¹⁰

4.114 Hamilton commenting on this proposal notes that it has several positive qualities, namely, that it deals comprehensively with the issue of drunkenness and that it does away with the specific intent/basic intent dichotomy and the capacity to form intent anomaly.²¹¹ However, he goes on to state that it suffers from several significant shortcomings, namely:

"First, it is in one sense more harsh than the present law which, at least in the case of specific intent offences, grants a complete acquittal to an accused who raises a reasonable doubt as to intent based on drunkenness. Under the Law Reform Commission's proposal, drunkenness as a 'defence' is eliminated in all cases except murder.

Second, it ascribes liability, even though the Crown has not proven the mental element. For example, an accused who is acquitted of theft because evidence of drunkenness negated the specific intent necessary for conviction would still be convicted of theft 'while intoxicated'.

Third, it mandates a conviction for 'manslaughter while intoxicated' in the case of an accused charged of murder who negatives the *mens rea* required for murder through evidence of drunkenness, notwithstanding that such evidence might also negative the *mens rea* required for manslaughter.

208
210
211

At p.30.
Review of Commonwealth Criminal Law, para. 10.10.
Op cit, p.17.

Fourth, by limiting the clause 3(3)(b) proviso to 'reasonable mistake', it introduces an objective standard of negligence, regardless of what the accused's actual belief was. So, for example, in a case of sexual assault, evidence of drunkenness actually causing the accused to believe that the complainant was consenting would not suffice, unless the accused could show that he would have held the same belief in consent, absent of drunkenness. In other words, this adopts the position stated by the Ontario Court of Appeal in *Moreau*²¹² ...

Finally, the proposal is silent as to the penalty to be imposed upon an accused convicted of a crime 'while intoxicated'.²¹³

4.115 A minority of the Commission preferred a simpler, more straightforward approach. Retaining the same general rule, they would then provide an exception, i.e., that if the intoxication was the accused's own fault, that is, if it arose for some reason other than fraud, duress, compulsion or reasonable mistake, it would be no defence to a crime that can be committed by negligence. So, a person charged with murder but lacking purpose on account of voluntary intoxication could be convicted of negligent killing. To ensure conviction for arson and vandalism, negligence would have to be included as a level of culpability for these two crimes.²¹⁴ This alternative was set out as follows:

"3(3) *Intoxication*

- (a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) Exception. This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.²¹⁵

4.116 Stuart comments on the Commission's proposals as follows:

"The majority recommendation would in one fell swoop return our defence of intoxication back to the fully repressive position of *Reginer* in 1551.²¹⁶ It would seem that it is envisaged that in every criminal trial there is to be a possibility of a compromise verdict of guilty but intoxicated. It seems far preferable to give the trier of fact the starker choice of guilt or innocence based on general principles. It would seem wise to first decide the question of how far we want to go in creating criminal responsibility for objective negligence. It was earlier submitted

212 (1986) 51 C.R. (3d) 209.

213 *Op cit.*, pp.17-8.

214 Recodifying Criminal Law, p.32.

215 At p.31.

216 *Reginer v Feogossa* (1551) 1 Plowden 1, 75 E.R. 1 (ex.). See *supra*, para. 2.1.

that the Commission, in its other work, seems wise in suggesting a limit to a gross departure from a norm causing serious harm. Once this measure is in place, one wonders whether we need any special offences involving impairment other than those relating to the inherently dangerous and privileged act of driving. There is then much to be said for the minority position of the Commission.¹²¹⁷

CHAPTER 5: PROVISIONAL PROPOSALS FOR REFORM

Majewski

5.1 Before making any provisional proposals for reform, we must state our attitude to the *Majewski* approach.

5.2 We sympathise with the Law Lords' attempt to reconcile policy with settled common law principles and acknowledge their frankness and realism in acknowledging that their approach lacked logic and consistency. The distinction between crimes of basic and specific intent is, indeed, artificial and as Glanville Williams pointed out at an early stage,¹ more and more offences are being expressed as crimes of recklessness. The Commission has itself, for example, adopted the recklessness approach in recommendations on receiving,² malicious damage³ and non-fatal offences against the person.⁴

5.3 What approach do we suggest instead? Most of the opponents of the *Majewski* approach cannot accept the absolute exclusion of intoxication as a relevant consideration in basic intent offences. Most of those who will not accept intoxication as an absolute defence to specific intent offences recommend the creation of *offences* of intoxication as fall-back offences to deal with this problem.

Our Choice Of Approaches

5.4 The Commission is satisfied at this stage that the choice lies between the creation of special offences to capture cases where the capacity to form an intent is found to be absent and the complete exclusion of intoxication as a defence to

1 See, e.g., *Textbook of Criminal Law*, Stevens & Sons, 1978, p.68.

2 See our *Report on Receiving Stolen Property*, 1987, para. 130.

3 See our *Report on Malicious Damage*, 1988, para. 30.

4 See our *Report on Non-Fatal Offences Against the Person*, 1994, e.g., paras. 9.45, 9.46 & 9.51.

any offence.

Realities

5.5 To begin with, let us set out, or repeat, a few realities:

- (a) In practice, intoxication is not accepted as a defence in Irish Courts. If anything, it has been found to be an aggravating factor. The Majewski 'bacillus' has not as yet found an agreeable 'host' in Ireland. However, it is central to the discussion of intoxication in the leading text-books (including Charleton), and will be brought to prominence again by this Consultation Paper. We must proceed on the basis that the "hard case" that may lead to its introduction is simply waiting to happen.
- (b) Intoxication can result from consumption of drugs as well as of alcohol. It is important not to base conclusions exclusively on intoxication brought on by alcohol. There would appear to be no boundary to the effects which can be brought about by drugs, 'designer' drugs being the phenomenon of the day.
- (c) It is universally accepted that a drunken intent is still an intent. It has not been definitively decided how much a person can be affected by an intoxicant and still be capable of forming an intoxicated intent. However, the degree of intoxication which might afford a defence must be so advanced as to render it questionable whether a person in that state, from drink in any case, would be physically capable of performing the, ostensibly, criminal act. A drug could substitute the intent of another 'personality' altogether.
- (d) The public is injured by the criminal act whatever the state of the criminal mind.
- (e) The discussion is often expressed as a conflict between principle, the *mens rea* approach, and policy, the discouragement of intoxicated endangerment. Could there not equally be a principle that self-induced intoxication does not afford a defence to crime?

A Special Offence

5.6 It must be emphasised that this option encompasses a number of forms at a number of different levels. The offence may be labelled in a variety of ways, so that it may be termed, for instance, "criminal intoxication" or "dangerous intoxication" or something similar; or, as the commission of the particular offence while in a state of intoxication. Some considerable importance has been attached

to the particular label by commentators, in particular, by those who would wish that the label adequately reflected the seriousness of the harm executed by the intoxicated person. At another level, it is either chargeable as an alternative offence for any offence; or alternatively, for a listed offence. As we have seen, this has also given rise to a degree of concern amongst commentators. Finally, and no less controversially, the appropriate sentence on conviction may vary as either being: a nominal sentence; a sentence commensurate or proportionate to that available for the principal offence; or, the sentence may be analogous to that available for the principal offence.

5.7 The benefits of this approach are that it avoids the specific intent/basic intent dichotomy; it is consistent with principles of criminal responsibility in that an accused will not be convicted of a crime for which he or she did not have the requisite *mens rea*; yet the accused does not go unpunished, rather he or she is convicted of the offence of becoming dangerously intoxicated or of committing the particular offence while voluntarily intoxicated.

5.8 This approach has not gone uncriticised, in particular, it has been argued that the creation of an offence of this type represents a transparent attempt to evade principle. It is alleged that the accused is not being punished for what he did, i.e. becoming recklessly intoxicated, but because he then proceeded to commit some further criminal act while in that state? Logically, under this approach the person should be convicted for becoming recklessly intoxicated *simpliciter*.

5.9 While this approach is common in civil law jurisdictions, its first manifestation in the common law world seems to have been in the Butler Committee Report. The Committee recommended the introduction of an offence of dangerous intoxication whereby the accused would be liable on conviction to one-year imprisonment for the first offence or for three years on a second or subsequent one. It is generally believed that the modification of this proposal offered by Professors Smith and Glanville Williams representing the minority position of the Criminal Law Revision Committee in its Fourteenth Report⁵ is superior. They recommended that the offence should be that of doing the proscribed act while intoxicated and that on conviction the accused should be liable to the same punishment as that provided by law for the offence charged, except for murder where the punishment should be as for manslaughter.

5.10 It is instructive briefly to re-examine the comprehensive analysis of this option by the Criminal Law Revision Committee,⁶ particularly the arguments of the minority and the majority in some detail.

5.11 The minority, Professors Smith and Glanville Williams, supported the proposal of a separate offence because, in the first place, they considered it to be a fundamental principle that a person should not be convicted of an offence

5 Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*. Cmnd. 7844 (March, 1980).

6 *Ibid.*

requiring recklessness when he or she was not in fact reckless. They argued that in such a case the verdict of the jury and the record of the court do not represent the truth. Secondly, they thought it important that the verdict of the jury should distinguish between an offender who was reckless and one who was not because that was relevant to the question of sentence. In their opinion there was a great difference between, for example, a person who knew that he or she was taking a grave risk of causing death and one who was unaware that there was any risk of any injury whatever to the person but was intoxicated. The fault of the former was in recklessly doing the act which caused injury to the person: the fault of the latter was in becoming intoxicated. They agreed that the same maximum penalty should be available to the judge in these two cases, because, exceptionally, an intoxicated offender may be such a public danger as to require the imposition of the maximum, but they were of the opinion that often the two cases ought to be dealt with differently.⁷

5.12 On the other hand, the majority of the Criminal Law Revision Committee felt that this approach would create a number of problems. First, that the separate offence would add to the already considerable number of matters which a jury often has to consider when deciding whether the offences charged have been proved. Secondly, difficulties would arise if, for example, six members of a jury were of the opinion that the accused was intoxicated so as not to be reckless whilst the other six members were of the opinion that he or she was reckless even though he or she had too much to drink. Thirdly, it seemed likely that there would be many more cases in which the accused would raise the issue of intoxication, and they foresaw cases where there would be overwhelming proof of the commission of the *actus reus* but in which many defendants might seek to plead to the special offence rather than the offence charged, either because they might prefer to be convicted of the special offence rather than the offence charged or because the special offence might tend to be regarded as a less serious offence. Fourthly, they considered that it was artificial and undesirable to have a separate offence for which conviction was automatic but which carried the same maximum penalty as the offence for which the defendant would have been convicted but for lack of proof of the required mental element due to intoxication. Finally, they argued that it was important to consider the public reaction to the creation of a special offence and concluded that the public would be confused by it.⁸

5.13 Again, in its Consultation Paper in 1993,⁹ the Law Commission, having rejected the notion for a number of years, returned to the idea of a new offence. It suggested that the offence would be committed by a person who, while deliberately intoxicated, caused the harm proscribed by any of the listed offences set out in the Consultation Paper. It was suggested that the new offence could be charged alone, but that there should be a special provision that a defendant charged with a listed offence might instead be convicted of the new offence. In

7 *Ibid.*, para. 262.

8 *Ibid.*, para. 264.

9 The Law Commission, *Intoxication and Criminal Liability*, Consultation Paper No. 127, 1993.

particular, it was suggested that the maximum punishment for the new offence should be less than, but proportionate to, that for the underlying listed offences.

5.14 The Victorian Law Reform Commission, in rejecting the special offence option, argued that the introduction of such an offence:

"in an endeavour to avoid the rare unmerited acquittal by providing a 'fall-back' offence may be expected to have the paradoxical effect of increasing compromise verdicts for the new offence and diminishing the number of convictions for more serious offences."¹⁰

5.15 In commenting on the recommendation of the Criminal Law Revision Commission, Dr. Ashworth,¹¹ while recognising the arguments against such a proposal, asked why the law should not go further than the summary offences of public drunkenness and make intoxication itself a serious crime, as a kind of inchoate offence. There is obviously a certain logic to this. If it is the act of becoming intoxicated that eventually leads to the conviction, then should one not be convicted regardless of whether one commits a further criminal act or not?

5.16 The introduction of a new offence also arose for the consideration of the Law Reform Commission of Canada. In 1982,¹² one of its alternative recommendations was to introduce an offence of criminal intoxication which would be charged unless the accused could prove that his or her intoxication was due to fraud, duress, physical compulsion or reasonable mistake. It is interesting to note that in its 1988 Report¹³ the majority of the Commissioners endorsed this recommendation.

5.17 Finally, one of the most interesting cases where the question of the introduction of a new offence has arisen is in South Africa. In *Chretien*¹⁴ a unanimous court held that severe intoxication which rendered the accused capable only of involuntary actions, was a complete defence, as the accused committed no *actus reus*. In considering the implications of the judgment, the South African Law Commission recognised that the South African courts followed a purely jurisprudential approach to intoxication as a defence which accorded with the general principles of South African criminal law. However, it went on to note that there had been a reluctance through the centuries to allow someone who was not criminally responsible for his or her actions by virtue of the consumption of alcohol or drugs to go free for harmful acts committed by him or her in that condition. It observed that this reluctance continued to exist, and while the number of acquittals was small, nevertheless, they did occur. It stated that the purely jurisprudential approach did not satisfy the sense of justice of society with regard to that small number of cases, and it concluded that the

10 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No. 34, October 1990, at para. 231.

11 Ashworth, *op cit*.

12 Law Reform Commission of Canada, *The General Part: Liability and Defences*, Working Paper 29, 1982.

13 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (1988).

14 [1981] 1 S.A. 1097 (A).

legislature should consider the possibility of placing more effective protection against intoxicated offenders on the statute book.¹⁵ In due course the 1988 Act was passed, and the law in South Africa now provides for the conviction of the intoxicated offender.

5.18 Recently, the Law Commission¹⁶ in considering this option commented that:

"By contrast, however, with the law in the non-Code states of Australia and in New Zealand, the abolition of the *Majewski* approach without replacement would *alter* our law; and it would re-open the concern ... that both public safety and respect for the law would suffer if a voluntarily intoxicated defendant could be acquitted, in effect, on the grounds of self-induced intoxication. These considerations have been voiced judicially not only in this country but also, significantly, in Australia by judges of the majority in *O'Connor* (including Barwick C.J.) as well as those who dissented. It is in order to accommodate these concerns, whilst at the same time avoiding the arbitrary, complex and erratic nature of any version of the *Majewski* approach, that support has been expressed for the combining the abolition of *Majewski* with the creation of a completely new offence to address cases where certain types of harm are caused by intoxicated persons."¹⁷

No Ideal Solution

5.19 Perhaps the main problem in considering this question is that all the arguments appear to be compelling whether for or against the creation of the offence of intoxication. The logic of Smith and Glanville Williams is inescapable, and yet the criticisms of their approach by the majority of the Criminal Law Revision Committee and of the Victorian Law Reform Commission are impressive. Juries (and judges) would find the special intoxication offence, at least, confusing and virtually irresistible in hard cases. The listing of offences would add to the confusion.

5.20 Ashworth is correct when he points out that, strictly speaking, the actual mischief to be addressed is getting intoxicated, not getting intoxicated and then committing the act. At that latter stage the offender is, supposedly, helpless.

5.21 There is no elegant solution or recommendation. Any solution must attract criticism from some quarter. The classical *mens rea/actus reus* approach to liability is a splendid model to adopt when one is dealing with the sane and sober criminal. The more intoxicated or insane the accused, the less helpful the classical intent-based doctrine becomes. Relentless adherence to the

15 South African Law Commission, *Report on Offences Committed Under the Influence of Liquor or Drugs*, Project 49, January 1986.

16 The Law Commission, *Intoxication and Criminal Liability*, Consultation Paper No. 127, 1993.

17 *Ibid*, para. 5.25.

jurisprudential approach in the courts, e.g. in Canada and South Africa has led to serious, justifiable and entirely predictable public disquiet.

5.22 Many practical laws are jurisprudentially 'impure'. Under our Road Traffic Acts, for example, the same act of dangerous driving can attract an enormous increase in available penalty if it causes death or serious bodily harm. When one drives out on a major road without stopping, the penalty one faces is a matter of pure chance. Simple dangerous driving is a summary offence carrying maximum penalties of six months imprisonment and/or a fine of £1,000. Dangerous driving causing death or serious bodily harm is an indictable offence carrying maximum penalties of five years imprisonment and/or a fine of £3,000. The Commission has already been compelled, regretfully, to acknowledge that, whatever the legal logic, consequences are significant in the context of the creation of offences.¹⁸

Complete Exclusion

5.23 We quoted above¹⁹ the advantages and disadvantages as seen by the English Law Commission concerning the absolute exclusion of intoxication as a defence. Perhaps the most difficult criticism to engage is that relating to the drunken burglar, i.e., the entrant who is too drunk to form an intent cannot be a burglar. Under the Larceny Act as amended, there are in simple terms two types of burglar; the one who trespasses with intent to steal, injure, rape or damage and the one who, having trespassed, steals or injures.

5.24 The entrant who is apprehended or surprised before manifesting his or her intention and who makes no admission is always difficult to prosecute unless, for example, he or she is wearing gloves or carrying other tools of the burglar's trade. The intoxicated entrant is in fact in a stronger position than the sober entrant because his or her intoxication, if so extreme as to affect intent, will be obvious and afford the explanation for being on the premises which ensures escaping prosecution for burglary.

5.25 The intoxicated entrant who steals or injures will have manifested an intoxicated choice between the two crimes. Where both criminal acts are perpetrated, e.g., where an elderly woman is raped and robbed, there is no insuperable intellectual obstacle involved in substituting the voluntary intoxication for the guilty mind in those, virtually inconceivable, cases where not even a drunken intent can be formed.

5.26 Under the Smith/Glanville Williams approach, the seriously intoxicated burglar will be charged with burglary *while intoxicated*, which when spelt out in full means "while intoxicated to such an extent as to be unable to form even a fleeting and transient drunken intent." One would have to sympathise with the jury in these cases and, indeed, with the judge who has to explain to them that

¹⁸ *Report on Non-Fatal Offences Against the Person*, (LRC 45-1994), paras. 9.41-9.42.

¹⁹ See paras. 4.48 & 49.

one can still be found guilty of 'ordinary' burglary while intoxicated.

5.27 To propose a law under which a person may be guilty of a specific offence "while intoxicated" rather than simply to rule out intoxication as a defence in any circumstances, particularly where there will be no difference in penalty, seems to us an unwarranted exercise in splitting hairs, no matter how logically pure the basis for the proposition. The profoundly and voluntarily intoxicated person who perpetrates the criminal act does merit the stigma of conviction.

Sentencing

5.28 Intoxication is a matter for consideration at time of sentence, as a aggravating or mitigating factor, and not at time of conviction. In sentencing, the judge can order whatever course of treatment may be necessary for the genuine alcoholic. The "accidental criminal" may be given the benefit of the Probation Act.

5.29 As for the argument that society tolerates intoxication and that, therefore, extreme intoxication leading to criminal acts should not be stigmatised, it need only be pointed out that society fosters and encourages driving, spending millions on roads, but punishes severely when the privilege is abused.

Involuntary Intoxication

5.30 Involuntary intoxication should continue to be a defence.²⁰

Insanity

5.31 The mental element in crime is among the items included in the Commission's First Programme for Law Reform. The Commission had intended, understandably, to address both insanity and intoxication in an integrated approach to the mental element. However, when it came to our attention that the preparation of new legislation on insanity was at an advanced stage in the Department of Justice, we decided to concentrate our energies on the law relating to intoxication.

5.32 In these circumstances, we can but express the hope that such new legislation would ensure

- (a) that self-induced intoxication should never form a basis for a finding of insanity;
- (b) that no finding of insanity should ever encompass a transient condition resulting from self-induced intoxication from which the defendant has recovered when he comes to be tried and

sentenced.

Conclusion

5.33 Accordingly, *we provisionally recommend that self-induced intoxication should never ground a defence to any criminal charge.* This might be given legal form in a general provision (adapting the provision in s. 4 of the *Criminal Justice Act, 1964*)²¹ that a person shall be presumed to intend his or her actions and the natural and probable consequences of those actions but that these presumptions may be rebutted, *except by evidence of self-induced intoxication.* However, we would welcome views on the drafting.

5.34 Despite the foreseeable difficulties, the Smith/Glanville Williams approach provides the best alternative option.

Submissions

5.35 The Commission would welcome views on its provisional recommendations. Submissions should be addressed to:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green,
Dublin 2,

and should be submitted not later than 1st May, 1995.

21 S.4 of the 1964 Act sets out the *mens rea* required for murder. In its *Consultation Paper on Sentencing (1993)*, the Commission provisionally recommended the abolition of mandatory sentences for all offences, including murder.

THE LAW REFORM COMMISSION
Ardilaun Centre
111 St Stephen's Green
Dublin 2

Telephone: 671 5699
Fax No.: 671 5316

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

- First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) [out of print] [photocopy available]
[10p Net]
- Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)
[£ 1.50 Net]
- Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977) [out of print] [photocopy available]
[£ 1.00 Net]
- Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977)
[£ 2.50 Net]
- First (Annual) Report (1977) (Prl. 6961) [40p Net]
- Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978)
[£ 1.00 Net]
- Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbours of a Spouse (Dec 1978) [out of print] [photocopy available]
[£ 1.00 Net]
- Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (Feb 1979)
[£ 1.50 Net]
- Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)
[£ 1.00 Net]
- Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (Dec 1979)
[£ 1.50 Net]
- Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]
- Working Paper No. 9-1980, The Rule Against Hearsay (April 1980) [out of print] [photocopy available]
[£ 2.00 Net]
- Third (Annual) Report (1980) (Prl. 9733) [75p Net]

First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	[£ 2.00 Net]
Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (Sep 1981)	[£ 1.75 Net]
Fourth (<u>Annual</u>) Report (1981) (Pl. 742)	[75p Net]
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	[£ 1.00 Net]
Report on Defective Premises (LRC 3-1982) (May 1982)	[£ 1.00 Net]
Report on Illegitimacy (LRC 4-1982) (Sep 1982)	[£ 3.50 Net]
Fifth (<u>Annual</u>) Report (1982) (Pl. 1795)	[75p Net]
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	[£ 1.50 Net]
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983)	[£ 1.00 Net]
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983)	[£ 1.50 Net]
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983)	[£ 3.00 Net]
Sixth (<u>Annual</u>) Report (1983) (Pl. 2622)	[£ 1.00 Net]
Report on Nullity of Marriage (LRC 9-1984) (Oct 1984)	[£ 3.50 Net]
Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 1984)	[£ 2.00 Net]
Seventh (<u>Annual</u>) Report (1984) (Pl. 3313)	[£ 1.00 Net]
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	[£ 1.00 Net]
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	[£ 3.00 Net]

Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	[£ 2.00 Net]
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	[£ 2.50 Net]
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	[£ 2.50 Net]
Report on Minors' Contracts (LRC 15-1985) (August 1985)	[£ 3.50 Net]
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	[£ 2.00 Net]
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (Sep 1985)	[£ 3.00 Net]
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (Sep 1985)	[£ 2.00 Net]
Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (Oct 1985)	[£ 3.50 Net]
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985)(Oct 1985)	[£ 2.00 Net]
Eighth (<u>Annual</u>) Report (1985) (Pl. 4281)	[£ 1.00 Net]
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (Sep 1987)	[£ 4.50 Net]
Consultation Paper on Rape (Dec 1987)	[£ 6.00 Net]
Report on the Service of Documents Abroad re Civil Proceedings - the Hague Convention (LRC 22-1987) (Dec 1987)	[£ 2.00 Net]
Report on Receiving Stolen Property (LRC 23-1987) (Dec 1987)	[£ 7.00 Net]
Ninth (<u>Annual</u>) Report (1986-1987) (Pl 5625)	[£ 1.50 Net]
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	[£ 3.00 Net]

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (Sep 1988)	[£ 3.00 Net]
Report on Malicious Damage (LRC 26-1988) (Sep 1988)	[£ 4.00 Net]
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (Oct 1988)	[£ 5.00 Net]
Tenth (<u>Annual</u>) Report (1988) (PI 6542)	[£ 1.50 Net]
Report on Debt Collection: (2) Retention of Title (LRC 28-1989) (April 1989) (out of print)	[£ 4.00 Net]
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	[£ 5.00 Net]
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	[£ 5.00 Net]
Consultation Paper on Child Sexual Abuse (August 1989)	[£10.00 Net]
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989)(Oct 1989)	[£ 4.00 Net]
Eleventh (<u>Annual</u>) Report (1989) (PI 7448)	[£ 1.50 Net]
Report on Child Sexual Abuse (September 1990) (LRC 32-1990)	[£ 7.00 Net]
Report on Sexual Offences Against the Mentally Handicapped (September 1990) (LRC 33-1990)	[£ 4.00 Net]
Report on Oaths and Affirmations (LRC 34-1990)(December 1990)	[£ 5.00 Net]
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	[£ 6.00 Net]
Consultation Paper on the Civil Law of Defamation (March 1991) [out of print]	[£20.00 Net]
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	[£ 7.00 Net]
Twelfth (<u>Annual</u>) Report (1990) (PI 8292)	[£ 1.50 Net]
Consultation Paper on Contempt of Court (July 1991) [out of print]	[£20.00 Net]

Consultation Paper on the Crime of Libel (August 1991)	[£11.00 Net]
Report on The Indexation of Fines (LRC 37-1991) (October 1991)	[£ 6.50 Net]
Report on The Civil Law of Defamation (LRC 38-1991) (December 1991) [out of print]	[£ 7.00 Net]
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	[£ 6.00 Net]
Report on The Crime of Libel (LRC 41-1991) (December 1991)	[£ 4.00 Net]
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	[£ 8.00 Net]
Thirteenth (Annual) Report (1991) (PI 9214)	[£ 2.00 Net]
Report on The Law Relating to Dishonesty (LRC 43-1992) (September 1992)	[£20.00 Net]
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	[£ 6.00 Net]
Consultation Paper on Sentencing (March 1993) [out of print]	[£20.00 Net]
Consultation Paper on Occupiers' Liability (June 1993) [out of print]	[£10.00 Net]
Fourteenth (Annual) Report (1992) (PN.0051)	[£ 2.00 Net]
Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	[£20.00 Net]
Consultation Paper on Family Courts (March 1994)	[£10.00 Net]
Report on Occupiers' Liability (LRC 46-1994) (April 1994) [out of print]	[£ 6.00 Net]
Report on Contempt of Court (LRC 47-1994) (September 1994)	[£10.00 Net]
Fifteenth (Annual) Report (1993) (PN.1122)	[£ 2.00 Net]
Report on The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	[£10.00 Net]