

**LEGISLATING THE  
CRIMINAL CODE:  
INTOXICATION AND  
CRIMINAL LIABILITY**



**LAW COMMISSION  
LAW COM No 229**

**LAW COMMISSION**

# **The Law Commission**

(LAW COM.No.229)

## **Legislating the Criminal Code INTOXICATION AND CRIMINAL LIABILITY**

**Item 5 of the Fourth Programme of Law Reform:  
Criminal Law**

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of  
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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# THE LAW COMMISSION

## LEGISLATING THE CRIMINAL CODE

### INTOXICATION AND CRIMINAL LIABILITY

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# THE LAW COMMISSION

Item 5 of the Fourth Programme of Law Reform: Criminal Law

## LEGISLATING THE CRIMINAL CODE: INTOXICATION AND CRIMINAL LIABILITY

*To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain*

### PART I INTRODUCTION

- 1.1 In this report we address the way in which our criminal law should take account of the fact that a defendant to a criminal charge was or may have been affected by intoxication at the time he acted in the manner complained of. By “intoxication” we mean the impairment of a person’s awareness, understanding or control by the consumption of an intoxicant such as alcohol or drugs—or, as it was put in a Canadian case,

the stupefied condition of a person who has imbibed alcoholic liquor in sufficient quantity to make him lose totally or partially the use of his mental or nervous faculties. ... [I]t suffices that an individual be affected by alcohol to the point of no longer having his normal control, his judgment, or, in a word, that he no longer has the use of all his intellectual or physical faculties.<sup>1</sup>

- 1.2 The area of law examined in this report is a matter of enormous significance. Quite apart from the contemporary importance of crimes committed under the influence of alcohol, the subject is of “increasing practical importance, with the availability of hallucinogenic drugs whose ingestion in very small quantities can lead to behaviour which is bizarre, unpredictable and violent”.<sup>2</sup> The National Association of Probation Officers recently reported that young people suffering from addiction to drink and drugs are responsible for more than one third of household burglaries, theft and property crime.<sup>3</sup> With medical and pharmaceutical advances, there is now a greater reliance by doctors on drugs, and these may from time to time produce as side-effects unexpectedly aggressive behaviour.<sup>4</sup>

<sup>1</sup> *Desbiens v R* (1951) 103 Can CC 36, 41, *per* Bienvenue J.

<sup>2</sup> *Kingston* [1994] 3 WLR 519, 525, *per* Lord Mustill.

<sup>3</sup> *The Independent*, 10 August 1994.

<sup>4</sup> See, eg, *Bailey* [1983] 1 WLR 76 and *Hardie* [1985] 1 WLR 64.



- 1.3 Our conclusion is that the present law should be codified, with some minor modifications, and that in areas of doubt it should be clarified. This conclusion accords with our ruling philosophy that whenever possible, and particularly in the area of the criminal law, we should be aiming to make the law simpler, fairer and cheaper to use.<sup>5</sup>

**The subject matter of this report**

- 1.4 More specifically, this report is concerned with the question whether, and if so in what circumstances, a person charged with a criminal offence should escape liability if, although his state of mind is not one which would ordinarily suffice for liability, his failure to form the requisite state of mind results from a state of intoxication. It is *not* concerned with the quite separate question of whether he should escape liability if, although his state of mind *is* one which would ordinarily suffice, he would not have formed that state of mind had he not been intoxicated.
- 1.5 This latter question arose in the recent case of *Kingston*,<sup>6</sup> where the House of Lords held (reversing the decision of the Court of Appeal) that it should be answered in the negative—even where the defendant was not at fault in becoming intoxicated in the first place. Lord Mustill, however, went on to suggest that

the existing work of the Law Commission in the field of intoxication could usefully be enlarged to comprise questions of the type raised by this appeal, and to see whether by statute a merciful, realistic and intellectually sustainable solution could be newly created.<sup>7</sup>

- 1.6 While we always give sympathetic consideration to suggestions as to the matters we might usefully examine (and particularly if they come from so august a source as the House of Lords), we have in this case concluded that we are unable to accept Lord Mustill's invitation. There are two reasons for this.
- 1.7 In the first place it was simply too late to incorporate the *Kingston* problem within this project's terms of reference. The matter was not raised in our consultation paper,<sup>8</sup> and we have not had the benefit of our respondents' views on it. We attach great importance to the process of consultation—indeed it will become apparent how much we have benefited from it in the course of this project—and it would have been neither wise nor appropriate to express a view on the very difficult issues involved without first undertaking that process.

<sup>5</sup> See, for example, our Twenty-Eighth Annual Report (1993) Law Com No 223, HC 341, para 1.9.

<sup>6</sup> [1994] 3 WLR 519.

<sup>7</sup> At p 537H.

<sup>8</sup> Intoxication and Criminal Liability (1993) Consultation Paper No 127.

- 1.8 Our second reason for declining Lord Mustill's invitation is that we doubt (with respect) that the *Kingston* problem would in any event have been suitable for inclusion within this project, because we suspect that the connection between that issue and the one with which we are here concerned is more apparent than real. The problem which exercised the House of Lords in *Kingston* was that of where to draw the line between matters going to liability and matters of mitigation—of whether a defendant, whose conduct in all other respects satisfies the requirements of a criminal offence, should nevertheless be acquitted on the ground of his comparative lack of culpability. We believe that this problem has little connection, either conceptual or practical, with that posed by the defendant whose state of mind does not satisfy the ordinary requirements of the offence, but who is himself *responsible* for the fact that it does not. The fact that both problems can arise from the defendant's intoxication is almost incidental.
- 1.9 For these reasons this report does not deal with the case of the defendant whose intoxication leads him to commit an offence in a state of mind which, whether or not induced by intoxication, is sufficient for a conviction for that offence. It is concerned with the case where intoxication results in a state of mind which would *not* otherwise suffice.

#### **The history of this project**

- 1.10 We decided to undertake this project as part of our programme to introduce codification into the criminal law through a series of discrete law reform projects. We started with non-fatal offences against the person. Our first report in this new programme, *Legislating the Criminal Code: Offences against the Person and General Principles*<sup>9</sup> (hereafter "Law Com No 218"), received widespread support when it was published in November 1993,<sup>10</sup> as had the consultation paper<sup>11</sup> on which these proposals were based.
- 1.11 When we were preparing that report, which also examined defences to offences against the person, we decided that the draft Criminal Law Bill to be included in the report should codify the present rules on intoxication. We feared that if it omitted all reference to these matters it might be thought that the present common law rules were not to apply to the new offences of violence created by the draft Bill, and to the general defences codified in it. For this reason the provisions on

<sup>9</sup> Law Com No 218 (1993) Cm 2370.

<sup>10</sup> See, eg, Lord Wilberforce's speech in the House of Lords: *Hansard* 23 November 1993, vol 550, cols 158-161.

<sup>11</sup> *Legislating the Criminal Code: Offences against the Person and General Principles* (1993) Consultation Paper No 122. Law Com No 218 refers at paras 3.1-3.6 to the strong support given to the proposals on consultation.

intoxication in the draft Criminal Law Bill contained in Law Com No 218<sup>12</sup> were not intended to reform or change the law in any way. They were simply intended to codify it, so far as was possible given all the uncertainties in the law as it now stands.

- 1.12 However, when preparing these provisions for the purposes of that Bill, we experienced considerable difficulty in determining some aspects of the present common law rules on intoxication and how they could be expressed in statutory form. This difficulty, and the further study of the subject we then undertook, led us to the conclusion that we ought to embark on a full-scale review of that part of the common law which governs questions relating to the effect of intoxication on criminal liability. We therefore prepared a consultation paper on this topic, which was published in February 1993.<sup>13</sup> In this report we refer to it as “LCCP 127”.
- 1.13 This report is thus intended to constitute the second tranche of our proposals for the codification of the criminal law. The recommendations we make are intended to supersede the intoxication provisions in the draft Criminal Law Bill annexed to Law Com No 218, and in the near future we will publish a revised draft Bill which will consolidate the provisions of the earlier Bill with the provisions of the Bill annexed to this report.<sup>14</sup> Thus the legislation required to implement the proposals that we have so far made for the codification of the criminal law will once again be ready for immediate enactment in a single Bill.

### **The issues**

- 1.14 The topic covered by this report is controversial, because it involves a direct clash between two very basic principles of liability that are widely regarded as being of central importance in the criminal law. In this context arguments of prudent social policy have been thought, in the particular case of harm or damage caused by an intoxicated person, to demand a departure from the first of these principles.
- 1.15 The basic principle is that nobody should be convicted of a serious offence unless (a) he acted *voluntarily*, and (b) he was, at least, *aware* when he acted that his conduct might cause damage of the kind forbidden by the offence with which he is charged.<sup>15</sup> The problem that has confronted the courts in cases of intoxication is that the defendant may have caused the harm forbidden by a particular offence

<sup>12</sup> The relevant provisions of the Bill are clauses 21 and 33. They are set out at Appendix E below.

<sup>13</sup> Intoxication and Criminal Liability (1993) Consultation Paper No 127. See Part V below for the options canvassed in it.

<sup>14</sup> There is a technical difficulty in consolidating the two Bills, which concerns the effect of our recommendations in this report on allegations of recklessness as defined in clause 1(b) of the Criminal Law Bill: see para 6.17, n 28 below. The difficulty will be resolved by means of an additional provision in the consolidated Bill.

<sup>15</sup> See Part II below.

without forming the degree of awareness that would normally be required to convict him, or, in an extreme case, without acting voluntarily at all.

- 1.16 Accordingly the courts have developed a second, contradictory principle, to the effect that a person who becomes voluntarily intoxicated “shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses”.<sup>16</sup> Blackstone<sup>17</sup> speaks of voluntary intoxication as not being “an excuse for any criminal misbehaviour”. The issue of public policy which has to be determined in relation to a voluntarily intoxicated defendant is this:

does our criminal law enable him to say that because he did not know what he was doing he lacked both intention and recklessness and accordingly is entitled to an acquittal?<sup>18</sup>

- 1.17 Under our present law this dilemma is resolved in different ways according to whether the offence charged has been categorised by the courts as one of “basic” or one of “specific” intent.<sup>19</sup> Where the offence charged is one of “basic intent”, such as the offence of assault occasioning actual bodily harm,<sup>20</sup> it seems that the jury should be directed<sup>21</sup> to disregard the fact that the defendant was too drunk or drugged to form the relevant awareness and to decide whether he would have been aware of the relevant risk if he had not been intoxicated.<sup>22</sup> If they answer this question in the affirmative, they must convict him.
- 1.18 The law is applied differently in relation to the group of offences which are categorised as offences of “specific intent”, such as murder.<sup>23</sup> In relation to these offences, the jury are permitted to consider the fact that the defendant was intoxicated, together with all the other evidence, when deciding whether he had the intention required for the offence.<sup>24</sup>

<sup>16</sup> Hale’s *Pleas of the Crown*, vol I, p 32, cited with approval by Lord Denning in *A-G for Northern Ireland v Gallagher* [1963] AC 349, 380.

<sup>17</sup> *Commentaries*, Book III, ch 2, p 25.

<sup>18</sup> *DPP v Majewski* [1977] AC 443, 471F-G, *per* Lord Elwyn-Jones LC.

<sup>19</sup> The uncertainties of the present law in this respect are discussed in more detail in paras 3.17-3.30 below.

<sup>20</sup> Offences against the Person Act 1861, s 47.

<sup>21</sup> References in this report to “the jury” include magistrates, and references to the manner in which a jury should be directed are to be understood as applying equally to the manner in which magistrates should approach issues of fact.

<sup>22</sup> *DPP v Majewski* [1977] AC 443: hereafter “*Majewski*”.

<sup>23</sup> *Sheehan* [1975] 1 WLR 739.

<sup>24</sup> *Bratty v A-G for Northern Ireland* [1963] AC 386, 410, *per* Lord Denning.

- 1.19 The policy considerations which underlie the present law were clearly expressed in the leading modern House of Lords decision on intoxication, *Majewski*.<sup>25</sup> They were, in brief, that the public should be protected from unprovoked violence,<sup>26</sup> and that if a person voluntarily becomes intoxicated it is reasonable to hold him responsible for his actions while he is in that state.<sup>27</sup> More recently, this policy approach has been justified on the basis that the intentional taking of an intoxicant without regard to its possible consequences is properly treated as a substitute for the mental element normally required.<sup>28</sup> We examine these arguments in greater depth in Part III of this report.
- 1.20 In 1980 the law of intoxication was considered by the Criminal Law Revision Committee (hereafter “the CLRC”).<sup>29</sup> The Committee’s main proposal was that the *Majewski* principle should apply where *recklessness* constitutes an element of the offence, but not where the question in issue is whether the defendant formed the *intention* required for its commission. This approach was similar to option 2(ii) of those put forward in LCCP 127.<sup>30</sup>
- 1.21 These recommendations of the CLRC were incorporated into our draft Criminal Code,<sup>31</sup> in accordance with our general policy of including recent recommendations of the CLRC in the Draft Code without any further consideration.<sup>32</sup>

#### **The consultation process**

- 1.22 In LCCP 127 we identified the problems of the present law, put forward six possible options<sup>33</sup> for reform and requested the views of our consultees on a variety of issues.

<sup>25</sup> [1977] AC 443.

<sup>26</sup> [1977] AC 443, 476F-G, *per* Lord Simon of Glaisdale: see para 3.12 below.

<sup>27</sup> *Per* Lord Elwyn-Jones LC at pp 474G-475A: see para 3.13 below.

<sup>28</sup> *Kingston* [1994] 3 WLR 519, 530E-G, *per* Lord Mustill: see para 3.15 below. See also *Majewski* [1977] AC 443, 498G, *per* Lord Russell of Killowen, and para 3.14 below.

<sup>29</sup> Fourteenth Report on Offences against the Person (1980) Cmnd 7844: see para 4.4 below and Appendix C to this report. The members of the committee in 1980 were Lord Justice Lawton, Lord Justice Waller, Professor Sir Rupert Cross, Judge Francis, Mrs Audrey Frisby, Mr John Hazan QC, Sir Thomas Hetherington QC, Mr J Hampden Inskip QC, Sir Kenneth Jones QC, Judge Lowry, Mr Charles McCullough QC, Sir David Napley, Mr William Scott, Sir Norman Skelhorn QC, Professor John Smith QC and Professor Glanville Williams QC. The latter two professors dissented from the committee’s recommendations on intoxication.

<sup>30</sup> See para 5.2 below.

<sup>31</sup> A Criminal Code for England and Wales (1989) Law Com No 177. In this report we shall refer to this document as “the Code Report” and to the draft Bill which it contains as “the Draft Code”.

<sup>32</sup> Code Report, para 3.34.

<sup>33</sup> See LCCP 127, Parts IV-VI, and para 5.2 below.

- 1.23 We took the provisional view that the *Majewski* approach was complex and difficult,<sup>34</sup> and that the law was erratic in its operation<sup>35</sup> and, if applied according to its terms, difficult to administer.<sup>36</sup> Many of these provisional views arose from the problems created by the categorisation of offences into those of “basic” and those of “specific” intent.<sup>37</sup>
- 1.24 We suggested in that paper, again on a provisional basis, that one or other of the last two options contained in the paper should be adopted. These were:
- (i) option 5,<sup>38</sup> which involved the abolition of the *Majewski* approach without replacement, so that the defendant’s intoxication would be taken into account with any other relevant evidence in determining whether he had the mental element required for the offence; and
  - (ii) option 6,<sup>39</sup> which combined the abolition of the *Majewski* approach with the introduction of a new offence of criminal intoxication. This offence would have been committed by a person who, while “deliberately intoxicated”, caused the harm proscribed by any of a number of specified offences.<sup>40</sup>

#### **The response on consultation**

- 1.25 We received a considerable volume of responses, from judges, practitioners, academics, civil servants and doctors.<sup>41</sup> Their views were very helpful and we are most grateful to everyone who responded to our paper. The strong representation of those concerned with the practical problems caused by intoxication suggests that we can rely on their views with some confidence in seeking to discover how the present law operates and what would be the impact of the different options we put forward.

<sup>34</sup> LCCP 127, paras 3.1-3.8.

<sup>35</sup> LCCP 127, paras 3.9-3.16.

<sup>36</sup> LCCP 127, paras 3.17-3.23.

<sup>37</sup> See paras 3.17-3.30 below.

<sup>38</sup> LCCP 127, Part V.

<sup>39</sup> LCCP 127, Part VI.

<sup>40</sup> These offences were homicide, bodily harm, criminal damage, rape, indecent assault and 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 causing danger to road users. See LCCP 127, para 6.41.

<sup>41</sup> See Appendix F for a full list of responses.

- 1.26 On consultation, it became clear that our two preferred options<sup>42</sup> were not acceptable to most of our consultees. Option 6, which involved the creation of a new offence, was rejected outright with cogent and persuasive reasons by, among others, the judges of the Queen's Bench Division, the Criminal Bar Association (supported in general terms by the Bar Council), the Law Society, and JUSTICE.<sup>43</sup> Thus there was an almost unanimous rejection of option 6 by practitioner bodies. There was an additional category of respondents who supported the new offence subject to a range of qualifications that, in our view, would have largely defeated its purpose. As we show later,<sup>44</sup> the Crown Prosecution Service (hereafter the "CPS") exemplified this category.
- 1.27 Our other preferred option was number 5,<sup>45</sup> which entailed the abolition of the *Majewski* principle without replacement. On consultation, serious practical considerations were urged upon us by, among others, the majority of the judges of the Queen's Bench Division.<sup>46</sup> They believed that the abolition of the *Majewski* rule would be perceived by the public as unacceptable. They gave the example of "even one high profile case where there was an acquittal because the alleged offender was too drunk to form the required intent". Such an acquittal would be viewed by the public as an example of the law, and the judges who applied it, being out of touch with public opinion, with the result that damage would be done to public confidence in the judicial system.
- 1.28 We were also told by our consultees that, so far as can be seen, juries do not in fact experience as much difficulty with the present law as we had provisionally thought. In addition, and very significantly, the judiciary (including the majority of the Queen's Bench judges), the Law Society and many others<sup>47</sup> found that the *Majewski* doctrine worked fairly and without any undue difficulty. We found the overall weight of these arguments convincing and they persuaded us to reject option 5.
- 1.29 Options 3 and 4 entailed disregarding the effect of intoxication, and neither we (in LCCP 127) nor our consultees favoured either of these options. This left two options, both of which would mean preserving at least the substance of *Majewski*: either to do nothing (option 1) or to codify the present law (option 2).

<sup>42</sup> See para 1.24 above.

<sup>43</sup> See paras 5.9-5.13 below.

<sup>44</sup> See paras 5.14-5.17 below. The CPS suggested that to avoid criminal liability for accidents, there should be a causal link between the defendant's intoxicated state and the harm that he committed. This suggestion was quite contrary to the thinking behind our suggested offence, for the reasons set out below.

<sup>45</sup> See LCCP 127, Part V.

<sup>46</sup> See para 5.22 below.

<sup>47</sup> See paras 5.29 and 5.47 below.

- 1.30 If we were to recommend no change at all (option 1), this would mean that we were content that nothing at all should be done to resolve a number of well-known problems on such basic points as that of determining whether a particular offence is one of basic or specific intent;<sup>48</sup> deciding whether *Majewski* applies to the *intentional* commission of a crime of basic intent, or is limited to allegations of recklessness or awareness of risk;<sup>49</sup> identifying the precise question that the jury need to address when determining a case which involves the *Majewski* doctrine;<sup>50</sup> and ascertaining the scope of what is described as “involuntary intoxication”—for example, whether (and, if so, to what extent) the doctrine applies to a defendant who takes an intoxicant for medicinal purposes.<sup>51</sup>
- 1.31 Another reason for rejecting option 1 is that from its earliest days the Law Commission has seen the necessity for the codification of the criminal law as a central feature of its work.<sup>52</sup> Codification is important for two quite different reasons.<sup>53</sup> First, the criminal law controls the exercise of state power against citizens, and the protection of citizens against unlawful behaviour, and it is very important that its rules should be determined by Parliament and not by the sometimes haphazard methods of the common law, which make it often difficult to ascertain what precisely the law does provide. This aim can be achieved only if the law is put into statutory form in a clear and comprehensive manner. Secondly, it is important from the standpoints of efficiency, economy and the proper administration of justice that the law should be stated in clear and easily accessible terms.<sup>54</sup>
- 1.32 For these reasons we decided that it would be quite wrong for us to recommend that no change should be made at all. We therefore turned, finally, to option 2. The results of consultation had persuaded us that the *Majewski* approach operated fairly, on the whole, and without undue difficulty, but that it was both desirable and necessary to set out the relevant principles clearly in codified form.<sup>55</sup>
- 1.33 As we have already indicated, however, and as we shall demonstrate in detail in this report,<sup>56</sup> there are some aspects of the present law that are uncertain or impossible to codify in any rational form. For these reasons we have had to recommend certain

<sup>48</sup> See paras 5.35-5.37 below.

<sup>49</sup> See paras 5.38-5.39 below.

<sup>50</sup> See paras 5.43-5.44 below.

<sup>51</sup> See paras 5.40-5.42 below.

<sup>52</sup> See Law Commissions Act 1965, s 3(1), for our statutory remit in this regard.

<sup>53</sup> See our Twenty-Eighth Annual Report (1993) Law Com No 223, HC 341, para 2.27.

<sup>54</sup> See our Twenty-Seventh Annual Report (1992) Law Com No 210, HC 518, paras 1.13-1.18.

<sup>55</sup> See paras 5.47-5.48 below.

<sup>56</sup> See paras 5.35-5.45 below.



amendments to the present law, and to choose between competing interpretations of the present law where there is uncertainty. In making our recommendations we have attempted to order the law in a manner consistent with the policy which underlies the *Majewski* principle, and which is apparent in the few reported cases in which it has been applied. We have also taken the view that, in areas of doubt, we should not extend the *Majewski* rules so as to incriminate people who do not at present fall within their scope.

### **Summary of our main recommendations**

1.34 Our main recommendations can be summarised as follows:<sup>57</sup>

- The present law of intoxication should be codified, with a few significant amendments.<sup>58</sup>
- Where the prosecution alleges any intention, purpose, knowledge, belief, fraud or dishonesty, evidence of intoxication should be taken into account in determining whether that allegation has been proved.<sup>59</sup>
- For the purpose of any allegation of any other mental element of an offence (in particular, allegations of recklessness or awareness of risk), a voluntarily intoxicated defendant should be treated as having been aware of anything of which he would have been aware but for his intoxication.<sup>60</sup>
- A person should not escape liability on the ground of automatism alone if his automatism is wholly or partly caused by voluntary intoxication.<sup>61</sup>
- Where a voluntarily intoxicated person holds a belief which, had he not been intoxicated, would have negated his liability for an offence, the belief should not have that effect if he would not have held it but for his intoxication *and* the offence does not require proof of intention, purpose, knowledge, belief, fraud or dishonesty.<sup>62</sup>
- A person should be regarded as “intoxicated” if his awareness, understanding or control is impaired by an intoxicant; and an “intoxicant” should be defined as meaning alcohol, a drug or any other substance (of whatever nature) which, once

<sup>57</sup> For a complete list of our recommendations, see para 9.1 below.

<sup>58</sup> See para 5.48 below.

<sup>59</sup> See paras 6.11, 6.17 and 6.19 below.

<sup>60</sup> See para 6.34 below.

<sup>61</sup> See paras 6.38 and 6.44 below.

<sup>62</sup> See para 7.12 below.

taken into the body, has the capacity to impair awareness, understanding or control.<sup>63</sup>

- A person's intoxication should be regarded as involuntary if
  - (a) when he took the intoxicant he was not aware that it was or might be an intoxicant;<sup>64</sup> or
  - (b) he took it solely for a medicinal purpose, and *either*
    - (i) was not aware that it would or might give rise to aggressive or uncontrollable behaviour on his part *or*
    - (ii) took it on, and in accordance with, medical advice;<sup>65</sup> or
  - (c) it was administered to him without his consent; or
  - (d) he took it under duress, or otherwise in such circumstances as would afford a defence to a criminal charge.<sup>66</sup>

### **The extent to which our recommendations would change the law**

- 1.35 It is hard to say how far these recommendations represent the present state of the law and how far they would change it, because it is far from clear exactly what the present law is—which is, of course, one of the main reasons for codifying it. In so far as the present position *is* clear, we have for the most part tried to reproduce it; and when in doubt as to the present position, we have selected what appears to us to be the most principled interpretation on offer. There are, however, a few points at which, in the interests of consistency and fairness, we have departed from what we believe (albeit with no great confidence) to be the existing law.
- 1.36 First, our recommendations would dispense with the need to classify the offence charged as one of “specific” or “basic” intent in order to determine which régime applies to it.<sup>67</sup> In place of this distinction we propose a set of rules which, instead of applying to some *offences* but not to others, are so formulated as to be capable of applying in relation only to certain kinds of *mental element*.
- 1.37 Secondly, it seems (though the position is not entirely clear) that the present law treats a mistaken belief brought about by the defendant's voluntary intoxication in different ways according to whether it is categorised as negating an element of the

<sup>63</sup> See para 8.8 below.

<sup>64</sup> See para 8.12 below. We also recommend that a person's intoxication should be regarded as involuntary if, though he was aware that the intoxicant taken by him was or might be an intoxicant, he is intoxicated by it only because he is peculiarly susceptible to it and he was unaware of this when he took it (or, if the susceptibility arises from anything he did or omitted to do *after* taking the intoxicant, when he did or omitted to do that thing): see clause 5(3) of the draft Bill at Appendix A.

<sup>65</sup> See para 8.30 below.

<sup>66</sup> See para 8.35 below.

<sup>67</sup> See paras 5.35-5.37 below.

offence or as forming part of a defence.<sup>68</sup> For example, where the defendant, because he was drunk, formed the mistaken belief that he needed to use force to defend himself, the jury must disregard what he in fact believed and must instead consider what he *would* have believed had he been sober—even where the offence charged is one of specific intent to which the *Majewski* rules would not normally apply. This rule is inconsistent with the law on mistakes which negate an element of an offence, and with the way in which the law treats defences created by statute.<sup>69</sup> Our proposal will apply the same rules in all of these cases, and will make the law consistent and much simpler to apply.

- 1.38 Finally, we believe that the present law operates in an inconsistent manner in drawing a distinction between “dangerous” and “non-dangerous” drugs.<sup>70</sup> If the court decides that the drug taken by the defendant is “non-dangerous”, a much less strict version of the *Majewski* approach is applied to him. The courts themselves have to decide, without the benefit of medical advice, which drugs are “non-dangerous” for this purpose. Valium, for example, has been held to be “non-dangerous”,<sup>71</sup> although medical evidence shows that it can increase aggression. Our proposals would remove this distinction, and instead require the courts to look at the defendant’s *purpose* in taking the drug, how drastic he expected its effect on him to be, and whether he obtained—and followed—medical advice.

### **The advantages to be gained from implementation of our recommendations**

#### *The advantages of codification in general*

- 1.39 We have already referred to our objective of codifying the criminal law and to the advantages of greater clarity and accessibility that the attainment of this objective would bring.<sup>72</sup> In the case of the law of intoxication these advantages would be especially welcome. Not only is the law in this area particularly obscure, but, because it consists almost entirely of decided cases, it is comparatively hard to find; and this can lead to costly mistakes even where the law is in fact clear.
- 1.40 For example, it is not uncommon at present, in cases involving offences of specific intent, for appeals to be brought on the ground that the judge has misdirected the jury by asking them whether the defendant had the *capacity* to form the relevant intent, rather than whether he did in fact form it.<sup>73</sup> Codification might be expected to reduce the number of such appeals, thus saving time and public expense. If our

<sup>68</sup> See paras 3.39-3.41 below.

<sup>69</sup> See paras 3.42-3.46 below.

<sup>70</sup> See paras 3.34-3.36 below.

<sup>71</sup> *Hardie* [1985] 1 WLR 64.

<sup>72</sup> See para 1.31 above.

<sup>73</sup> See para 5.34, n 24 below.

proposals are accepted, judges will need only to refer to the legislation, rather than some quite complicated case law, in order to find the rules applicable.

*The elimination of uncertainty*

- 1.41 In the case of the law relating to intoxication, moreover, the element of uncertainty which is inherent in an uncodified system of criminal law is particularly pronounced. We summarise here the main areas in which the present law is unclear, and how our proposed codification would resolve these uncertainties.
- 1.42 In the first place our recommendations would remove the distinction drawn in the present law between *offences* of specific and of basic intent—a distinction which is hard to draw because there is no agreed criterion.<sup>74</sup> Instead we propose that the *Majewski* principle should be formulated in such a way that it can apply only in relation to allegations of certain states of mind (and also in relation to the defences of automatism and mistake). This approach would eliminate the uncertainty which at present arises whenever the offence charged is one which has not previously been classified into one category or the other, or which combines two or more mental elements (such as intention and recklessness). We describe at paragraphs 9.2-9.25 below the way in which this scheme would operate in practice.
- 1.43 Secondly it is uncertain when intoxication is “voluntary” for the purposes of the *Majewski* doctrine under the present law. Our proposals would remove this uncertainty, since the draft Bill annexed to this report includes detailed rules for determining whether intoxication is voluntary or involuntary.<sup>75</sup> It provides, for example, a statement of the circumstances in which the defendant’s taking of an intoxicant for a medicinal purpose will exempt him from the operation of the codified *Majewski* rule. This exemption will be much clearer, more consistent and easier to apply than the present distinction between “dangerous” and “non-dangerous” drugs.
- 1.44 Finally our proposals would make it clear not only when the rules should apply, but also what questions the jury should be invited to decide. At present there are differing views on the question whether the jury should be asked to determine whether the defendant would have been aware of the relevant risk if he had not been intoxicated, or whether proof of intoxication can be regarded by them as equivalent to *mens rea*.

<sup>74</sup> See paras 3.17-3.30 below.

<sup>75</sup> See cls 5, 6(3) and 6(5) of the draft Bill at Appendix A.

*The elimination of anomalies*

- 1.45 As we pointed out at para 1.35 above, we have at certain points departed from what we understand the present law to be; but we have done so only where we believe the present law to be anomalous and irrational. It follows that in respect of these matters the implementation of our recommendations would have the advantage of making the law more consistent and more rational.

**The structure of this report**

- 1.46 Following this introduction, in Part II of this report we explain some of the technical terms and concepts to which we shall be referring in the main body of the report; in Part III we outline the present law; and in Part IV we briefly describe the results of previous law reform and codification exercises in this area. In Part V we discuss the provisional proposals that we made in our consultation paper, and we explain why the consultation process persuaded us in the end to adopt instead the policy of codifying the present law. In Part VI we discuss how the *Majewski* rules should be formulated in respect of the requirements of mens rea and of voluntary conduct, and in Part VII how they should be adapted for the case where an intoxicated mistake is relied upon by way of defence. In Part VIII we consider the definition of the "voluntary intoxication" which brings the rules into play. Part IX contains a list of our recommendations and an explanation of how the changes we recommend would affect the practical operation of the law.
- 1.47 Finally, we attach in Appendix A a draft Bill, which would implement the policy we recommend in this report. The Bill is ready for immediate enactment as it stands, but its provisions are intended to be incorporated into the draft Criminal Law Bill contained in Law Com No 218, in place of the intoxication provisions in that Bill, and we will publish a new combined Bill in the near future.<sup>76</sup>

<sup>76</sup> See para 1.13 above.

## PART II

# SOME LEGAL TERMS AND CONCEPTS

- 2.1 Parts II-IV of this report are intended to provide our readers, especially non-lawyers, with enough background information to enable them to understand the discussion of our policy recommendations which follows in Parts V-VIII. As we explained in Part I,<sup>1</sup> the issue at the heart of this study is whether, and if so to what extent, it is right for the law to regard a state of intoxication as an alternative to the state of mind normally required for the commission of a particular offence. We shall therefore start with a very brief explanation of some of the legal terms we shall be using<sup>2</sup> to describe the mental elements of different offences in the remainder of this report.
- 2.2 The general principle is that “the full definition of every crime contains expressly or by implication a proposition as to a state of mind”.<sup>3</sup> Thus, for murder, the defendant must *intend* to kill or to cause serious injury; and for the offence of inflicting grievous bodily harm<sup>4</sup> he must either *intend* to cause bodily harm or be *reckless* whether he causes it. That element of an offence which consists in the particular state of mind in which the defendant must be proved to have acted is technically known as “mens rea”.<sup>5</sup> It must be distinguished from the “actus reus”,<sup>6</sup> the *physical* element of the offence—for example, in murder, the causing of death within a year and a day.

### Intention and purpose

- 2.3 There is no statutory definition of “intention”, but the following definition appears in clause 1(a) of the draft Criminal Law Bill annexed to Law Com No 218:<sup>7</sup>

[A person acts] “intentionally” with respect to a result when—

- (i) it is his purpose to cause it, or

<sup>1</sup> See paras 1.14-1.16 above.

<sup>2</sup> Lord Simon of Glaisdale pointed out in *Majewski* [1977] AC 443, 477F that considerable difficulty in this branch of the law has arisen from the terminology which has been used.

<sup>3</sup> *Tolson* (1889) 23 QBD 168, 187, *per* Stephen J.

<sup>4</sup> Offences against the Person Act 1861, s 20.

<sup>5</sup> “Guilty mind”.

<sup>6</sup> “Guilty act”.

<sup>7</sup> See para 1.10 above, and Appendix E below.

- (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result ... .

2.4 The primary, central meaning of “intention” is that of *purpose*. “Purpose” is not itself defined in the draft Criminal Law Bill, because it is intended to bear the same meaning as in ordinary speech: broadly speaking, it is a person’s purpose to cause a particular result if that is his *reason* (or one of his reasons) for acting as he does.

The concept of purpose is ideally suited to express the idea of intention in the criminal law, because that law is concerned with results that the defendant causes by his own actions. Those results are intentional, or intentionally caused, on his part when he has sought to bring them about, by making it the purpose of his acts that they should occur.<sup>8</sup>

2.5 Some offences require, either in terms or in effect,<sup>9</sup> that the defendant should be proved to have acted with a particular purpose; but more often the requirement is technically one of intention. As the definition quoted above makes clear, purpose is one form of intention.

2.6 However, in the great majority of cases where intention is an element of the offence charged, courts and juries are actually concerned only with purpose.<sup>10</sup> The second limb of the definition is aimed at the person who must be treated as intending “the means as well as the end and the inseparable consequences of the end as well as the means”.<sup>11</sup> It extends only very slightly the primary meaning set out in the first limb. We emphasise that a person does not act intentionally merely because he foresees the result as highly likely to occur: he must know that, in the absence of some wholly improbable supervening event,<sup>12</sup> the achievement of his purpose will *inevitably* involve the result in question.

<sup>8</sup> Law Com No 218, para 7.5.

<sup>9</sup> eg by such expressions as “with a view to ...”, as in Theft Act 1968, s 17(1) (false accounting).

<sup>10</sup> *Nedrick* [1986] 1 WLR 1025.

<sup>11</sup> *Hyam* [1975] AC 55, 74D, *per* Lord Hailsham of St Marylebone LC. An example is the case in which the defendant, for the purpose of injuring another, throws a brick at a window behind which he knows the intended victim to be standing. He can be said to intend to break the window, although his primary purpose is to hit the other person.

<sup>12</sup> As where, in the example cited, the window is flung open while the brick is in flight.

### Awareness and recklessness

- 2.7 Many offences do not require proof that the defendant had any particular purpose or intention in acting as he did; instead they require proof that he was *aware* that particular circumstances might exist, or that a particular result might occur. This kind of requirement is different in kind from a requirement of intention or purpose, because it relates only to the defendant's awareness of possibilities and not to his reasons for acting.
- 2.8 Sometimes an offence expressly requires that the defendant should be proved to have been "aware" of a particular possibility;<sup>13</sup> sometimes other expressions are used, but are interpreted as meaning the same thing. Under section 20 of the Offences against the Person Act 1861, for example, it is an offence "maliciously" to inflict grievous bodily harm; but the word "maliciously" means that the defendant must be proved to have foreseen the possibility that some physical harm might result from his act.<sup>14</sup>
- 2.9 These requirements that it must be proved that the defendant was aware of a possibility are commonly referred to by lawyers as requirements of "recklessness". However, this term is used in several slightly different senses.

#### *Subjective recklessness*

- 2.10 In criminal law the term "recklessness" usually has the meaning assigned to it by the draft Bill annexed to Law Com No 218. Clause 1(b) provides:

[A person acts] "recklessly" with respect to —

- (i) a circumstance, when he is aware of a risk that it exists or will exist, and
- (ii) a result, when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk ... .

- 2.11 Recklessness in this sense has two elements. The first is *actual awareness* of the risk in question. This is a *subjective* concept, in the sense that it relates to the actual state of the defendant's mind: it is not enough that he failed to realise what he should have realised. But prolonged reflection and decision-making are not required. Nor need the defendant have foreseen all the details of what occurs.<sup>15</sup>

<sup>13</sup> eg Public Order Act 1986, s 6; cf para 3.49 below.

<sup>14</sup> *Cunningham* [1957] 2 QB 396; *Savage* [1992] 1 AC 699. In Law Com No 218 we advanced proposals for the replacement of this and related offences.

<sup>15</sup> See Law Com No 218, para 14.12.



- 2.12 The second element of recklessness in this sense is that it must be *unreasonable* for the defendant to take the risk in question. This issue must be determined on the basis of the circumstances *actually* known to the defendant, not those which he *should* have known; but the test is otherwise an objective one. It is immaterial that he may have regarded the risk as a reasonable one if in fact it was not. This issue is, in essence, the same as that which arises on an allegation of negligence: namely whether the risk is outweighed by the value (if any) of the defendant's conduct. Many everyday actions involve, and are recognised to involve, *some* degree of risk; but the risk is so small, and the social cost of eliminating it so great, that it is reasonable to take the risk. Driving a car (with reasonable care and skill) is one example.
- 2.13 In practice the latter requirement is seldom in issue in a criminal trial: where the prosecution alleges recklessness, the defendant usually denies that he was aware of the risk, not that the risk was an unreasonable one. For this reason "recklessness" is often used as if it were synonymous with the former requirement, namely that of actual awareness of risk; and it is chiefly in connection with the former requirement that the defendant's intoxication may be relevant.

*Caldwell recklessness*

- 2.14 Some offences expressly require an element of "recklessness"; and in *Caldwell*<sup>16</sup> and *Lawrence*,<sup>17</sup> for the purpose of some of these offences, the House of Lords held that this term does not bear the meaning traditionally assigned to it.<sup>18</sup> Instead, it was held that a person is reckless for these purposes if (1) his conduct creates a risk (of the relevant harm) that would be obvious *to an ordinary prudent individual*, and (2) he *either* (a) has given no thought to the possibility of there being a risk *or* (b) recognises the existence of the risk and unjustifiably<sup>19</sup> goes on to take it.
- 2.15 This definition does not include the case (sometimes referred to as the "lacuna") in which the defendant does consider whether there is a risk involved, but decides that there is not; or where he perceives the risk to be so small that (if he were right) he would be justified in taking it.<sup>20</sup>

<sup>16</sup> [1982] AC 341.

<sup>17</sup> [1982] AC 510.

<sup>18</sup> See paras 2.10-2.13 above.

<sup>19</sup> Thus the requirement that the risk should be an unreasonable one applies to *Caldwell* recklessness as well as subjective recklessness: cf para 2.12 above.

<sup>20</sup> The lacuna was recognised in *Reid* (1990) 91 Cr App R 263, 269, *per* Mustill LJ (in the context of the former offence of reckless driving):

The defendant was not saying [that] he recognised the existence of a risk and assessed it as negligible, or that he assessed it as less than serious, whatever precisely that term may mean. So far as he was concerned, there was no risk. If this was so, or might have been so, the jury must acquit.

- 2.16 It now appears that this definition of recklessness applies to a very restricted range of offences. The most important of these are the offences of criminal damage under the Criminal Damage Act 1971; other examples are scarce.<sup>21</sup>

*Recklessness in taking a non-dangerous intoxicant*

- 2.17 Recklessness has a third, loose, connotation in the narrow context of the state of mind of a person who takes an intoxicant judicially classified as not being dangerous. We consider this below.<sup>22</sup>

**Voluntary action and automatism**

- 2.18 A physical movement cannot normally constitute an offence if it occurs against, or without, the defendant's will<sup>23</sup>—for example, a movement of the muscles without any control by the mind (such as a reflex action), or an act done by a person who is not conscious of what he is doing (because, for instance, he is suffering from concussion).<sup>24</sup> Nearly all criminal offences, including those of strict liability,<sup>25</sup> require willed or “voluntary”<sup>26</sup> action on the part of the defendant.<sup>27</sup>

The lacuna was also recognised in the House of Lords in that case: [1992] 1 WLR 793, 806B-E (*per* Lord Ackner), 813B (*per* Lord Goff of Chieveley, though he regarded the *term* “lacuna” as misleading).

<sup>21</sup> One such offence appears to be that created by s 5(5) of the Data Protection Act 1984, of recklessly contravening any of the provisions of s 5: *Data Protection Registrar v Amnesty International (British Section)*, *The Times* 24 November 1994. Formerly, *Caldwell* recklessness applied also to the offences (now abolished) of reckless driving and causing death by reckless driving, and to that kind of involuntary manslaughter which consists in causing death by a breach of duty; but in *Adomako* [1994] 3 WLR 288 the House of Lords held that in these cases gross negligence, not recklessness, is the test.

<sup>22</sup> See paras 3.34-3.36 below.

<sup>23</sup> Similarly, where an offence can be committed by omission, an omission which arises from the defendant's physical incapacity will not found liability.

<sup>24</sup> *Bratty v A-G for Northern Ireland* [1963] AC 386, 409, *per* Lord Denning.

<sup>25</sup> These are offences which do not require an element of awareness or intention on the part of the defendant: eg he may be guilty of the offence of abduction of an unmarried girl under 16 from her parent or guardian, contrary to s 20 of the Sexual Offences Act 1956, even if he believed on reasonable grounds that the girl was over 16: *Prince* (1875) LR 2 CCR 154.

<sup>26</sup> This requirement is sometimes expressed by saying that the defendant's act or omission must be *intentional*; but this usage invites confusion with the concept of intention to bring about a *result* (see para 2.3 above), and is not employed in the Draft Code.

<sup>27</sup> Exceptions to this general rule are “status” or “situation” offences, eg being in charge of a motor vehicle in a public place when unfit to drive through drink or drugs, contrary to s 4(2) of the Road Traffic Act 1988; and see *Larsonneur* (1933) 24 Cr App Rep 74.

- 2.19 It is a defence, known as “automatism”, that this element of voluntary conduct has not been proved. Intoxication apart, there is normally no criminal liability for an “act” done in a state of automatism.<sup>28</sup>
- 2.20 A statement of the rules relating to automatism can be found in clause 33(1) of the Draft Code.<sup>29</sup>

A person is not guilty of an offence if—

- (a) he acts in a state of automatism, that is, his act—
  - (i) is a reflex, spasm or convulsion; or
  - (ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of the act; and
- (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.

<sup>28</sup> This does not necessarily mean that the defendant is acquitted: some cases of automatism are governed by the law of insanity, since the automatism is regarded as arising from “a disease of the mind”.

<sup>29</sup> See para 1.21, n 31 above. Cl 33(2) provides that a person is not guilty of an offence by virtue of an omission to act if he was physically incapable of acting in the way required, unless his incapacity was caused by voluntary intoxication.

## PART III

# AN OUTLINE OF THE PRESENT LAW

- 3.1 In this part of our report we will summarise the present law of intoxication, setting out where necessary its historical development. We will also be referring to some of the uncertainties in the present law.

### Introduction

- 3.2 Intoxication<sup>1</sup> is not in itself a defence to a criminal charge if, despite the defendant's intoxication, the legal requirements of guilt are still present:

in cases where drunkenness and its possible effect upon the defendant's mens rea<sup>2</sup> is an issue, ... the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.<sup>3</sup>

This is so even if the defendant's intoxicated state was not of his own making.<sup>4</sup>

- 3.3 There are, however, cases where the defendant's intoxication gives rise to doubts as to whether he did indeed possess the mental element of the offence charged. It is this type of case with which this report is concerned.
- 3.4 These cases are at present dealt with in different ways according to the offence charged. For some offences, characterised as offences of "specific intent", the defendant's intoxicated state is taken into account, together with all the other relevant circumstances, in determining whether he acted in the necessary state of mind; but for other offences (those of "basic intent") the law requires that his mental state, and hence his liability, be determined as though he had not been intoxicated. This latter rule was discussed and applied by the House of Lords in the leading modern authority on the subject, *DPP v Majewski*,<sup>5</sup> and we refer to it throughout this report as "the *Majewski* principle" or "the *Majewski* approach". In

<sup>1</sup> The rules relating to intoxication apply to a wide range of drugs, as well as alcohol.

<sup>2</sup> That is, the mental element of the offence: see para 2.2 above (footnote added).

<sup>3</sup> *Sheehan* [1975] 1 WLR 739, 744B-C, per Geoffrey Lane LJ. This would apply a fortiori to recklessness. The jury should have regard to all the evidence, including that relating to drink, draw such inferences as they think proper, and ask themselves whether they feel sure that, at the material time, the defendant had the requisite intent: *Bowden* [1993] Crim LR 380.

<sup>4</sup> *Kingston* [1994] 3 WLR 519.

<sup>5</sup> [1977] AC 443: see paras 3.10-3.14 below.

order to explain the *Majewski* principle, it may be useful to look first at the historical development of the law.

### **The historical development of the law**

- 3.5 Under the law of England until early in the nineteenth century, voluntary drunkenness was never an excuse for criminal misconduct.<sup>6</sup> This view was in terms based upon the principle that a man who by his voluntary act debauches and destroys his will power should be no better situated in regard to criminal acts than a sober man.<sup>7</sup> An early statement of the law is to be found in *Reniger v Fogossa*:<sup>8</sup>

... if 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 avoided it, he shall not be priviledged thereby.

- 3.6 The harshness of this rule was gradually relaxed throughout the nineteenth century, although it was difficult to ascertain any one intelligible governing principle, until in a murder case in 1887<sup>9</sup> Stephen J said:

Although you cannot take drunkenness as any 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 constitute the crime.<sup>10</sup>

If his drunkenness prevented his forming an intention to kill or to cause grievous bodily harm, he would be guilty only of manslaughter.

- 3.7 In another murder case, *Beard*,<sup>11</sup> Lord Birkenhead LC reviewed the authorities and said<sup>12</sup> that they established that (except where insanity is pleaded)

where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming

<sup>6</sup> See, eg, Hale's *Pleas of the Crown*, vol I, p 32, cited in para 1.16 above.

<sup>7</sup> Blackstone's *Commentaries*, Book III, ch 2, p 25: see para 1.16 above.

<sup>8</sup> (1552) 1 Plowd 1, 19.

<sup>9</sup> *Doherty* (1887) 16 Cox CC 306.

<sup>10</sup> (1887) 16 Cox CC 306, 308, cited by Lord Birkenhead LC in *Beard* [1920] AC 479, 498.

<sup>11</sup> [1920] AC 479.

<sup>12</sup> [1920] AC 479, 499. The Earl of Reading CJ, Viscount Haldane and Lords Dunedin, Atkinson, Sumner, Buckmaster and Phillimore all agreed with Lord Birkenhead's speech.

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 of a crime which was committed only if the intent was proved.<sup>13</sup>

3.8 It is arguable from the context in which these words appeared that Lord Birkenhead did not mean to add anything to the meaning of the word “intent” in the opening words of this passage by his use of the word “specific” to qualify it. He may merely have meant to reiterate the law as formulated by Stephen J,<sup>14</sup> or the successful argument of the Crown in *Beard*, which referred to specific intent as being a case where intent is an important ingredient of the offence.<sup>15</sup> However, the phrase “specific intent” was picked up by judges in later cases<sup>16</sup> and given a distinct, technical meaning, and this has formed the basis of the way in which the law now treats a defendant’s intoxication in different ways depending on the type of offence charged.

3.9 In *Broadhurst*,<sup>17</sup> Lord Devlin, giving the advice of the Privy Council, said that the proposition stated in *Beard* was not easy to grasp and that the law as there laid down might have to be reconsidered in the light of the House of Lords’ decision in

<sup>13</sup> Later in his speech, however (at p 504), Lord Birkenhead said:

I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—eg, wounding with intent to do grievous 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 ..., a person cannot be convicted of a crime unless the mens was rea.

Lord Salmon referred in *Majewski* [1977] AC 443, 483B-G, to this “somewhat obscure” passage, but construed it as meaning that “drunkenness was relevant to all cases in which it was necessary to prove a specific intent and was not confined to cases in which, if the prosecution failed to prove such an intent, the accused could still be convicted of a lesser offence.”

<sup>14</sup> See para 3.6 above.

<sup>15</sup> [1920] AC 479, 489.

<sup>16</sup> “If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge ... in which a *specific intent* is essential” (emphasis added): *Bratty v A-G for Northern Ireland* [1963] AC 386, 410, *per* Lord Denning.

<sup>17</sup> [1964] AC 441, 461.

*Woolmington v DPP*,<sup>18</sup> which amended the existing rules on the burden of proof.<sup>19</sup> This warning was repeated by the Court of Appeal in *Sheehan*.<sup>20</sup>

***DPP v Majewski***

- 3.10 In *Majewski*, the leading modern authority on intoxication, the House of Lords answered the following certified question in the affirmative:

Whether a defendant may properly be convicted of assault notwithstanding that by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault.<sup>21</sup>

Their Lordships also discussed the wider question of the effect of voluntary intoxication on criminal liability in general.

- 3.11 Broadly stated, the rule laid down in *Majewski* and subsequent authorities is that, in offences of “basic intent” (as distinct from those of “specific intent”),<sup>22</sup> voluntary intoxication by alcohol or another drug (other than one which is merely soporific or sedative<sup>23</sup> or taken as medical treatment)<sup>24</sup> cannot found a defence that the defendant did not form the mental element of the offence, even if the intoxication produced a state of automatism.<sup>25</sup> In other words, in such a case the voluntarily intoxicated defendant can be convicted even though the prosecution has not proved any intention or awareness or indeed any voluntary act.
- 3.12 The policy considerations which underlie the decision in *Majewski* were clearly expressed in that case. For example, as to the protection of the public, we may cite Lord Simon of Glaisdale:

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

<sup>18</sup> [1935] AC 462. Until that case, the burden lay upon the defendant to prove a defence of lack of specific intent: *Sheehan* [1975] 1 WLR 732, 744A.

<sup>19</sup> There are certain dicta in *Beard* which seem to suggest that there is no onus on the Crown to establish that, notwithstanding the alleged intoxication, the defendant formed the intent.

<sup>20</sup> [1975] 1 WLR 732.

<sup>21</sup> [1977] AC 443, 457C-D. The appellant had been convicted on three counts of assault occasioning actual bodily harm, contrary to s 47 of the Offences against the Person Act 1861, and three counts of assault on a police constable in the execution of his duty, contrary to s 51(1) of the Police Act 1964.

<sup>22</sup> See paras 3.17-3.30 below.

<sup>23</sup> See paras 3.34-3.36 below.

<sup>24</sup> See paras 3.32-3.33 below.

<sup>25</sup> See para 3.47 below.

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.<sup>26</sup>

- 3.13 On the perceived justice and morality of convicting an intoxicated offender, Lord Elwyn-Jones LC (with whom Lords Diplock, Kilbrandon and Simon of Glaisdale agreed) said:

If a man of his own volition takes a substance which causes him to cast 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. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases ...<sup>27</sup>

- 3.14 A similar approach was adopted by Lord Russell of Killowen, who said that in such a case “the element of guilt or moral turpitude is supplied by the act of self-intoxication reckless of possible consequences”.<sup>28</sup>
- 3.15 More recently, Lord Mustill identified two justifications for the *Majewski* approach: first, that the intentional taking of an intoxicant without regard to its possible consequences is a substitute for the mental element normally required; and secondly, that the defendant is “estopped” (that is, debarred) from relying on the absence of a mental element if it is absent because of his own acts.<sup>29</sup>

#### **Section 8 of the Criminal Justice Act 1967**

- 3.16 This section was enacted in order to rebut the disputed view<sup>30</sup> that a person is conclusively presumed to foresee and intend the natural consequences of his acts.<sup>31</sup>

<sup>26</sup> [1977] AC 443, 476F-G.

<sup>27</sup> [1977] AC 443, 474G-475A.

<sup>28</sup> [1977] AC 443, 498G.

<sup>29</sup> *Kingston* [1994] 3 WLR 519, 530E-G. Lords Keith of Kinkel, Goff of Chieveley, Browne-Wilkinson and Slynn of Hadley concurred.

<sup>30</sup> Adopted, however, by the House of Lords in *Smith* [1961] AC 290 in relation to murder.

<sup>31</sup> The section provides:

A court or jury, in determining whether a person has committed an offence,—



It was argued in *Majewski* that the principle laid down in that case was inconsistent with this provision;<sup>32</sup> but the argument was rejected on the ground that the *Majewski* principle was one of substantive law, whereas section 8 was concerned only with evidence.<sup>33</sup> Thus, the provisions of section 8 do not affect the application of the *Majewski* doctrine.

### Offences of specific and of basic intent

3.17 Every offence belongs to one of two categories: crimes of basic intent, to which the *Majewski* principle applies; and crimes of specific intent, to which it does not. There are a number of alternative theories as to the meanings of these two terms, and the criteria for categorising offences in this way; and there is a great deal of uncertainty as a result. We do not regard this as satisfactory.

3.18 For example, Lord Elwyn-Jones LC in *Majewski* cited with approval a passage from the dissenting speech of Lord Simon of Glaisdale in *DPP v Morgan*:<sup>34</sup>

By "crimes of basic intent" I mean those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus.<sup>35</sup> The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it: but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus.

3.19 Professor Glanville Williams<sup>36</sup> speculates that Lord Simon's definition was

presumably meant to exclude the type of crime where the law requires a certain consequence to be intended or foreseen *without requiring that the consequence should actually occur* (attempt, theft,<sup>37</sup> burglary in one of

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

<sup>32</sup> This point has also been made by Professor J C Smith [1975] Crim LR 574, and referred to by the Court of Appeal in *Sheehan* [1975] 1 WLR 732.

<sup>33</sup> [1977] AC 443, 475G-476A, *per* Lord Elwyn-Jones LC (with whom Lords Diplock, Kilbrandon and Simon of Glaisdale agreed) and at 497E-498A, *per* Lord Edmund-Davies.

<sup>34</sup> [1976] AC 182, 216G-H.

<sup>35</sup> See para 2.2 above for the meaning of these expressions (footnote added).

<sup>36</sup> In his *Textbook of Criminal Law* (1st ed 1978) pp 429-430.

<sup>37</sup> In that the owner need not in fact be permanently deprived (footnote in original).

its forms, forgery). These last are crimes of specific intent. In contrast, crimes of basic intent are those where no consequence is referred to, or, if one is referred to, it must occur before the crime is regarded as committed (murder, wounding with intent) ... . But, if this is the distinction, it not only attaches a very peculiar meaning to “specific intent” but fails to explain the law. Everyone agrees that murder and wounding with intent are crimes of specific intent ... .<sup>38</sup>

- 3.20 An alternative explanation is that crimes of basic intent require intention or awareness in respect only of the *physical act* required for the offence.<sup>39</sup> By contrast, an offence of specific intent is one in which the mental element includes intention to cause, or awareness of a risk of, a specified *consequence*. This approach would explain why murder is a crime of specific intent, because it requires an intention to kill or cause serious injury.
- 3.21 However, this explanation, too, does not accord with the present law, since it would categorise common assault as a crime of specific intent, requiring as it does the intention to cause the victim to fear a battery (or the foresight of such fear). It would also place in this category any assault which caused injury, if the injury could not be regarded as *part* of the defendant’s action—for example, if the defendant threw a stone. However, all the members of the House of Lords in *Majewski* held that both common assault and assault occasioning actual bodily harm are offences of basic intent.
- 3.22 A third explanation holds that “basic intent” is equivalent to recklessness<sup>40</sup> and that “specific intent” equates to “intention”.<sup>41</sup> Some support for this approach can be found in *Majewski*, since Lord Elwyn-Jones supported his view of the English law of intoxication by reference<sup>42</sup> to the basic rule in section 2.08(2) of the American Law Institute’s Model Penal Code. It states:

When recklessness establishes an element of the offence, 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 unawareness is immaterial.

<sup>38</sup> Emphasis in original.

<sup>39</sup> *DPP v Newbury* [1977] AC 500, 509C, *per* Lord Salmon: “what is called a basic intention ... is an intention to do the acts which constitute the crime”.

<sup>40</sup> See paras 2.7-2.17 above.

<sup>41</sup> See paras 2.3-2.6 above.

<sup>42</sup> [1977] AC 443, 475C-D.

This provision applies only where recklessness is an element of the offence. It was cited by the CLRC in support of its own recommendation to the same effect.<sup>43</sup>

3.23 Interestingly, Lord Russell of Killowen in *Majewski* spoke<sup>44</sup> of the guilt of the voluntarily intoxicated defendant as being “supplied by the act of self-intoxication reckless of possible consequences”.

3.24 Support for this theory can also be found in *Caldwell*,<sup>45</sup> where Lord Diplock said:

The speech of Lord Elwyn-Jones LC in [*Majewski*], with which Lord Simon of Glaisdale, Lord Kilbrandon and I agreed, is authority that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary mens rea.<sup>46</sup>

3.25 However, it is possible that the correlation between recklessness and basic intent is not at present as clear as this would suggest. For example, Lord Edmund-Davies in his dissenting speech in *Caldwell*<sup>47</sup> cited with approval a passage from a case<sup>48</sup> in which Eveleigh LJ appeared to hold that, in the context of section 1(2) of the Criminal Damage Act 1971,<sup>49</sup> the alternatives of intention and recklessness *both* amount to a specific intent.

3.26 Furthermore, a number of the law lords in *Majewski* envisaged that there might be certain allegations of intention in respect of which voluntary intoxication ought not

<sup>43</sup> Fourteenth Report on Offences against the Person (1980) Cmnd 7844: see para 1.20 above, and Appendix C below.

<sup>44</sup> [1977] AC 443, 498G.

<sup>45</sup> [1982] AC 341: see paras 2.14-2.16 above.

<sup>46</sup> [1982] AC 341, 355D-E. Lord Keith of Kinkel and Lord Roskill agreed with him (at p 362).

<sup>47</sup> [1982] AC 341, 359-360; Lord Wilberforce concurred.

<sup>48</sup> *Orpin* [1980] 1 WLR 1050, 1054.

<sup>49</sup> Which states:

A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

- (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
- (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

to be taken into account. Lord Elwyn-Jones LC<sup>50</sup> cited with approval the speech of Lord Simon of Glaisdale in *Morgan*<sup>51</sup> in which he described assault as an offence of basic intent, for which the required mental element was either intention to cause another person to apprehend immediate and unlawful violence, or recklessness as to that result. It should also be noted that the question before the House in *Majewski* specifically dealt with the effect of intoxication on issues of intention.<sup>52</sup>

3.27 It is apparent, therefore, that there is no general agreement on the test which should be applied in order to distinguish between offences of basic and of specific intent. Indeed, a leading textbook (rightly, in our view) concludes that the designation of crimes as requiring, or not requiring, specific intent is based on no principle at all, and that, in order to know how a crime should be classified for this purpose, “we can look only to the decisions of the courts”.<sup>53</sup> This lack of accepted and established criteria must inevitably lead to uncertainty, wasted court time and the unnecessary incurring of legal costs when a new offence is introduced, since, until the matter is decided by the courts, it will not be possible to ascertain into which category it falls.

3.28 Examples of crimes that have been held (or assumed) to be of specific intent are: murder;<sup>54</sup> wounding or causing grievous bodily harm with intent;<sup>55</sup> theft;<sup>56</sup> robbery;<sup>57</sup> burglary with intent to steal;<sup>58</sup> handling stolen goods;<sup>59</sup> all offences involving an intent to deceive or defraud;<sup>60</sup> causing criminal damage contrary to section 1(2) of the Criminal Damage Act 1971 where only *intention* to endanger life is alleged;<sup>61</sup> and indecent assault where proof of indecent purpose is required.<sup>62</sup>

<sup>50</sup> [1977] AC 443, 471A-G. His speech was concurred in by Lord Simon of Glaisdale, who added some further passages (at pp 478G-479G) which seem to envisage the application of *Majewski* to issues of intention; by Lord Kilbrandon; and, significantly, by Lord Diplock himself, who said, at p 476D-E, that he agreed not only with Lord Elwyn-Jones’ conclusions but also with the speech in which they were expressed.

<sup>51</sup> [1976] AC 182, 216.

<sup>52</sup> See para 3.10 above for the certified question.

<sup>53</sup> J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 221.

<sup>54</sup> *Sheehan* [1975] 1 WLR 739.

<sup>55</sup> Offences against the Person Act 1861, s 18; *Pordage* [1975] Crim LR 575.

<sup>56</sup> See, eg, *Majewski* [1977] AC 443, 482D, *per* Lord Salmon.

<sup>57</sup> As a corollary of theft.

<sup>58</sup> *Durante* [1972] 1 WLR 1612.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Caldwell* [1982] AC 341, 350-351.

<sup>62</sup> *Culyer*, *The Times* 17 April 1992 (CA).

3.29 Offences that have been held to be of basic intent include: involuntary manslaughter, apparently in all its forms;<sup>63</sup> rape;<sup>64</sup> maliciously wounding or inflicting grievous bodily harm;<sup>65</sup> kidnapping and false imprisonment;<sup>66</sup> various assault offences, including<sup>67</sup> assault on a constable and assault occasioning actual bodily harm; indecent assault where the act is unambiguously indecent;<sup>68</sup> taking a conveyance without the consent of the owner;<sup>69</sup> (assuming that mens rea is required for the offence) allowing a dog of a certain type to be in a public place without being muzzled or kept on a lead;<sup>70</sup> and arson and causing criminal damage contrary to section 1(2) of the Criminal Damage Act 1971 where recklessness to endanger life is relied on.<sup>71</sup>

3.30 In many cases where the defendant's intoxication precludes a conviction of an offence of specific intent, he can be convicted of a lesser offence of basic intent. Thus manslaughter is a substitute for murder, and malicious wounding or inflicting grievous bodily harm for wounding or causing grievous bodily harm with intent. But in many cases there is no alternative offence available.<sup>72</sup> Theft and other dishonesty offences will often fall in this category.

#### **Voluntary intoxication**

3.31 The *Majewski* principle applies only where the defendant's intoxication was *voluntary*; but the precise width of this concept of "voluntariness" is not completely clear. Presumably a person's intoxication is involuntary if he became intoxicated under duress. Again, it is probably involuntary where his drink, alcoholic or not, was surreptitiously "laced" with alcohol;<sup>73</sup> but a mere failure to appreciate (for example)

<sup>63</sup> *Beard* [1920] AC 479; *Gallagher* [1963] AC 349; *Bratty v A-G for Northern Ireland* [1963] AC 386, 410, *per* Lord Denning. In *Lipman* [1970] 1 QB 152, 157A, the law was stated in general terms, not restricted to cases in which the unlawful act that founded the charge was an offence of basic intent. In fact, however, the unlawful act in *Lipman* was a battery, a crime of basic intent; and subsequently, in *O'Driscoll* (1977) 65 Cr App R 50, 55, the Court of Appeal stated, *obiter*, that the *Majewski* rule did not apply if the underlying offence was one of specific intent.

<sup>64</sup> *Fotheringham* (1989) 88 Cr App R 206.

<sup>65</sup> Offences against the Person Act 1861, s 20; *Bratty v A-G for Northern Ireland* [1963] AC 386, 410, *per* Lord Denning; *Aitken* [1992] 1 WLR 1006, 1016G-1017A.

<sup>66</sup> *Hutchins* [1988] Crim LR 379.

<sup>67</sup> As in *Majewski* itself.

<sup>68</sup> *Culyer*, *The Times* 17 April 1992 (CA).

<sup>69</sup> *MacPherson* [1973] RTR 157; *Diggin* (1980) 72 Cr App R 204; *Gannon* (1987) 87 Cr App R 254.

<sup>70</sup> Contrary to the Dangerous Dogs Act 1991, s 1(7); *Kellet* [1994] Crim LR 916. McCowan LJ referred to the offence as being "at most" one of basic intent.

<sup>71</sup> *Cullen* [1993] Crim LR 936.

<sup>72</sup> See *Majewski* [1977] AC 443, 497E, *per* Lord Russell of Killowen.

<sup>73</sup> *Kingston* [1994] QB 81 (CA); [1994] 3 WLR 519, 530G (HL).

the strength of an alcoholic drink voluntarily taken, or the fact that his capacity was lowered by fatigue, does not prevent his intoxication from being treated as voluntary.<sup>74</sup>

### **Intoxicants taken for a medicinal purpose**

- 3.32 It is not clear to what extent the law regards a person who has taken an intoxicant for a medicinal purpose as being voluntarily intoxicated, because there is very little direct authority on this issue. It is worth recalling that the rationale of the *Majewski* doctrine is to punish the defendant (in cases of basic intent) for “the act of self-intoxication-reckless of possible consequences”<sup>75</sup> or for “an element of recklessness in the self-administration of the drug”.<sup>76</sup> Thus the taking of an intoxicant for genuine medicinal purposes ought in principle to be outside *Majewski*. In the absence of authority, however, it is not at present certain that this view is correct.
- 3.33 In *Majewski* Lord Elwyn-Jones LC referred in passing to the man who “consciously and deliberately takes alcohol and drugs *not on medical prescription*, but in order to escape from reality, to go ‘on a trip’, to become hallucinated, whatever the description may be ...”.<sup>77</sup> Furthermore, section 2.08 of the American Law Institute’s Model Penal Code, which states in subsection (2) that lack of awareness of risk due to self-induced intoxication is immaterial in offences which have recklessness as an element, provides in subsection (5)(b):

“self-induced intoxication” means intoxication caused by substances that 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 ...<sup>78</sup>

In *Majewski* Lord Elwyn-Jones LC cited the basic rule in section 2.08(2) of the Model Penal Code in support of his view of the English law of intoxication,<sup>79</sup> but did not refer to the exemption for intoxicants taken pursuant to medical advice.

<sup>74</sup> *Allen* [1988] Crim LR 698; *Kingston* [1994] QB 81, 88H (CA); [1994] 3 WLR 519, 530G (HL).

<sup>75</sup> [1977] AC 443, 498C, *per* Lord Russell: see para 3.23 above.

<sup>76</sup> *Hardie* [1985] 1 WLR 64, 69A, *per* Griffiths LJ.

<sup>77</sup> [1977] AC 443, 471H (emphasis added).

<sup>78</sup> Emphasis added.

<sup>79</sup> [1977] AC 443, 475C-D.

### Non-dangerous substances

3.34 While there is no clear exemption in English law for intoxicants taken on medical advice, a somewhat similar effect is achieved by a different route: there is authority for confining the full *Majewski* principle to intoxication caused by alcohol or by a drug judicially categorised as “dangerous”. A much less rigorous version of the principle applies to a substance not so categorised, such as one that is “merely soporific or sedative”, even if it is taken in excessive quantity. The *Majewski* principle applies to intoxication by such a substance only if the defendant’s taking of it was itself “reckless”, which in this context has a special meaning—namely, that the defendant appreciated the risk that his taking the intoxicant might lead to aggressive, unpredictable or uncontrollable conduct, and nevertheless deliberately ran the risk or otherwise disregarded it. He need not have actually foreseen the particular act or consequence in question.<sup>80</sup>

3.35 The main authority for this qualification of the *Majewski* principle is *Hardie*,<sup>81</sup> where the defendant was charged with the aggravated offence of criminal damage.<sup>82</sup> His defence was that he had taken valium (which had been prescribed to his wife) to calm his nerves, and that this had resulted in intoxication which prevented him from forming the mens rea of the offence. Valium was described by the Court of Appeal as “wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness”.<sup>83</sup> Parker LJ, giving the reserved judgment of the court, said that the jury

should have been directed that if they came to the conclusion that, as a result of the valium, the appellant was, at the time, unable to appreciate the risks to property and persons from his actions they should then consider whether the taking of the valium was itself reckless.<sup>84</sup>

<sup>80</sup> *Bailey* [1983] 1 WLR 760, 765A. In *Hardie* [1985] 1 WLR 64, 70D, the Court of Appeal was “unable to suggest a model direction” on the matter, because “circumstances will vary infinitely and model directions can sometimes lead to more rather than less confusion”: see LCCP 127, para 2.29.

<sup>81</sup> [1985] 1 WLR 64. This decision purports to follow the reasoning in *Bailey* [1983] 1 WLR 760, where the court said (at p 765A-B) that if a person deliberately takes the risk of becoming aggressive, unpredictable and uncontrollable then he is “reckless”. However, the court was there concerned with a diabetic who claimed to have acted in a state of automatism caused by hypoglycaemia after taking insulin and subsequently failing to take food. It was apparently assumed that if he had been in a state of automatism it would have been caused not by the insulin (ie not by intoxication) but by the failure to take food. The court thus envisaged *extending* the *Majewski* principle beyond the sphere of intoxication to the analogous case where the automatism is recklessly self-induced but otherwise than by intoxication. This reasoning was then adopted in *Hardie* as the basis for a *qualification* to the *Majewski* principle where the defendant is intoxicated, but by a “non-dangerous” drug.

<sup>82</sup> Contrary to the Criminal Damage Act 1971, s 1(2).

<sup>83</sup> [1985] 1 WLR 64, 70A.

<sup>84</sup> [1985] 1 WLR 64, 70C.

3.36 At present it would appear, from such scant authority as now exists, that the judge must decide in each case whether a drug is “non-dangerous” before directing the jury as above. In *Hardie*, the factors which the court appeared to take into consideration were, first, that valium was not “liable to cause unpredictability or aggressiveness”, and secondly that it had a merely soporific or sedative effect.

#### **How the *Majewski* principle applies to *Caldwell* recklessness**

3.37 *Majewski* is irrelevant in the primary situation governed by *Caldwell* recklessness<sup>85</sup>—namely, that in which there is an obvious risk, to which the defendant gives no thought. In this type of case the *reason* why the defendant does not advert to the risk (whether it be, as in *Caldwell* itself, voluntary intoxication or, say, mental handicap)<sup>86</sup> is immaterial. The test is whether the risk would have been obvious to a reasonable, prudent *and sober* person.

3.38 In a case which would otherwise fall within the “lacuna”, however (that is, where the defendant *does* consider whether there is a risk but decides that there is not),<sup>87</sup> the fact that the defendant is intoxicated may be relevant to his liability: it would seem in principle that the *Majewski* rule should apply. It would follow that if, but for his intoxication, the defendant would have been aware of the risk, he is regarded as having been reckless.

#### **Intoxicated mistake as a defence**

3.39 Intoxication aside, a defendant’s mistake as to the circumstances in which he acts may have the effect of negating his liability. This may happen either because the mistake negatives the alleged mental element of the offence<sup>88</sup> or because the defendant, while admitting the facts alleged, relies on further facts to excuse his conduct.<sup>89</sup> In either case, the fact that the mistake results from voluntary intoxication may preclude the defendant from relying on it.<sup>90</sup>

3.40 Where, but for the intoxication, the effect of the mistake would be to negative the alleged mental element, the *Majewski* principle precludes reliance on the mistake if (but only if) the offence charged is one of basic intent. Where the mistake would

<sup>85</sup> See paras 2.14-2.16 above.

<sup>86</sup> *Elliott v C (a minor)* [1983] 1 WLR 939.

<sup>87</sup> See para 2.15 above.

<sup>88</sup> Thus a man is not guilty of rape if he has sexual intercourse in the mistaken belief that the woman consents to it, because recklessness as to her lack of consent is an ingredient of the offence: Sexual Offences (Amendment) Act 1976, s 1(1)(b).

<sup>89</sup> As where the defendant contends that he acted in self-defence: *Williams* [1987] 3 All ER 411, approved in *Beckford* [1988] AC 130: see paras 7.5-7.6 below.

<sup>90</sup> *Woods* (1982) 74 Cr App R 312. In *Fotheringham* (1988) Cr App R 206, the defendant had sexual intercourse with a fourteen-year-old girl, under the drunken impression that she was his (consenting) wife. His mistake was held to be no defence.



negative liability for some other reason, however, recent authority suggests that it may be no defence even to an offence of *specific* intent. Thus in *O'Grady*<sup>91</sup> the defendant appealed unsuccessfully against his conviction for manslaughter, an offence of basic intent; but in giving the judgment of the Court of Appeal, Lord Lane CJ said,<sup>92</sup> obiter,<sup>93</sup> that a mistake caused by voluntary intoxication would be no defence even to an offence of specific intent, such as murder.

- 3.41 That statement was followed in *O'Connor*,<sup>94</sup> in which the Court of Appeal said, in relation to murder, that intoxication was not relevant to the question whether the defendant was entitled to rely on his belief that he was acting in self-defence.<sup>95</sup> 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 formed the necessary intent.

*Intoxicated mistake in statutory defences*

- 3.42 Where a *statute* provides that a belief in a particular fact is a defence, it appears that the *Majewski* doctrine does not necessarily apply. Under section 5(2)(a) of the Criminal Damage Act 1971, for example, it is a defence that

at the time of the act or acts alleged to constitute the offence [the defendant] believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances.

Under section 5(3) of the Act, "it is immaterial whether a belief is justified or not if it is honestly held".

- 3.43 In *Jaggard v Dickinson*<sup>96</sup> the Divisional Court held that the defendant, who had caused damage in gaining entry to a house, was entitled to rely on her intoxicated belief that the house belonged to a friend who would have consented to what she did. Mustill J said that the considerations of policy underlying the *Majewski* principle

<sup>91</sup> [1987] QB 995. The defendant, when drunk, killed a man in the mistaken belief that he was being attacked.

<sup>92</sup> At p 999G.

<sup>93</sup> That is, the statement was not necessary for the decision and is not binding on other courts.

<sup>94</sup> [1991] Crim LR 135.

<sup>95</sup> In *Conlon* (1993) 69 A Crim R 93, the New South Wales Supreme Court held that intoxication was a factor to take into account in deciding whether the belief of the particular defendant was reasonable.

<sup>96</sup> [1981] QB 527.

do not apply to a case where Parliament has specifically required the court to consider the accused's actual state of belief, not the state of belief which ought to have existed. It seems to us that the court is required by section 5(3) to focus on the existence of the belief, not its intellectual soundness; and a belief can be just as much honestly held if it is induced by intoxication, as if it stems from stupidity, forgetfulness or inattention.<sup>97</sup>

3.44 Donaldson LJ agreed, and added:

Parliament has very specifically extended what would otherwise be regarded as "lawful excuse" by providing that it is immaterial whether the relevant belief is justified or not provided that it is honestly held. The justification for ... the *Majewski* exception ... is said to be that the course of conduct inducing the intoxication supplies the evidence of mens rea ... . It seems to me that to hold that this substituted mens rea overrides so specific a statutory provision, involves reading section 5(3)<sup>98</sup> as if it provided that "for the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held and the honesty of the belief is not attributable only to self-induced intoxication". I cannot so construe the section ... .<sup>99</sup>

3.45 In view of the emphasis placed in *Jaggard v Dickinson* on the provisions of section 5(3), it is debatable whether the same conclusion would have been reached in the absence of any such provision. Sometimes it is expressed to be a defence that the defendant believed something to be the case (or believed that it would in other circumstances have been the case) but it is not expressly stated that that belief need not be reasonable. Section 12(6) of the Theft Act 1968, for example, provides that a person does not commit the offence of taking a conveyance without authority

by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

3.46 It is not provided that the belief need not be reasonable, but this must be implied.<sup>100</sup> It is arguable that, by analogy with the position under the Criminal Damage Act, a belief that the taking was authorised would be a defence even if it were caused by voluntary intoxication; but in view of the absence of a provision corresponding to

<sup>97</sup> [1981] QB 527, 531H-532A.

<sup>98</sup> The report reads "section 5(2)", but this is clearly an error.

<sup>99</sup> [1981] QB 527, 533C-E.

<sup>100</sup> In *Clotworthy* [1981] RTR 83 it was suggested that this is not the case; *sed quaere*.

section 5(3) of that Act, and the reliance placed on section 5(3) in *Jaggard v Dickinson*, the matter is not beyond doubt.<sup>101</sup>

### **Automatism**

3.47 This expression is defined in paragraphs 2.19 and 2.20 above. In an offence of basic intent the *Majewski* principle precludes the defendant from relying on a state of automatism caused wholly by voluntary intoxication:<sup>102</sup> it was taken for granted in *Majewski*<sup>103</sup> that intoxication could not have an effect through a defence of automatism that it did not enjoy under the intoxication rules themselves. The position is, however, less clear when intoxication is one of a number of factors alleged to have combined, either sequentially or concurrently, to produce an automatic state.<sup>104</sup>

### **“Dutch courage”**

3.48 There is a dictum of Lord Denning to the effect that if a person brings about his own intoxication in order to steel himself to commit an offence (including one of specific intent), he cannot escape liability for that offence on the ground that, because of his intoxication, he lacks the necessary intention at the time of his subsequent actions.<sup>105</sup> Although the situation envisaged is referred to as one of “Dutch courage”, this is something of a misnomer: whereas the defendant’s *purpose* in taking the intoxicant is merely to fortify him in his intention (a factor which would in any event be no defence),<sup>106</sup> the *effect* is that, *at the crucial time*, he does not have the necessary intention at all. If the dictum is correct, it represents an

<sup>101</sup> In *Gannon* (1988) 87 Cr App R 254 the trial judge (Judge Halnan) had ruled that a belief which arose as a result of self-induced intoxication was not a defence under s 12(6). The Court of Appeal held it unnecessary to decide whether the ruling was right, because the defendant had no recollection of the incident and there was therefore no evidence that he had formed the belief in question anyway. See Professor Glanville Williams, “Two Nocturnal Blunders” (1990) 140 NLJ 1564.

<sup>102</sup> eg *Lipman* [1970] 1 QB 152: see para 5.24 below. Automatism caused by self-induced intoxication can be a defence to an offence of specific intent: see the commentary to *Pullen* [1991] Crim LR 457.

<sup>103</sup> [1977] AC 443, 476C, *per* Lord Elwyn-Jones LC; p 479G, *per* Lord Simon of Glaisdale; p 482A-C, *per* Lord Salmon.

<sup>104</sup> See LCCP 127, para 3.23.

<sup>105</sup> *A-G for Northern Ireland v Gallagher* [1963] AC 349 (decided on a different point), at p 382:

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 drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this 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.

<sup>106</sup> See para 3.2 above.

exception to the general rule that an intention to do an act at some future time is not enough: the mens rea must generally *coincide* with the prohibited conduct.<sup>107</sup>

### **Public Order Act 1986**

3.49 Section 6 of the Public Order Act 1986 lays down certain requirements as to the mental elements of the offences created by the Act, including requirements that the defendant should be aware of certain possibilities.<sup>108</sup> Subsection (5) provides:

For the purposes of this section a person whose awareness is impaired by intoxication 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 taking or administration of a substance in the course of medical treatment.<sup>109</sup>

The emphasised words appear to place upon the defendant not just an “evidential” burden but a “persuasive” one—that is, he must not only adduce sufficient evidence to justify the conclusion that his intoxication *may* have resulted from medical treatment or not have been self-induced, but must *prove* (on the balance of probabilities) that that was the case.<sup>110</sup>

<sup>107</sup> See generally J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 229.

<sup>108</sup> eg, for the purpose of the offence of riot, he must either intend to use violence or be aware that his conduct may be violent: s 6(1).

<sup>109</sup> Emphasis added. Subsection (6) provides a definition of “intoxication” for the purposes of subsection (5).

<sup>110</sup> For the undesirability of placing a persuasive burden of proof on the defendant see the CLRC’s Eleventh Report on Evidence (1972) Cmnd 4991, para 140; and para 8.37, n 37 below.

## **PART IV PREVIOUS LAW REFORM AND CODIFICATION EXERCISES**

- 4.1 In this part we briefly outline the recommendations which have been made by two committees who reviewed the effect of these rules just before and just after *Majewski* was decided. For the sake of completeness, we will then describe how we have proposed the codification of the rules in the past.

### **Previous law reform exercises on *Majewski***

#### *The Butler Committee*

- 4.2 The law of intoxication was reviewed as part of a law reform exercise on two occasions before we undertook the present study. The first such review was undertaken before *Majewski* was decided, in the Report of the Butler Committee on Mentally Abnormal Offenders.<sup>1</sup> The terms of reference of this committee were:
- (a) To consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted and his disposal;
  - (b) To consider what, if any, changes are necessary in the powers, procedure and facilities relating to the provision of appropriate treatment, in prison, hospital or the community, for offenders suffering from mental disorder or abnormality, and to their discharge and aftercare; and to make recommendations.<sup>2</sup>
- 4.3 The committee recommended that if evidence of intoxication was given for the purpose of negating the mental element of the offence charged, the jury should be directed that they could acquit the defendant of that offence, but find him guilty of a proposed new offence of dangerous intoxication, if (i) satisfied that the intoxication was voluntary and (ii) not sure that he had the state of mind necessary for the commission of the offence charged. We proposed a more developed version of this suggested new offence as option 6 in LCCP 127.<sup>3</sup>

<sup>1</sup> (1975) Cmnd 6244. The relevant paragraphs are reproduced in Appendix B below.

<sup>2</sup> *Ibid*, para 1.1.

<sup>3</sup> See LCCP 127, Part VI, and para 5.2 below.

*The Criminal Law Revision Committee*

- 4.4 Next, the CLRC considered the law of intoxication in the course of its Fourteenth Report on Offences against the Person.<sup>4</sup> Its main proposal was that the *Majewski* principle should apply where recklessness constituted an element of the offence, but not where intention (“specific” or not) was required. This approach was reflected in our option 2(ii).<sup>5</sup>

**Previous codification exercises**

*The Criminal Code*

- 4.5 In the Draft Code<sup>6</sup> we adopted the approach of the CLRC. This was in accordance with our general policy that, although the Code project was not a law reform exercise and thus did not necessitate any reconsideration of the relevant law on our part, we should nevertheless incorporate in the Draft Code recent recommendations for the reform of the law made by (among others) the CLRC which had not yet been implemented by legislation: to do otherwise would have been to perpetuate areas of the law which had been found to be defective.<sup>7</sup> Thus the provisions on intoxication which we included in the Draft Code<sup>8</sup> did not spring from any review of the law which we had ourselves undertaken, but rather from our general policy of codifying recent recommendations of the CLRC.

*The draft Criminal Law Bill published with Law Com No 218*

- 4.6 The Draft Bill annexed to our report Law Com No 218<sup>9</sup> included provisions relating to intoxication. These provisions were broadly similar to those included in the Draft Code, and are set out in full in Appendix E to this report.<sup>10</sup>
- 4.7 The provisions were intended merely to reflect the existing common law so far as was necessary for the purposes of the Bill, despite the fact that “[t]here is ... considerable difficulty in determining what that common law is.”<sup>11</sup> If the Criminal Law Bill had simply been silent on the question of intoxication, it might have been thought that the effect would be to abolish the common law rules on the effect of intoxication in relation to the matters dealt with in the Bill.<sup>12</sup> The provisions in the

<sup>4</sup> (1980) Cmnd 7844: see para 1.20, n 29 above. The CLRC’s proposals are set out in full in Appendix C to this report.

<sup>5</sup> See para 5.2 below.

<sup>6</sup> See para 1.21, n 31 above.

<sup>7</sup> Law Com No 177, para 3.34.

<sup>8</sup> See Appendix D below for these provisions.

<sup>9</sup> See para 1.10 above.

<sup>10</sup> Our reasons for including these provisions in the Criminal Law Bill are set out in para 1.11 above.

<sup>11</sup> Law Com No 218, para 44.1.

<sup>12</sup> Law Com No 218, para 43.1.

Bill did not, therefore, represent our considered view as to how the law should deal with the issue of intoxication. In the consultation paper which preceded the publication of that report,<sup>13</sup> we had already announced that we had instituted a separate full review of the law of intoxication.

- 4.8 For the purposes of the Bill we adopted a formulation which applied the *Majewski* rules only to allegations of recklessness and cognate mental states, even though we were doubtful whether this formulation reflected the full extent of the present law.<sup>14</sup> It did, however, have the advantage that it could be expressed in a comprehensible statutory form.

<sup>13</sup> Legislating the Criminal Code: Offences against the Person and General Principles (1992) Consultation Paper No 122, para 2.15.

<sup>14</sup> Law Com No 218, para 44.7.

## **PART V**

# **THE OPTIONS FOR REFORM CANVASSED IN LCCP 127 AND THE RESPONSE ON CONSULTATION**

5.1 In this part of the report we will be listing the options for reform which we canvassed in LCCP 127,<sup>1</sup> and summarising the main recommendations we made in that paper. We will then outline the response to our provisional proposals which we received on consultation. We end this part with our central recommendation that the present law should, with some alteration, be codified.

### **The options canvassed in LCCP 127**

5.2 In LCCP 127 we put forward the following policy options for consideration:

#### *Options which would retain the Majewski principle*

1. Do nothing.
2. Codify the *Majewski* approach, in one of three different ways:
  - (i) codify the present law without amendment;
  - (ii) adopt the proposals of the CLRC and the rule in the American Model Penal Code, so as to apply *Majewski* only to allegations of recklessness;<sup>2</sup>  
or
  - (iii) adopt a simplified version of (ii), under which a state of voluntary intoxication would itself constitute recklessness in law.

#### *Options which would entail disregarding the effect of voluntary intoxication*

3. Disregard the effect of voluntary intoxication in *any* offence, with the effect that the defendant could in no case rely on voluntary intoxication to negate mens rea.
4. Disregard the effect of voluntary intoxication in *any* offence (as in option 3), but subject to a statutory defence whereby it would be open to the defendant to prove, on the balance of probabilities, that he lacked the mens rea of the offence.

<sup>1</sup> See para 1.12 above.

<sup>2</sup> So that evidence of intoxication would be capable of negating the *intention* required for any offence; but that in offences in which recklessness constituted an element, 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 would be immaterial.



*Options which would entail abandoning the Majewski principle*

5. Abolish the *Majewski* approach without replacement, so that the defendant's intoxication would be taken into account with all the other relevant evidence in determining whether he had the prescribed mental element of the offence.
6. Combine the abolition of the *Majewski* approach with the introduction of a new offence of "criminal intoxication", which would be committed by a person who, when deliberately intoxicated to a substantial extent, caused the harm proscribed by one of a number of offences in a fixed list. We provisionally proposed that the maximum sentence for the new offence should be significantly lower than that for the underlying listed offence.

**The provisional recommendations made in LCCP 127**

- 5.3 We analysed and evaluated the *Majewski* approach in LCCP 127<sup>3</sup> in much greater depth than either the Butler Committee or the CLRC.<sup>4</sup> We provisionally identified the following objections to it.
  - 5.4 First, conflicting views as to the exact implications of *Majewski*, and in particular the lack of any satisfactory criteria for drawing the crucial distinction between crimes of basic and of specific intent,<sup>5</sup> meant that the law was complicated and difficult to explain.
  - 5.5 Secondly, the *Majewski* principle operates through technical rules of law which have been developed piecemeal by the courts. As a result, the policy which lies behind the rules, namely the protection of the public from those who commit violent or harmful acts when intoxicated, is being implemented in an erratic and unprincipled manner. This is particularly apparent in the way the rules are applied to defences based on a mistaken belief.<sup>6</sup>
  - 5.6 Thirdly, the *Majewski* approach gives rise to practical difficulties, because it is not clear whether evidence of the defendant's intoxication can be treated as *equivalent* to the mental state required by the offence, or whether the jury should ignore *only* the fact of the defendant's intoxication and consider whether he would have had the necessary awareness had he not been intoxicated. We asked consultees with practical experience of the operation of these rules whether, as far as they could tell, juries experienced any problems when answering this hypothetical question.

<sup>3</sup> See, in particular, LCCP 127, Part III.

<sup>4</sup> See paras 4.2-4.4 above.

<sup>5</sup> See paras 3.17-3.30 above.

<sup>6</sup> See Part VII below.

5.7 As a result, although we had *formulated* six possible options for reform,<sup>7</sup> we provisionally favoured only options 5 and 6, both of which involved the total abandonment of the *Majewski* principle. As with all our law reform work, when we published the consultation paper we looked forward with keen interest to receiving and considering the responses to our provisional views.

### **The response on consultation**

#### *Option 6: replace Majewski with a new offence*

- 5.8 The overwhelming response to option 6 (abolition of *Majewski*, combined with a proposed new offence)<sup>8</sup> was such that, in our view, option 6 should be abandoned.
- 5.9 This response can be divided into two categories. The first group comprised those who straightforwardly opposed the new offence. This group included the judges of the Queen's Bench Division<sup>9</sup> and of the Birmingham Crown Court, the Law Society, and the Legal Committee appointed by the Chief Metropolitan Magistrate, all of whom opposed the abolition of the *Majewski* approach; it also included the Criminal Bar Association, supported by the Bar Council and JUSTICE, who favoured such abolition.
- 5.10 The practical and, in our view, cogent reasons given by those who opposed the new offence were as follows. First, since it would be perceived by defendants (however unrealistically) as a chance to be convicted of a less serious offence, it would engender both more trials and, in cases where there is a trial anyway, the raising of more issues than occurs at present. This would remain true even if, contrary to our provisional proposal,<sup>10</sup> the new offence were to carry the same maximum punishment as the underlying listed offence.
- 5.11 Secondly, since it was an essential ingredient of the offence, which the prosecution would have to prove, that the defendant's awareness, understanding or control was "substantially impaired" through the use of an intoxicant, this would open the door to expert evidence and add to the length of trials.
- 5.12 Thirdly, the requirement of substantial impairment would require the police to devote more time to enquiries into the defendant's movements and his intake of intoxicants prior to the offence.
- 5.13 Fourthly, the prosecution would not know in advance whether it should include the new offence as an alternative offence on the indictment. As a result, the essential

<sup>7</sup> See para 5.2 above.

<sup>8</sup> See para 5.2 above.

<sup>9</sup> Who were almost unanimous in their opposition to the new offence, although significantly divided on the question whether the *Majewski* approach should be abolished or retained.

<sup>10</sup> See para 5.2 above.

features of the case would not be before the jury at the outset, and difficulties could arise in the course of the trial over the question whether and when to add a separate count.

- 5.14 The second category of respondents consisted of those who broadly supported the new offence, but subject to a range of qualifications that, in our view, would largely defeat its purpose.
- 5.15 The Crown Prosecution Service (the “CPS”) is a good example of this category. It suggested that, to avoid criminal liability for accidents, there should be a causal link between the defendant’s intoxicated state and the harm that he commits. Thus, for example, if an intoxicated defendant raised his hand to hail a taxi, and in doing so struck a passer-by, the jury would have to consider whether he hailed the taxi in that manner *because* he was drunk, or whether he would still have done so had he been sober, so that his striking the other person should properly be described as “accidental”.
- 5.16 This was contrary to the approach which we took in LCCP 127,<sup>11</sup> where we considered that a requirement of this type would involve formidable problems of proof and render the new offence very hard to prosecute. Our view is reinforced by the recent case of *Cullen*,<sup>12</sup> in which the Court of Appeal stated that the concept of causing harm “by accident” had no part to play in the *Majewski* approach:

[T]he logical outcome of the principles enunciated in *Majewski* is that, whether or not an act done in a condition of self-induced intoxication ... was accidental, is irrelevant ... .

[T]he first issue for the jury was whether [the defendant] was responsible, *accidentally or otherwise*, for the fire.<sup>13</sup>

This reasoning would apply equally to the new offence.

- 5.17 The CPS also suggested that the maximum punishment for the new offence should not be less than that prescribed for the underlying listed offence. This represents a fundamental difference of approach. In LCCP 127 we took the view that to take up this stance would be objectionable in principle, because the defendant should be

<sup>11</sup> Paras 6.67-6.69.

<sup>12</sup> [1993] Crim LR 936.

<sup>13</sup> Emphasis added.

regarded as less blameworthy for becoming intoxicated than for intentionally or recklessly committing a defined criminal act when sober.<sup>14</sup>

5.18 The consultation process, through which we are able to take account of the views of many interested and well-informed people on the provisional proposals we make, is central to our law reform work. In the present instance, consultation has persuaded us that the new offence would, in practice, be likely to lead to more contested cases and to longer and more difficult trials. In any event we are convinced that it would not be possible to reach any consensus of opinion as to the form the new offence should take. For these reasons, we do not recommend the creation of a new offence of criminal intoxication.

*Option 5: abolish the Majewski principle without replacement*

5.19 Since options 5 and 6 were presented in LCCP 127 as our (alternative) provisional proposals, it might seem rational that the rejection of option 6 should lead to the acceptance of option 5.

5.20 We think it significant that on consultation many respondents concerned with the practical operation of the *Majewski* rule—namely the Bar and a significant minority of the Queen’s Bench Division judges—expressed support for option 5, the abolition of the *Majewski* principle without replacement. Indeed, none of the Queen’s Bench Division judges doubted that the provisional conclusions in LCCP 127 were “academically sound”: there was, they explained,

no dissent among the judges that, *if all other considerations were equal*, abolishing the rule in *Majewski* would be desirable whether it was achieved as suggested in option 5 ... without the creation of a new offence to protect the public, or, as proposed in option 6, with the offence of criminal intoxication.<sup>15</sup>

5.21 The Criminal Bar Association Working Party was unequivocal in its support for option 5:

We think that the *Majewski* approach should be abandoned and should not be replaced ... . The number of cases where a defendant claims that he was so intoxicated that he had no intent is very rare indeed ... .

<sup>14</sup> Although the basis of the intoxication offence is that the defendant was at fault in becoming intoxicated, this fault is of a general and less obviously culpable nature than the fault—the intentional or reckless commission of a defined criminal act—that founds liability for the listed offence. It would not, therefore, be right to put these two cases on a level in terms of punishment: see LCCP 127, paras 6.43-6.44.

<sup>15</sup> Emphasis added.

5.22 We were, however, impressed by the practical considerations urged upon us by, in particular, the majority of the judges of the Queen's Bench Division. They expressed concern about the effect of

even one high profile case where there was an acquittal because the alleged offender was too drunk to form the required intent. The majority believe that such an acquittal would be viewed by the public as another example of the law, and inevitably the judges who apply that law, being out of touch with public opinion and public perception of fault. There can be little doubt that in such circumstances the media would side with the outraged victim, and the harm done in the present climate to public confidence in the system by but a handful of such cases cannot be ignored.

5.23 Professor Sir John Smith QC (who supported option 5 "in principle") also pointed out that "the real reason for punishing [the defendant, by applying *Majewski*,] is the outrage that would quite reasonably be felt if serious injury caused to an innocent person by a drunk were to go unpunished".

5.24 This consideration may be perceived as applying with even greater force to intoxication caused by an unlawful and dangerous drug, the possession of which, unlike that of alcohol, is not socially acceptable and constitutes an offence. One graphic example of such a case was *Lipman*,<sup>16</sup> in which the defendant killed the victim by cramming a sheet into her mouth and striking her while on an LSD "trip", believing that he was being attacked by snakes in the centre of the earth. He was convicted of manslaughter.

5.25 A working party of the Society of Public Teachers of Law, the majority of whom supported option 5, nonetheless conceded that the acquittal of

the likes of *Lipman*<sup>17</sup> ... by a strict application of traditional mens rea would bring the law into disrespect. In *Majewski*<sup>18</sup> Lord Edmund-Davies said the public would surely have a sense of "outrage" if a *Lipman* were to walk free. A good point and one which does not admit of an easy answer.

5.26 In *Majewski* Lord Salmon had put this point forcefully:

It would, in my view, be disastrous if the law were changed to allow men who did what *Lipman* did to go free. It would shock the public, it

<sup>16</sup> [1970] 1 QB 152.

<sup>17</sup> See para 5.24 above.

<sup>18</sup> [1977] AC 443.

would rightly bring the law into contempt and it would certainly increase one of the really serious menaces facing society today. This is too great a price to pay for bringing solace to those who believe that, come what may, strict logic should always prevail.<sup>19</sup>

5.27 If the *Majewski* approach were to be abolished, moreover, there is a risk that defendants might easily and readily concoct the excuse that they did not have the mens rea for the offence charged because they were intoxicated, particularly as a result of taking perception-altering or hallucinogenic drugs. Such an allegation might be difficult for the prosecution to refute, and would almost certainly call for expert evidence.<sup>20</sup>

5.28 It was, perhaps, for reasons such as these that in Australia provisions in the Model Criminal Code,<sup>21</sup> which would have abolished the *Majewski* approach without replacement, proved unacceptable. Instead, the Standing Committee of Attorneys-General instructed the drafting committee to prepare a codified version of *Majewski* for inclusion in their Criminal Code Bill.<sup>22</sup>

<sup>19</sup> [1977] AC 443, 484F-G.

<sup>20</sup> In *O'Connor* (1980) 54 ALJR 349, 355, Barwick CJ endorsed the remarks of Starke J that "over nearly forty years' experience in [Victoria] I have found juries to be very slow to accept a defence based on intoxication. I do not share the fear held by many in England that if intoxication is accepted as a defence as far as general intent is concerned the floodgates will open and hordes of guilty men will descend on the community". He did however refer to the need for careful directions on the expert evidence which was likely to be adduced in a case where intoxication was relied upon. Disputed expert evidence is in our experience particularly likely to lead to uncertainty on the part of the jury and to lead to an acquittal.

<sup>21</sup> *Model Criminal Code: General Principles of Criminal Responsibility* (Final report, December 1992).

<sup>22</sup> Division 8 of the Schedule to the Criminal Code Bill 1994 provides, in part:

8.1 For the purposes of this Division, intoxication is self-induced unless it came about:

- (a) involuntarily; or
- (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

8.2(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

*Note: A fault element of intention with respect to a circumstance or with respect to a consequence is not a fault element of basic intent.*

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

5.29 Significantly, it also became clear from our consultation that many of our worries about the difficulties flowing from the operation of *Majewski* were not well-founded. Thus a “very clear majority” of Queen’s Bench judges thought that *Majewski* “presents surprisingly few problems on a day to day basis”. The Council of Circuit Judges, the Law Society and others were satisfied or had “no practical objection to leaving the law as it is”. For all these reasons, we decided in the end to reject option 5.

*Options 3 and 4: disregard the effect of voluntary intoxication*

5.30 Option 3 was to disregard the effect of voluntary intoxication in *any* offence, with the effect that the defendant could in no case rely on voluntary intoxication to negative mens rea. In LCCP 127 we did not favour this option, because, in our opinion, this approach could be thought draconian in a society which tolerates the consumption of alcohol. Moreover, the hypothetical question required by the *Majewski* approach could produce unforeseen and intolerable consequences if applied to all offences. For example, it is the essence of the offence of burglary (in those cases where no crime is actually committed in the premises entered) that the accused entered *with the intention* of stealing, or committing some other prohibited act. If he in fact had no such intention, his conduct cannot, in our view, properly be characterised as burglary—even if the necessary intention might otherwise have been inferred from his conduct.

5.31 Option 4 was, similarly, to disregard the effect of voluntary intoxication in any offence, but subject to a statutory defence whereby it would be open to the defendant to prove, on the balance of probabilities, that he lacked the mental element of the offence. In LCCP 127 we identified several objections to this option. The proposed statutory defence would mean that in some cases involving offences of basic intent the law would be more favourable to the accused than the present law, and that where the defence was established a person who had caused harm when intoxicated would walk free. Conversely, this option would mean, for example, that a defendant charged with murder who relied on the proposed defence to negative any intent to kill would be convicted if the jury, though doubtful whether he had that intent, were not *satisfied* that he lacked it. The outcome in any given case would thus be based not on any ground of policy but on the ability of the defendant to discharge the burden of proof placed upon him.

(5) A person may be regarded as having considered whether or not facts existed if:

- (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
- (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

5.32 We have never favoured either of these two options, and there was no significant evidence of support for either of them on consultation.<sup>23</sup> For these reasons, we do not recommend either of them.

*Option 1: do nothing*

5.33 On consultation, there was considerable judicial support for option 1—“do nothing”. Nevertheless, we do not consider “doing nothing” to be a practical option.

5.34 By way of introduction, it is our long-term objective to produce a comprehensive criminal code. In paragraph 1.31 above we set out the reasons why the codification of English criminal law is so urgently needed. It would therefore be inappropriate to allow areas of the common law to co-exist with a modern criminal code which was accessible, comprehensible and consistent in form, if this can possibly be avoided. This is particularly important when the common law rules in question are, in some important respects, obscure and uncertain, as is the case with the law of intoxication.<sup>24</sup> In the following paragraphs we identify some of the aspects of this law which we consider to be particularly unsatisfactory.

5.35 First, the present law on intoxication is difficult to state with any certainty. This is demonstrated, in particular, by the lack of any satisfactory criteria for drawing the distinction between crimes of basic and specific intent, on which much of the present law turns.<sup>25</sup>

5.36 Although most of the more important and commonly occurring offences have now been classified as offences of either specific or basic intent,<sup>26</sup> there is no agreed criterion for classifying offences in this way. This may cause uncertainty and lead to time being wasted on legal arguments in front of the trial judge (together with unnecessary appeals) when new offences are created by legislation, or when offences have so far escaped judicial consideration at appellate level, since trial courts have received no guidance as to how to categorise them.

<sup>23</sup> The Association of Chief Police Officers favoured option 3, because they considered that the discretion to prosecute would ensure that trivial offenders were not brought to court. The majority of the Law Society’s Criminal Law Committee’s Working Party also supported this option, but only if the mandatory life sentence for murder were abolished and only if option 3 were restricted to a fixed list of offences of violence and sexual offences.

<sup>24</sup> It is a fairly common ground of appeal in cases involving offences of specific intent that the judge has misdirected the jury by asking them to decide whether the defendant was *capable* of forming the necessary intent, rather than whether he did in fact form it: eg *Sheehan and Moore* (1975) 60 Cr App R 308; *Garlick* (1980) 72 Cr App R 291; *Horton*, *Archbold News* 27 March 1992; *Cole* [1993] Grim LR 300; *Armstrong*, 11 March 1993, Criminal Appeal Office transcript No. 91/4205/Y2.

<sup>25</sup> See paras 1.35, 3.17-3.30 above.

<sup>26</sup> See paras 3.28-3.29 above.



- 5.37 A good example is the new offence of causing danger to road-users, created by section 6 of the Road Traffic Act 1991.<sup>27</sup> This offence can only be committed “intentionally”, not recklessly, and thus on one view it cannot be a crime of basic intent; but it contains no element of *purpose* of the kind that, on another view, is required for it to be a crime of specific intent.<sup>28</sup> There is no obvious way in which a trial judge can resolve this dilemma with any degree of certainty that he has got the answer right.<sup>29</sup>
- 5.38 Secondly, the classification of all crimes as offences of either basic or specific intent may be an over-simplification in the context of some of the more complex crimes. It has been suggested<sup>30</sup> that the correct approach may, rather, be to consider whether a particular *allegation* is one of “specific” intent, and to apply the *Majewski* approach, not according to the legal definition of the offence with which the defendant is charged, but according to the state of mind that has to be proved against him in respect of the particular allegation.
- 5.39 Thus, for example, in an offence of wounding with intent to resist arrest, contrary to section 18 of the Offences against the Person Act 1861,

as far as wounding goes, s[ection] 18 is an offence of basic intent. But the intent to resist lawful apprehension seems a clear case of specific intent.<sup>31</sup>

Similarly, in those cases of indecent assault in which, following *Court*,<sup>32</sup> the prosecution has to prove an indecent purpose on the defendant’s part, the assault

<sup>27</sup> Introducing a new section, 22A, into the Road Traffic Act 1988, which provides:

A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause—  
(a) causes anything to be on or over a road, or  
(b) interferes with a motor vehicle, trailer or cycle, or  
(c) interferes (directly or indirectly) with traffic equipment,  
in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.

Under subs (2) the term “dangerous” refers to the danger of personal injury or of serious damage to property; and circumstances within the defendant’s knowledge may be taken into account in determining what would be obvious to a reasonable person. The maximum sentence of imprisonment following conviction on indictment (the offence is triable either way) is 7 years: 1991 Act, s 26; Sch 2, para 13.

<sup>28</sup> See paras 3.17-3.26 above.

<sup>29</sup> For our proposals to avoid this problem, see paras 6.11, 6.17, 6.19 and 6.34 below.

<sup>30</sup> J C Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 222-223.

<sup>31</sup> *Ibid.*

<sup>32</sup> [1989] AC 28.

would appear to be a matter of basic intent but the indecent purpose a matter of specific intent.<sup>33</sup>

- 5.40 Thirdly, it is not entirely clear at present what is meant by “involuntary intoxication”, which can be taken into account in determining whether the defendant acted with the required mens rea. For example, we are not aware of any direct authority on the question whether, and in what circumstances, intoxication would be regarded as voluntary if it resulted from the defendant being *compelled* (by a threat of violence, for instance) to take an intoxicant.<sup>34</sup>
- 5.41 Similarly, it is not clear to what extent a defendant who consumes an intoxicant for medicinal purposes is to be regarded as being voluntarily intoxicated.<sup>35</sup>
- 5.42 Fifthly, the present rule which disapplies the *Majewski* approach when a defendant has consumed drugs of a soporific or sedative character is unsatisfactory.<sup>36</sup> There is no fixed list of drugs to which this rule applies. From the few authorities, it appears that the courts must themselves decide, apparently without the benefit of medical evidence, which drugs are or are not “dangerous”. Thus in one case<sup>37</sup> valium was held to be a non-dangerous drug. The Law Society, however, told us on consultation that, according to a medical expert on drugs<sup>38</sup> whom the Society had consulted when preparing its comments, “the most problematic group of drugs are the benzo-diazepines [including valium] because, although they are taken clinically to increase sedation and relaxation, they can also increase aggression”.<sup>39</sup>
- 5.43 Sixthly, the precise question that the jury need to address when determining a case involving the *Majewski* principle is also uncertain.<sup>40</sup> Thus on one view the practical effect of *Majewski* is that

<sup>33</sup> *C* (1992) 156 JP 649, 654F; [1992] Crim LR 642 (commentary by Professor J C Smith). It should however be noted that in *C* the Court of Appeal, which did not have the benefit of the argument here referred to, stated unequivocally, though obiter, that “what was the law prior to the decision in *Court* remains the law and indecent assault remains an *offence* of basic intent with the consequence that ... the self-induced voluntary intoxication does not amount to a defence” (emphasis added).

<sup>34</sup> See paras 8.34-8.35 below.

<sup>35</sup> See paras 8.21-8.30 below.

<sup>36</sup> See paras 3.34-3.36 above.

<sup>37</sup> *Hardie* [1985] 1 WLR 64: see para 3.35 above.

<sup>38</sup> Dr Patrick Toseland, Charing Cross and Westminster Hospital.

<sup>39</sup> See *Webb* (unreported) *Archbold News*, 29 April 1994, where the defendant, having taken two valium tablets on prescription, attacked a neighbour; there was medical evidence that valium can cause aggression. Our recommendations in connection with these rules are set out in paras 8.21-8.30 below.

<sup>40</sup> See generally LCCP 127, para 3.17.

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 or 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 to be relevant.<sup>41</sup>

5.44 By contrast, Professor Glanville Williams believes<sup>42</sup> that *Majewski* requires the jury to ignore *only* intoxication, and to have regard to all the evidence *except* that of intoxication in deciding whether the defendant formed the mens rea of the offence.<sup>43</sup>

5.45 Finally, for reasons which we explain in detail in Part VII, we consider that the way in which the present law deals with a mistaken belief brought about by intoxication, when this belief is relied upon by way of a defence (such as self-defence), is, in some cases at least, inconsistent with the way in which a mistaken belief is treated when it negatives a mental element of the offence itself; and that it is not even clear to which defences this inconsistency relates.

5.46 For all these reasons, we have rejected option 1. In reaching that conclusion we agree with Professor Sir John Smith, who in his response to our consultation paper cogently disposed of the argument that the present law should be left to operate on the ground that it “works”: he is

totally unconvinced by the argument ... that the present law “works”. Of course it works. How could it not do so? The judge cannot tell the jury the law is unworkable so you can go home. He does the best he can. He may (and I am sure he sometimes does) have to ask the jury to answer impossible questions, but I have yet to hear of a jury which informed the judge that the question he has put to them is nonsense and that it is not possible to answer it. Presumably they put the direction aside and apply their common sense. So the law inevitably “works”. This says nothing whatever about whether it produces a just result or the right result in law—whatever that may be.

<sup>41</sup> J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 223.

<sup>42</sup> *Textbook of Criminal Law* (2nd ed 1983) pp 474-475.

<sup>43</sup> As we said in LCCP 127, para 3.19, we believe that this latter view is the better one. Our proposal to remove this uncertainty forms our Recommendation 5: see para 6.34 below.

## Conclusion

- 5.47 We were impressed on consultation by the amount of support for the present law expressed by those who are involved in its practical operation.<sup>44</sup> The response of the judges of the Queen's Bench Division is detailed and vigorously expressed. It is firmly based on practical considerations: the judges concede that the present law is difficult to state in terms that academic commentators find acceptable, but, they continue, "against that has to be set the fact that in its practical application ..., it is the view of the very clear majority of judges that it presents surprisingly few problems on a day to day basis".
- 5.48 For all these reasons **we recommend that the present law of intoxication should be codified, with a few significant amendments (Recommendation 1)**. Our policy, therefore, is to adopt option 2 of those advanced in LCCP 127.
- 5.49 We have suggested three different ways in which the law might be codified.<sup>45</sup> In the following parts of the report we consider in some detail how our codification of the law should be formulated. We begin by identifying which, if any, of these three possibilities we propose to adopt.

<sup>44</sup> For example, the Police Federation of England and Wales, the Legal Committee appointed by the Chief Metropolitan Magistrate, the majority of the judges of the Queen's Bench Division and the Birmingham judges, the majority of the judicial officers in the Office of the Judge Advocate General, the Council of Circuit Judges and the Law Society.

<sup>45</sup> LCCP 127, paras 4.8-4.35; para 5.2 above.

## PART VI CODIFYING THE PRESENT LAW

- 6.1 In this part we examine how the *Majewski* doctrine should be codified, first in relation to mental states such as intention and recklessness, and second in relation to involuntary conduct or “automatism”. This is followed, in Part VII, by consideration of how the rule should apply to intoxicated mistakes relied upon by way of defence; and in Part VIII, by a discussion of how “voluntary intoxication” (which alone is affected by the *Majewski* principle) should be defined.

### **Option 2(i)**

- 6.2 In LCCP 127 we suggested three different approaches to the possible codification of the *Majewski* doctrine: options 2(i), 2(ii) and 2(iii). Option 2(i), however, consisted of codifying the existing law without amendment; and we do not regard this as a practical possibility, for two reasons. In the first place, in various respects to which we have already referred,<sup>1</sup> it is far from clear what the existing law is. In order to codify such an ill-defined rule we must of necessity attempt to identify its underlying principles and to base our proposals on them. To achieve this objective in the confidence that our proposals would not alter the law in any respect would be possible only if those principles were much clearer than they are.
- 6.3 Secondly, in so far as it is clear what the present law is, it is in some respects irrational and inconsistent—for example in the distinction between “dangerous” and “non-dangerous” drugs,<sup>2</sup> and that between intoxicated mistakes relied upon as affording a defence at common law on the one hand and as affording a defence created by statute on the other.<sup>3</sup> To preserve such inconsistencies would undermine one of the main objectives of the codification process. We therefore reject option 2(i).

### **The scope of the *Majewski* principle**

- 6.4 Before considering the choice between the other two versions of option 2, we must draw attention to an advantage over the present law which they both share. The most problematic aspect of the *Majewski* rule is the distinction it draws between crimes of basic and of specific intent. In paragraphs 3.17-3.30 above we outlined three different theories which have been put forward to explain this distinction, none of which is uniformly consistent with the present law. And in paragraphs 5.35-5.37 above we explained how the lack of any clear rationalisation of the distinction can

<sup>1</sup> See paras 5.35-5.45 above.

<sup>2</sup> See paras 3.34-3.36 and 5.42 above.

<sup>3</sup> See paras 3.39-3.46 above, and Part VII below.

cause difficulties where an offence has not already been judicially categorised as being one of specific or basic intent.<sup>4</sup>

- 6.5 The CLRC in its Fourteenth Report on Offences against the Person<sup>5</sup> also found this distinction to be problematic:

Another weighty objection [to the *Majewski* principle] is that it is not always clear what crimes are crimes of “basic” and “specific” intent. ... It is this latter defect, as we see it, that is most in need of attention and that our proposals seek to repair.

The solution to this problem adopted by the CLRC<sup>6</sup> was based on the provision in section 2.08(2) of the American Model Penal Code.<sup>7</sup> This is to the effect that evidence of intoxication should be capable of negating the *intention* required for any offence; but that in offences in which *recklessness*<sup>8</sup> constituted an element it should be no defence that the defendant, owing to voluntary intoxication, failed to appreciate a risk which he would have appreciated had he been sober.

- 6.6 We too have concluded that the best way of codifying the present law, whilst avoiding the problems inherent in the present distinction between offences of specific and of basic intent, is to confine the *Majewski* principle, broadly speaking,<sup>9</sup> to offences for which proof of recklessness (or awareness of risk) is sufficient.<sup>10</sup> Our Recommendations 2-6 below would have this effect.
- 6.7 This policy *may* represent the present law, although it is difficult to state this with any certainty.<sup>11</sup> It is consistent with the rationalisations of the *Majewski* approach suggested by the House of Lords in *Majewski* itself and in *Kingston*,<sup>12</sup> and dealt with in greater detail at paragraphs 3.12-3.15 above. Be that as it may, it has the

<sup>4</sup> See paras 3.28-3.29 above for such judicial categorisation as has taken place.

<sup>5</sup> (1980) Cmnd 7844, para 258: see Appendix C below.

<sup>6</sup> By a majority: Professors J C Smith and Glanville Williams supported the proposal of a separate offence. See Appendix C below.

<sup>7</sup> See para 3.22 above.

<sup>8</sup> See paras 2.9-2.17 above.

<sup>9</sup> Technically our recommendation is that the *Majewski* principle should apply to *allegations* of recklessness, or other awareness of risk, rather than to *offences* for which those states of mind are sufficient: see para 6.8 below. The distinction is of little practical significance.

<sup>10</sup> To the extent that the *Majewski* principle precludes reliance on intoxicated automatism or mistake, it must a fortiori extend also to offences of “strict liability”, which do not require proof of any mental element at all but only proof of voluntary conduct: see paras 6.38-6.49 and Part VII below.

<sup>11</sup> See paras 3.17-3.30 above.

<sup>12</sup> [1994] 3 WLR 519.

advantages of simplicity and clarity, both matters of great importance in any system of criminal law.<sup>13</sup> Finally, this change in the law will have a negligible practical effect in relation to crimes already judicially categorised as being of basic or specific intent, since most crimes designated as being of basic intent are capable of reckless commission, and most crimes of specific intent can only be committed intentionally.<sup>14</sup>

- 6.8 There is, however, a slight difference between the technique we employ and that adopted by the CLRC and the Model Penal Code. Instead of a rule applying to *offences* of which awareness is an element, we propose a rule that would operate in relation to *allegations* of certain kinds of mental element. The distinction is significant only because English law<sup>15</sup> recognises many offences for which two or more different mental elements will suffice, such as intention or recklessness. If recklessness constitutes *one* element of an offence, the offence would be subject to the CLRC's version of the *Majewski* principle, even if *another* element of the offence is one of intention. The CLRC's rule would not in practice *affect* an allegation of an element of intention, even in respect of an offence involving an element of recklessness, because its effect would be merely to impute to the defendant an *appreciation of risk* which he did not in fact have. Nevertheless, we think it preferable in the interests of clarity to formulate our version of the *Majewski* principle in such a way as to make it clear that it applies to *allegations* of certain mental elements and not others.

*Allegations of intention or purpose*

- 6.9 In particular, we emphasise that the principle we recommend would have no effect where the *only* allegation made (usually because it is the only allegation which will suffice) is one of *intention* or *purpose*. For example, the new offence of causing danger to road-users<sup>16</sup> requires proof that the defendant acted *intentionally*. The fact that he was intoxicated would not in itself assist the prosecution in proving that his act was intentional, but would be one of the factors to be taken into account in determining whether it was. This is an example of an offence which, under the present law, is hard to classify with any certainty as one of specific or of basic intent. Our proposals would remove this uncertainty.
- 6.10 Our recommendation refers to purpose as well as intention because the two concepts are distinct. Clause 1(a) of the Criminal Law Bill annexed to Law Com

<sup>13</sup> See para 1.31 above.

<sup>14</sup> The practical effects of our recommendations are outlined in more detail in Part IX below.

<sup>15</sup> Unlike, eg, the New York Penal Law: see LCCP 127, para 4.24.

<sup>16</sup> Road Traffic Act 1988, s 22A, introduced by Road Traffic Act 1991, s 6: see para 5.37, n 27 above.

No 218<sup>17</sup> provides that a person acts “intentionally” with respect to a result not only when it is his purpose to cause it, but also when he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.<sup>18</sup> If the *Majewski* principle has no application to allegations of intention, a fortiori it can have no application to an allegation of purpose.

6.11 **We recommend that where the prosecution alleges any intention or purpose, evidence of intoxication should be taken into account in determining whether that allegation has been proved (Recommendation 2).**

6.12 The application of this principle to any particular offence would of course depend whether the definition of that offence, properly understood, requires the prosecution to allege and prove an element of intention or purpose. At least until we achieve our objective of codifying the whole of the criminal law in consistent and clearly defined terminology,<sup>19</sup> courts will on occasion be required to pronounce on whether a particular offence does impose any such requirement.<sup>20</sup> Believing, as we do, that such allegations should in principle have to be proved without the help of the *Majewski* rule, we think it is right that the courts should decide whether, on the true construction of an offence, any such allegation is being made.

*Allegations of knowledge or belief*

6.13 It is not entirely clear whether an offence which requires proof of knowledge or belief would at present be classified as one of basic or specific intent. Handling stolen goods is such an offence, since the defendant must be proved to have known or believed that the goods in question were stolen,<sup>21</sup> and it appears to be an offence of specific intent,<sup>22</sup> but this may be because it also requires proof of dishonesty.<sup>23</sup>

6.14 An example of an offence which requires proof of knowledge or belief, but not of dishonesty, is that of delivering counterfeit notes and coins. Section 15(2) of the Forgery and Counterfeiting Act 1981 provides:

<sup>17</sup> See para 2.3 above.

<sup>18</sup> This definition appears also in cl 1(5) of the draft Bill annexed to this report: see Appendix A below.

<sup>19</sup> See para 1.31 above.

<sup>20</sup> For example, it might need to be decided whether Mr Stephen White is right in arguing (“Taking the Joy Out of Joy-Riding: The Mental Element of Taking a Conveyance Without Authority” [1980] Crim LR 609) that the words “for his own or another’s use” in s 12(1) of the Theft Act 1968 imply an element of purpose.

<sup>21</sup> Theft Act 1968, s 22(1).

<sup>22</sup> *Durante* [1972] 1 WLR 1612.

<sup>23</sup> See paras 6.18-6.19 below.



It is an offence for a person to deliver to another, without lawful authority or excuse, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin.

We are not aware of any authority on the liability for this offence of a person who delivers a counterfeit note or coin which, were he not voluntarily intoxicated, he would know to be a counterfeit.

6.15 We believe, however, that such an offence would almost certainly be classified as one of specific intent, so that the defendant would not be guilty of the offence unless he were proved to have *actually* known or believed the fact in question. We think that this would be right in principle, because there is a great deal of difference between an allegation that the defendant was *aware of a risk* that something might be the case, or that he was *reckless* as to that possibility, and an allegation that he *knew or believed* it to be the case. The latter requires proof of a state of mind bordering on certainty.<sup>24</sup>

6.16 Moreover it will be remembered that most, and probably all, offences requiring proof of *intention* appear to be offences of specific intent.<sup>25</sup> We have already referred to clause 1(a) of the Criminal Law Bill annexed to Law Com No 218,<sup>26</sup> which provides that a person acts “intentionally” with respect to a result not only when it is his purpose to cause it, but also when he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result; and even under the present law this latter state of mind is sufficient to justify a jury in inferring that the defendant intended the consequence in question.<sup>27</sup> If knowledge is sometimes equivalent to intention, it would seem to follow that an allegation of knowledge should not be subject to the *Majewski* principle.

6.17 **We recommend that where the prosecution alleges any knowledge or belief, evidence of intoxication should be taken into account in determining whether that allegation has been proved (Recommendation 3).**<sup>28</sup>

<sup>24</sup> *Hall* (1985) 81 Cr App R 260.

<sup>25</sup> See paras 3.17-3.30 above.

<sup>26</sup> See para 2.3 above.

<sup>27</sup> *Nedrick* [1986] 1 WLR 1025.

<sup>28</sup> This recommendation would create a technical difficulty if enacted in combination with our definition of the expression “recklessly” in clause 1(b) of the Criminal Law Bill annexed to Law Com No 218, which requires not only that the defendant be *aware* of the risk in question but that it be “unreasonable, having regard to the circumstances known to him, to take that risk”. In the light of this definition it might be argued that an allegation of recklessness necessarily includes an allegation that the defendant *knew* at least some of the relevant circumstances, and that this latter allegation could not be proved if at the material time he were so intoxicated as to know nothing at all. Such an argument, if successful, would drive a coach and horses through the *Majewski* approach. When we come to consolidate the Criminal Law Bill and the Criminal Law (Intoxication) Bill

*Allegations of fraud or dishonesty*

- 6.18 Offences of dishonesty appear to be regarded as offences of specific intent, so that the hypothetical question required by the *Majewski* approach does not at present apply to them. An example is theft,<sup>29</sup> which one would expect to be an offence of specific intent because, apart from the element of dishonesty, it requires proof of an *intention* permanently to deprive the property's owner of it.<sup>30</sup> The offence of handling stolen goods,<sup>31</sup> on the other hand, requires no such intention; but it is apparently assumed to be an offence of specific intent.<sup>32</sup> It is not clear whether this is because it requires proof of knowledge or belief that the goods in question are stolen<sup>33</sup> or because it requires proof of dishonesty. We are not aware of an offence of dishonesty which is an offence of basic intent.<sup>34</sup>
- 6.19 Dishonesty is a complex concept, requiring proof that the defendant's conduct would be regarded as dishonest by ordinary people *and* that he knew they would so regard it.<sup>35</sup> The former requirement is purely objective, and there is therefore no room for any rule affecting allegations as to the defendant's state of mind. Even where the latter requirement is in issue it would seem that the *Majewski* rule ought not to apply, since the allegation is one of *knowledge* rather than awareness of risk.<sup>36</sup> The same reasoning must apply to allegations of fraud, which by definition include an allegation of dishonesty.<sup>37</sup> **We recommend that where the prosecution alleges fraud or dishonesty, evidence of intoxication should be taken into account in determining whether that allegation has been proved (Recommendation 4).**

annexed to the present report, we therefore propose to include a provision which will obviate the difficulty.

<sup>29</sup> *Ruse v Read* [1949] 1 KB 377; *Majewski* [1977] AC 443, 482, *per* Lord Simon.

<sup>30</sup> Theft Act 1968, s 1(1).

<sup>31</sup> Theft Act 1968, s 22(1).

<sup>32</sup> *Durante* [1972] 1 WLR 1612.

<sup>33</sup> See paras 6.13-6.17 above.

<sup>34</sup> The offence of taking a conveyance is an offence of basic intent (*MacPherson* [1973] RTR 157, *Gannon* (1987) 87 Cr App R 254); but, though an offence under the Theft Act 1968, it does not require proof of dishonesty. Presumably the offence of removing articles from places open to the public, contrary to s 11 of the Theft Act 1968, is also an offence of basic intent, since it requires neither dishonesty nor an intention permanently to deprive.

<sup>35</sup> *Ghosh* [1982] QB 1053.

<sup>36</sup> See paras 6.13-6.17 above.

<sup>37</sup> *Landy* [1981] 1 WLR 355.

6.20 The effect of our Recommendations 2 to 4 would be that the prosecution could not rely on our codified version of the *Majewski* principle in support of any allegation of intention, purpose, knowledge, belief, fraud or dishonesty. It follows that the principle would be of no assistance in establishing liability for any offence of which one of those mental states is an essential element. It would therefore be confined to offences for which proof of some lesser mental element will suffice;<sup>38</sup> and, after excluding those referred to above, the only kind of mental element remaining would appear to be that of *awareness of risk*—of which the most important form is recklessness.

6.21 Leaving option 2(i) aside,<sup>39</sup> both the other approaches to codification of the *Majewski* principle which we put forward in LCCP 127 would have the effect of imposing liability for an offence which normally requires awareness of a risk on a defendant who was not in fact aware of the risk in question, on the ground that he was voluntarily intoxicated. We now turn to consider which of these two approaches we should adopt.

#### **Formulating a rule for allegations of awareness**

6.22 Under option 2(ii), which broadly corresponds to the proposals of the CLRC and to the American Model Penal Code,<sup>40</sup> a voluntarily intoxicated defendant would be treated as having been aware, at the material time, of anything of which he would then have been aware had he not been intoxicated. Option 2(iii) is a simplified version of 2(ii): under this option a state of voluntary intoxication would *itself* constitute recklessness in law.

#### *Option 2(iii): voluntary intoxication a complete alternative to mens rea*

6.23 We consider these alternatives in reverse order. Under option 2(iii) the prosecution, instead of having to prove that the defendant had actually been aware of the risk, could simply lead, or elicit in cross-examination, evidence that he had taken drink or drugs to such an extent as to impair his capacity to foresee the consequences of his acts.<sup>41</sup>

6.24 This approach would reflect the policy reasons on which, according to some judicial statements, *Majewski* is founded. For example, Lord Elwyn-Jones LC said in *Majewski*, of a man who becomes voluntarily intoxicated, so as to “cast off the

<sup>38</sup> And, in so far as it is relevant (viz in connection with intoxicated automatism and intoxicated mistake relied upon by way of defence), to offences requiring proof of no mental element at all: see paras 6.38-6.49 and Part VII below.

<sup>39</sup> See paras 6.2-6.3 above.

<sup>40</sup> See para 6.5 above.

<sup>41</sup> It is not clear to what extent this now occurs in practice. It seems inconsistent with Lord Salmon’s statement in *Majewski* [1977] AC 443, 481F, that the issue was whether the defendant could rely on voluntary intoxication *as a defence*.

restraints of reason and conscience”:

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.<sup>42</sup>

6.25 Similarly, Lord Simon of Glaisdale said:

... there is nothing unreasonable or illogical in the law holding that a mind rendered self-inducedly insensible (short of M’Naghten 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 as to whether they ensue).<sup>43</sup>

6.26 There are, however, powerful objections to this approach. In the first place, its application would automatically result in the conviction of an intoxicated defendant even if he was unaware, for *any* reason, of the possible consequences of his acts. Such a situation would in our view be likely to arise frequently. We believe that such a rule would be unduly harsh.

6.27 There is, moreover, a practical difficulty in formulating a provision to this effect—namely, that of defining the *degree* of intoxication that would trigger off such a rule. It would, for example, seem inappropriate that a defendant charged with the reckless commission of an offence, who denied having been aware of the relevant risk, should be convicted because he had drunk one glass of beer. It would therefore be necessary to restrict the rule to cases of *serious* or *substantial* intoxication; and this would not only involve an unacceptable degree of uncertainty but would severely reduce the supposed practical advantage of the rule, which is that once the defendant is shown to have been intoxicated there would be no need to enquire further into his mental state.

*Option 2(ii): a hypothetical test*

6.28 Turning now to option 2(ii), codification along these lines would provide, in effect, that, for the purpose of an allegation that he was at the material time aware of a particular risk, a voluntarily intoxicated defendant should be treated as having been aware of anything *of which he would have been aware had he not been intoxicated*.<sup>44</sup>

<sup>42</sup> [1977] AC 443, 474H-475A.

<sup>43</sup> At p 479G-H.

<sup>44</sup> The test would not be whether a hypothetical reasonable and sober person would have been aware of the risk, but whether the defendant himself, if sober, would have been so aware.

- 6.29 By contrast with option 2(iii), this would enable the defendant to rely on factors other than intoxication (such as illness or fatigue) which had impaired his faculties. For example, if he committed the actus reus of the offence when his awareness was diminished by a moderate amount of alcohol, this rule would not prevent him from contending that, though mildly intoxicated, he would still have been aware of the risk in question had he not also been ill: the jury would be directed to disregard his lack of awareness *only* to the extent that it was caused by the intoxication rather than the illness. This approach has the merit of ensuring that the defendant would not be penalised in so far as his condition was caused by matters other than the intoxication.
- 6.30 A powerful argument in support of option 2(ii) is that it is more likely than option 2(iii) to represent the present law,<sup>45</sup> and that in general a codification of the *Majewski* principle ought not to operate more unfavourably against defendants than does the present law.
- 6.31 In LCCP 127<sup>46</sup> we took the provisional view that the present law was defective because it required juries to answer a hypothetical question, namely: would the defendant have formed the mens rea of the offence had he not been intoxicated? We suggested that this approach was artificial and difficult for a jury to apply.
- 6.32 However, we were persuaded by our consultation<sup>47</sup> that, so far as can be known, juries have no difficulty with this hypothetical question. For example, the judges of the Queen's Bench Division told us:

There is one sense in which the exercise, far from being more difficult, is easier for a jury. They see the defendant sober, and can assess his likely awareness in such a condition. They do not see the defendant drunk, and, having regard to the varying effects of drink or drugs on individuals, it could be argued that to expect them to assess the defendant's likely awareness in a state in which they never see him is in itself an impossible task.

<sup>45</sup> See LCCP 127, para 3.19.

<sup>46</sup> Paras 3.19-3.20.

<sup>47</sup> The Institute of Legal Executives favoured option 6, but considered that "option 2(ii) ... could be an appropriate way forward"; Miss Gráinne de Búrca believed that any problem inherent in *Majewski* could be "resolved by a clarification in accordance with a proposal such as that of the CLRC"; and Professor Sir John Smith said "if *Majewski* is to be retained, this is one, and I think, the best, of the ways of resolving the uncertainties of the rule". The Police Federation would find either of these two versions of option 2 acceptable.

6.33 Furthermore, we now take the view that the question involved in option 2(ii), despite its hypothetical nature, is the question that in principle the jury *ought* to address. As Professor Sir John Smith wrote in his response:

I continue to think that the hypothetical question provides the right test. Why should this defendant, who lacked the foresight or awareness required by the mens rea of the offence, be convicted of anything?  
Answer: because he would have been aware if he had not been drunk.

Thus, on facts such as those in *Lipman*,<sup>48</sup> in which the defendant killed the victim by cramming a sheet into her mouth and striking her while he was on an LSD “trip” and believed he was being attacked by snakes in the centre of the earth, the jury would have no difficulty in deciding that, had he not been intoxicated, he would have been aware that his actions might be dangerous.

6.34 We have therefore concluded that option 2(ii) should be adopted. **We recommend that, where the prosecution alleges any mental element of the offence charged other than intention, purpose, knowledge, belief, fraud or dishonesty, in determining whether the allegation has been proved a defendant who was voluntarily intoxicated at the material time should be treated as having then been aware of anything of which he would then have been aware but for his intoxication (Recommendation 5).**

*Caldwell recklessness*

6.35 Recklessness in the ordinary, “subjective”, sense involves an element of awareness of risk, and to an allegation of that element our Recommendation 5 would clearly apply. As we have seen,<sup>49</sup> however, for certain offences<sup>50</sup> (known as offences of *Caldwell* recklessness) proof of “recklessness” in a looser, more “objective” sense will suffice: it is sufficient to prove that the risk in question was obvious and that the defendant gave no thought to the possibility of its existence. Whether he gave no thought to the possibility because he was intoxicated or for some other reason is legally immaterial.

6.36 If, on a charge of an offence of *Caldwell* recklessness, the prosecution were to put its case on the basis that the defendant was *actually* aware of the risk (in other words that he was *subjectively* reckless), our Recommendation 5 would apply; but in most cases it would make no practical difference, because he would still be liable even if he were *not* aware of the risk—*provided* that he gave no thought to the possibility.

<sup>48</sup> [1970] 1 QB 152.

<sup>49</sup> Paras 2.14-2.16 above.

<sup>50</sup> Primarily those under the Criminal Damage Act 1971.

6.37 In the case of the “lacuna”,<sup>51</sup> however, where the defendant *does* give thought to the possibility but, because of voluntary intoxication, mistakenly concludes that the risk either does not exist or is so small that (if he were right) it would in fact be reasonable for him to take it, he would not be *Caldwell* reckless without the assistance of the *Majewski* principle; but the effect of the formulation of that principle that we propose in Recommendation 5 would be that he is treated as having actually been aware of the risk. The rule is capable of affecting this case because the allegation of “recklessness” includes, if only by way of alternative, an allegation of *subjective* recklessness.<sup>52</sup> If the requirements of the rule are satisfied then the defendant is regarded as having been subjectively reckless, which is sufficient (though not necessary) for liability.

### **Automatism**

6.38 In paragraph 2.18 above we observed that it is in general a prerequisite of criminal conduct that it should be *voluntary*, or willed; if this requirement is not satisfied the defendant escapes liability on the ground of automatism. An exception to this general rule is the case where a person acts in a state of automatism caused solely by voluntary intoxication.<sup>53</sup> Our proposal retains this common law principle. **We recommend that a person who was at the material time in a state of automatism caused by voluntary intoxication should not escape liability on the ground of automatism alone; but that Recommendations 2-5 above should apply to such a person as appropriate (Recommendation 6).**

6.39 It follows that if the offence in question requires proof of intention, purpose, knowledge, belief, fraud or dishonesty, a person who acts in a state of automatism caused by voluntary intoxication will still escape liability—not on the ground of automatism as such, but because he will not have formed the necessary mens rea. If the offence is one for which awareness of risk is sufficient mens rea, he will not escape liability on the ground of the automatism alone, but it will remain to be determined whether, had he not been intoxicated, he would have been not only conscious of what he was doing but also aware of the risk in question. And if the offence is one of strict liability, for which not even awareness of risk is required, he will have no defence: the only defence that would have been open to him had he not been intoxicated, namely that of automatism, is precluded by the fact that the automatism was caused by voluntary intoxication.

<sup>51</sup> See para 2.15 above.

<sup>52</sup> The allegation is therefore an allegation of a “mental element” of the offence within the meaning of cl 1(1) of the draft Bill annexed to this report: see Appendix A below.

<sup>53</sup> See para 2.20 above for the provisions of the Draft Code in this respect.

*Automatism caused only partly by voluntary intoxication*

6.40 Two further matters call for consideration in this context. The first arises where automatism is caused partly by voluntary intoxication and partly by another element (other than “disease of the mind”).<sup>54</sup>

6.41 The present law relating to this situation is not clear. In *Stripp*,<sup>55</sup> where the defendant claimed to have acted in a state of automatism brought about by concussion sustained in a fall while he was drunk, Ormrod LJ said, giving the judgment of the court:

In the course of dealing with the situation where there were two possible causes for this behaviour, concussion on the one hand and drink on the other, which might have been operating together or one after the other, the learned judge, in our judgment, went wrong in his direction to the jury. He in effect directed the jury that if they thought that the concussion resulted from a blow on the head which had arisen as a consequence of intoxication, the appellant could not take advantage of the fact that his behaviour was not fully conscious because of the concussion.

That in our view was not a right direction, because it is clear, on the authorities, that once a proper foundation for such a defence has been laid, the burden, which is always on the prosecution, to prove that the acts were voluntary, becomes an active burden and it is for the prosecution to satisfy the jury at the end of the day that the actions were voluntary in the sense that they were fully conscious. *If it was a question of two causes operating, we venture to think that the prosecution would not be able to discharge the burden of proof.*<sup>56</sup>

6.42 This passage appears to imply that the *Majewski* rule would not apply unless the automatism was *wholly* attributable to the intoxication. However, the whole passage is obiter: Ormrod LJ had already made it clear that, since the defendant had not discharged the evidential burden of raising the issue, the issue of automatism should not have been left to the jury anyway. It was therefore immaterial whether the jury were misdirected on it.

6.43 A leading textbook suggests that the *Majewski* principle ought to apply in this situation too.

<sup>54</sup> See paras 6.46-6.49 below.

<sup>55</sup> (1979) 69 Cr App R 318.

<sup>56</sup> At p 323 (emphasis added).



Intoxication is no defence to a charge of a crime not requiring specific intent because this is thought necessary for the protection of the public. If the public needs protection against one whose condition is wholly brought about by intoxication, it also needs protection against one whose similar condition is partially so brought about. D should be found guilty of the offence.<sup>57</sup>

6.44 We find this argument convincing. **We recommend that, subject to Recommendation 8 below, Recommendation 6 above (that automatism caused by voluntary intoxication should be no defence) should apply equally where the automatism is caused partly by voluntary intoxication and partly by some other factor (Recommendation 7).**

6.45 We stress that this recommendation would not involve the exclusion of the defence of automatism in every case where the defendant was voluntarily intoxicated, or even in every case where he would not have been in a state of automatism had he not become intoxicated, but only if the intoxication was a *cause* of the automatism. If the automatism was caused solely by concussion, for example, the defendant would still be able to rely on the automatism even if (as in *Stripp*)<sup>58</sup> he would not have sustained the concussion had he not been intoxicated. Although it would be true to say that the automatism would not have occurred had he not been intoxicated, it does not follow that it would be *caused* by the intoxication: it would probably be regarded as “part of the history” and not as an operative cause.

*Automatism caused partly by disease of the mind*

6.46 The second matter relates to insanity. If intoxication produces insanity, the M’Naghten Rules apply.<sup>59</sup> Insanity is not within the scope of the present exercise, and the codifying legislation is not intended to affect any part of that body of law.

6.47 There is, however, a difficulty in respect of automatism. Many cases of automatism are, and will continue to be, governed by the law relating to insanity; but it is not clear which régime is applicable to a case of automatism caused *partly* by voluntary intoxication and partly by such “disease of the mind” as would, if it were the sole cause, require a verdict of insanity. In principle such a case must be subject either to the *Majewski* doctrine or to the law of insanity. In *Burns*<sup>60</sup> the Court of Appeal appeared to assume that in such a case the defendant would be entitled to an unqualified acquittal, but it seems unlikely that this is the law. Part of our objective

<sup>57</sup> J C Smith and B Hogan, *Criminal Law* (6th ed 1988) p 191. The latest edition, the 7th (1992), refers the reader to the 6th edition.

<sup>58</sup> (1979) 69 Cr App R 318: see para 6.41 above.

<sup>59</sup> See LCCP 127, para 2.31.

<sup>60</sup> (1973) 58 Cr App R 364.

in codifying the existing law is to eliminate areas of uncertainty, and we therefore cannot recommend leaving the present position unchanged.

6.48 On the other hand we do not feel able to leave this situation to be governed by our Recommendation 7, that automatism caused partly by voluntary intoxication and partly by some other factor should be no defence. We are anxious to ensure that the codified law of intoxication does not encroach on the territory presently governed by that of insanity, which is designed to cater for both the protection of the public and the welfare of the defendant. *If* the present law is that automatism caused by a combination of intoxication and disease of the mind is to be treated as insane automatism, our Recommendation 7 would deprive the defendant in such a situation of the protection currently afforded by the law of insanity. In order to avoid this possibility we conclude that, whether or not the situation in question is at present subject to the M’Naghten rules, it should in future be so subject.

6.49 **We recommend that automatism caused partly by intoxication and partly by disease of the mind should be dealt with under the existing law of insanity (Recommendation 8).**

**“Dutch courage”**

6.50 In paragraph 3.48 above we referred to a dictum of Lord Denning to the effect that if a person brings about his own intoxication in order to steel himself to commit an offence of specific intent, he cannot escape liability on the ground that, owing to his intoxication, he lacked the necessary intention at the time of his subsequent actions. This rule, if it represents the law, runs contrary to the general rule that an intention to do an act at some time in the future is not mens rea.<sup>61</sup> However, some academic writers support Lord Denning’s principle. For example, Smith and Hogan consider this case analogous to

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?<sup>62</sup>

6.51 We agree that such a case would be analogous to that of the innocent agent. However, the situation is far-fetched in the extreme; and it is not the situation that Lord Denning had in mind. Lord Denning was concerned with the defendant who becomes intoxicated *in order to give himself courage to carry out his intention*—not in the hope that he will lose all control of his actions but will nevertheless somehow

<sup>61</sup> J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 76.

<sup>62</sup> *Op cit*, p 229; and see Glanville Williams, *Textbook of Criminal Law* (2nd ed 1983) p 468.

happen to do the very thing that he lacks the courage to do while conscious. If his purpose is to give himself “Dutch courage” rather than to turn himself into an automaton, we do not think it right that he should be regarded, *at the time when he causes the consequence he desires*, as intending that consequence. He cannot fairly be deemed to have had, at that later time, the intention that he in fact had when he became intoxicated, because things have not worked out as he planned. We think this situation is more closely analogous to another case put by Smith and Hogan:

If D, having resolved to murder his wife at midnight, drops off to sleep and, while still asleep, strangles her at midnight, it is thought that he is not guilty of murder ...<sup>63</sup>

6.52 We have considered whether to propose a special rule for the case of the person who becomes intoxicated in order to turn himself into an automaton, hoping that while in that state he will commit the actus reus of an offence requiring intention; but we have concluded that such a rule would be of no practical value. In the first place it is almost inconceivable that the case envisaged could ever arise: certainly we are unaware of any such case. Even if it were to arise, it is hard to imagine how the prosecution might refute a claim that the defendant did not intend to turn himself into an automaton but only to give himself “Dutch courage”—which, for the reasons explained above, we do not think should be sufficient.

6.53 It must be emphasised that our rejection of Lord Denning’s principle would not normally entitle such a defendant to a complete acquittal: it would merely enable him to rely on his automatism as a defence to an offence requiring proof of intention, purpose, knowledge, belief, fraud or dishonesty. If he killed in such a state, for example, he would have a defence to a charge of murder but not to one of manslaughter.

#### **Section 8 of the Criminal Justice Act 1967**

6.54 As we observed in paragraph 3.16 above, it is the present law that this section applies only to questions of evidence, and that, since the rule in *Majewski* is one of substantive law, there is no conflict between the two rules. This will remain the case under the codified version of the rule which we recommend.

6.55 We now believe, moreover, that this point answers an objection to the *Majewski* principle which we raised in LCCP 127,<sup>64</sup> that the effect of the principle is to enable a defendant to be convicted of an offence although that offence requires a mental element which is not proved to have been present in his case. In our view it is more accurate to say that the principle amounts to a *relaxation* of the mental element required by certain offences. The offence of which the defendant is convicted does

<sup>63</sup> *Op cit*, p 229.

<sup>64</sup> At paras 4.27-4.30.

*not* in truth require the mental element that he does not have: it permits a conviction, by way of alternative, on proof of a *different* element (arguably not a *mental* element at all) which he *does* have. This is, in our view, no more unconstitutional than any other case where liability can be established without proof of mens rea. Whether such relaxation of the principle of mens rea is *justified*, as a matter of policy, is another matter; but we have explained why we believe that in this case it is.<sup>65</sup>

<sup>65</sup> See Part V above.

## PART VII INTOXICATED MISTAKE AS A DEFENCE

- 7.1 In this part of the report we consider how the codified rule should apply to intoxicated mistakes relied upon by way of defence. The question to be determined is this: if, at the material time, the defendant is under the misapprehension that the circumstances in which he acts are such as would have afforded him a defence, is he precluded from relying on that misapprehension by the fact that, had he not been voluntarily intoxicated, he would have realised the truth?

### Defences and definitional elements

- 7.2 It has in the past been conventional to draw a sharp distinction between the definitional elements of a crime and “defences” to it. More recently, however, it has been recognised that for many purposes they are merely two sides of the same coin, and that what is commonly referred to as a “defence” is in truth no more than the absence of a definitional element. Automatism,<sup>1</sup> for example, is frequently described as a “defence”; but strictly speaking the reason why there is no liability for acts done in a state of automatism<sup>2</sup> is that the prosecution cannot prove the *voluntary act* which is part of the definition of nearly every offence.
- 7.3 Similarly a “defence” may, on closer inspection, prove to be no more than the absence of a *mental* element which is part of the definition of the particular offence in question. This point was recognised in *DPP v Morgan*,<sup>3</sup> where the House of Lords held that a man does not commit rape by having sexual intercourse with a woman whom he believes to consent, even if she does not consent and even if there are no reasonable grounds for his belief that she does. The reason for this is that an honest (albeit unreasonable) belief in consent must logically preclude the mental element required for the offence. Lord Hailsham said:

Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a “defence” of honest belief or mistake, or of [*sic*] a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be

<sup>1</sup> See paras 2.18-2.20 above.

<sup>2</sup> Unless the automatism is caused by voluntary intoxication: see paras 6.38-6.49 above.

<sup>3</sup> [1976] AC 182.

evidence for or against the view that the belief and therefore the intent was actually held ... .<sup>4</sup>

- 7.4 In *Kimber*<sup>5</sup> the Court of Appeal applied this reasoning to the defence of consent in the offence of indecent assault:

If, as we adjudge, the prohibited act in indecent assault is the use of personal violence to a woman without her consent, then the guilty state of mind is the intent to do it without her consent. Then, as in rape at common law, the inexorable logic, to which Lord Hailsham referred in *R v Morgan*, takes over and there is no room either for a “defence” of honest belief or mistake, or of [*sic*] a “defence” of honest and reasonable belief or mistake ... .<sup>6</sup>

- 7.5 *Morgan* and *Kimber* were applied in *Williams*<sup>7</sup> in the context of the defence of self-defence to the offence of assault. The Court of Appeal held that the defence is available to a defendant who honestly believes the circumstances to be such that, if he were right, he would be using no more than reasonable force by way of self-defence—even if there are no reasonable grounds for that belief. Again it was recognised that such a belief precluded the mental element which was an essential part of the offence:

The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.<sup>8</sup>

- 7.6 *Williams* was in turn approved by the Privy Council in *Beckford*.<sup>9</sup> Lord Griffiths, giving the advice of the Judicial Committee, said:

If ... a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully.<sup>10</sup>

<sup>4</sup> [1976] AC 182, 214F-G.

<sup>5</sup> [1983] 1 WLR 1118.

<sup>6</sup> At p 1122B-C, *per* Lawton LJ, giving the judgment of the court.

<sup>7</sup> [1987] 3 All ER 411.

<sup>8</sup> At p 414b, *per* Lord Lane CJ, giving the judgment of the court.

<sup>9</sup> [1988] AC 130; see also *Blackburn v Bowering* [1994] 1 WLR 1324.

<sup>10</sup> At p 144D-E.

- 7.7 This reasoning is clearly not confined to the defences of consent and self-defence: in principle it ought to apply to a defendant who commits the *actus reus* of any offence requiring intention or subjective recklessness while under the mistaken impression that circumstances exist which, if true, would for any reason render his action lawful.<sup>11</sup> He is not guilty of the offence because the requisite intention or subjective recklessness is lacking.

#### **Allegations of awareness**

- 7.8 In the case of allegations of subjective recklessness or awareness of risk, it is clear (given our earlier recommendations) that a defendant should not be permitted to rebut such an allegation by relying on a mistake which, but for his voluntarily intoxicated state, he would not have made. If, for example, he is charged with unlawful wounding,<sup>12</sup> and in answer to the allegation of recklessness he claims that, owing to voluntary intoxication, he thought the victim was about to attack him, our codified version of the *Majewski* principle will apply: the jury will be directed to consider whether, had the defendant not been intoxicated, he would have been aware of the possibility that the victim was *not* about to attack him and that his act might therefore be unjustified.

#### **Allegations of intention and similar mental states**

- 7.9 In the case of allegations of *intention*, however, or the other allegations to which our codified version of the *Majewski* principle will not apply,<sup>13</sup> the position is less clear. As we observed in paragraphs 3.39-3.41 above, it is doubtful whether at present a defendant can *ever* escape liability on the ground of a mistaken belief in circumstances which, if true, would have amounted to a common law defence, if the mistake was due to voluntary intoxication. In *O'Grady*<sup>14</sup> and *O'Connor*<sup>15</sup> the Court of Appeal said that such a belief would be no defence even to an offence of specific intent; but it may be significant that in neither case was a conviction of an offence of specific intent upheld on this ground.
- 7.10 Before either of these cases was decided, the CLRC had proposed that the *Majewski* principle should apply to defences *only* in relation to offences in which *recklessness* constituted an element of the offence.<sup>16</sup> In the Code Report, which was published in the interval between the two cases, we declined to adopt the dictum in *O'Grady*,

<sup>11</sup> Cf cls 25-28 of the Criminal Law Bill annexed to Law Com 218: see Appendix E to this report.

<sup>12</sup> Offences against the Person Act 1861, s 20.

<sup>13</sup> See paras 6.9-6.19 above.

<sup>14</sup> (1987) 85 Cr App R 315.

<sup>15</sup> [1991] Crim LR 135.

<sup>16</sup> Fourteenth Report on Offences against the Person (1980) Cmnd 7844: see para 4.4 above and Appendix C below.

stating that

it would, we believe, be unthinkable to convict of murder a person who thought, for whatever reason, that he was acting to save his life and who would have been acting reasonably if he had been right.<sup>17</sup>

7.11 We are still of the same opinion. We believe that the rule stated in *O'Grady* and *O'Connor* cannot sensibly be reconciled with the existing rule that even voluntary intoxication can be taken into account in determining whether the defendant formed the mental element of an offence of specific intent: by analogy with the reasoning in *Morgan*, *Kimber*, *Williams* and *Beckford*, the mental element of such an offence is not just an intention to bring about a given consequence but an intention to do so *unlawfully*. If A kills B in the intoxicated belief that B is an animal, he is not guilty of murder because he does not intend to kill a human being; similarly we do not think he should be guilty of murder if he kills B in the intoxicated belief that this is the only way to prevent B from killing *him*.

7.12 **We recommend, therefore, that where a voluntarily intoxicated person holds a belief which, had he not been intoxicated, would have negated his liability for an offence, the belief should not have that effect if he would not have held it but for his intoxication and the offence does not require proof of intention, purpose, knowledge, belief, fraud or dishonesty (Recommendation 9).**

7.13 Murder, for example, requires proof of an *intention* unlawfully to kill or to cause really serious harm. If, therefore, it is proved that the defendant killed, but it appears that he may have done so in the mistaken belief, due to voluntary intoxication, that the deceased was about to attack him in such a manner as would have justified him in killing the deceased by way of self-defence, he will be guilty not of murder but of manslaughter (for which no such intention is required). He cannot, of course, be sure of escaping liability for the more serious offence simply by *claiming* to have been under such a misapprehension: as in any other case, it will be for the jury to decide whether his explanation may be true. They may be satisfied that it is not.

7.14 Our Recommendation 9 is so formulated that the crucial question is whether the offence in question *requires* proof of intention (or of one of the other mental states that we regard as comparable to intention). In this respect it is slightly different from Recommendations 2 to 5, which distinguish between different kinds of *allegation* rather than different kinds of *offence*.<sup>18</sup> This is because, whereas

<sup>17</sup> A Criminal Code for England and Wales (1989) Law Com No 177, HC 299, vol 2, para 8.42.

<sup>18</sup> See para 6.8 above.



Recommendation 5 (to which Recommendations 2 to 4 are effectively exceptions) would work by enabling the prosecution to prove the allegation that the defendant was aware of a particular risk, the “defence” of mistake need not involve the rebuttal of any particular allegation. The defendant may admit all the prosecution’s allegations but claim that his conduct was justified by his mistake. Where the prosecution alleges a mental element, it may be debatable whether, intoxication aside, the mistake would rebut that allegation or would afford a defence independently of it;<sup>19</sup> but where no mental element is alleged, and the defendant nevertheless escapes liability on the ground of his mistake, this must be because the mistake affords him a defence independent of the prosecution’s allegations, and not because those allegations are not proved.

- 7.15 For example, the defendant might claim, in answer to a charge of failing to observe a traffic sign, that he believed he was being pursued by enemies bent on murder. If the mistake were due to voluntary intoxication it would be no defence; but it would be impossible to achieve this result by means of a fiction that any particular *mental* element had been proved. Whether the defence is available must therefore depend not on what the prosecution in fact alleges, but on what the offence in question *requires* it to allege.

#### **Statutory defences**

- 7.16 As we have explained,<sup>20</sup> statutory offences are sometimes subject to one or more express defences that the defendant mistakenly believed some fact to be the case; and some of these defences, if not all, can be established by showing that the defendant held the mistaken belief in question as a result of voluntary intoxication, even where the offence is one of basic intent. Where this is the case, we believe the result to be anomalous.
- 7.17 If, for example, a person damages property belonging to another in the intoxicated belief that the property belongs to him, he appears to be guilty of recklessly damaging property belonging to another;<sup>21</sup> but if he damages property that he *knows* belongs to another, in the belief (mistaken, and attributable to voluntary intoxication) that the owner would consent, he escapes liability.<sup>22</sup> The statute provides that such a belief is a defence, and that it need not be a reasonable belief as long as it is honestly held.

<sup>19</sup> As where the prosecution alleges an intent to kill and the defendant shows that he thought it was necessary to kill in self-defence: has he rebutted an implied allegation that he intended to kill *unlawfully* (cf para 7.7 above), or does he have a defence although the allegation of intent is proved?

<sup>20</sup> See paras 3.42-3.46 above.

<sup>21</sup> Criminal Damage Act 1971, s 1(1).

<sup>22</sup> *Jaggard v Dickinson* [1981] QB 527; see para 3.43 above.

7.18 We see no justification for a distinction between defences recognised only by the common law and those recognised by statute. We think that *any* defence consisting in a mistaken belief on the part of the defendant, whether common law or statutory, should be subject to the codified *Majewski* rule. If the defendant is treated as having been aware of those things that he would have been aware of had he not been intoxicated, it must logically follow that he is treated as *not* having *believed* anything that, had he not been intoxicated, he would have been aware might not be true. **We recommend that the same rules should apply to statutory defences as to defences in general (Recommendation 10).**

### **Voluntary manslaughter**

7.19 In general this project does not affect the law of voluntary manslaughter<sup>23</sup> because in that context intoxication may raise issues other than those with which we are concerned in this report—for example, the relevance or otherwise, to a defence of provocation, of the fact that the defendant's susceptibility to provocation was exacerbated by drink. These issues cannot be considered in isolation from a more general review of the policy underlying the whole of the law of voluntary manslaughter.

7.20 There is, however, one point of contact between this project and the law of voluntary manslaughter: namely the case of a defendant who intentionally kills but, because voluntarily intoxicated, mistakenly believes the circumstances to be such that, if he were right, he would be guilty only of manslaughter (for example, on grounds of provocation). At present he is guilty only of manslaughter, just as he would have been guilty only of that offence if the circumstances had been as he believed them to be—even if there were no reasonable grounds for his belief, and even if it was due to voluntary intoxication.<sup>24</sup>

7.21 We believe that this rule is logical and fair. The effect of our Recommendation 9 is that the defendant's intention to kill would not be regarded as an intention to kill *unlawfully* if (albeit through voluntary intoxication) he believes in circumstances which, if true, would have rendered the killing lawful;<sup>25</sup> similarly, we think it right that the homicide which he intends should be regarded as the *less heinous* form of homicide if (albeit through voluntary intoxication) he believes in circumstances which, if true, would have reduced the homicide to that less heinous form. **We recommend that if a person kills in the belief that circumstances exist which, if they existed, would reduce the homicide to manslaughter, he**

<sup>23</sup> A person is guilty of voluntary manslaughter if he intended to kill or to cause really serious injury, but is not guilty of murder because he was (a) suffering from diminished responsibility; (b) provoked; or (c) a member of a suicide pact: Homicide Act 1957, ss 2, 3 and 4 respectively.

<sup>24</sup> *Letenock* (1917) 12 Cr App R 221.

<sup>25</sup> See paras 7.9-7.13 above.

**should be guilty only of manslaughter—even if the belief is attributable to voluntary intoxication (Recommendation 11).**

## PART VIII

# THE MEANING OF “VOLUNTARY INTOXICATION”

- 8.1 Our codified version of the *Majewski* rule applies only in cases of voluntary intoxication. In this part we discuss how a detailed definition of “voluntary intoxication” should be formulated. We will consider what is meant, first, by *intoxication*; and second, by *voluntary* intoxication.

### Intoxication

- 8.2 There is little direct authority on the definition of “intoxication”.<sup>1</sup> In practice the question can seldom arise: either the defendant was intoxicated, in which case the *Majewski* rules apply, or he was not, in which case it will usually be open to the jury to infer (in the absence of some other explanation) that he was aware of anything of which a sober person in his position might be expected to be aware.
- 8.3 We considered two possible definitions: first, that a person is intoxicated whenever he has taken an intoxicant; and second, that he is intoxicated if he has taken an intoxicant *and* his awareness, understanding or control is thereby impaired. There is probably no practical difference between the two: if the defendant’s faculties are *not* impaired it follows that he cannot be unaware of anything of which, had he not taken the intoxicant, he would have been aware. Nevertheless it seems to us that it would be a misuse of language to describe a person as intoxicated if, though he has taken an intoxicant, his faculties are wholly unimpaired—particularly in view of the wide definition of an “intoxicant” which we propose.<sup>2</sup> We have therefore decided to confine the term “intoxication” to cases where a person’s awareness, understanding or control is impaired.

### *A requirement of substantial impairment?*

- 8.4 The definition of “intoxication” which we proposed for the purposes of the new offence suggested as option 6 in LCCP 127 required that the impairment of the defendant’s awareness, understanding or control should be *substantial*.<sup>3</sup> Now that we have decided to reject option 6 in favour of codification of the existing law, however,

<sup>1</sup> But see para 1.1 above.

<sup>2</sup> See para 8.8 below.

<sup>3</sup> LCCP 127, paras 6.49-6.51.

no such requirement is necessary. The new offence would have been committed by anyone who, while voluntarily intoxicated, committed the actus reus of certain other offences: it would not have required that any lack of awareness on the defendant's part should be *attributable* to the intoxication. Without the requirement of substantial impairment, the offence would have been committed by someone who, after drinking one glass of beer, inadvertently caused harm in a way that he might have done even if sober.

- 8.5 Our proposed codification of the *Majewski* approach, on the other hand, fixes the defendant with notice *only* of things of which he *would* have been aware but for his intoxication; and there is therefore no need for an *additional* requirement that the intoxication be substantial. If the defendant is only slightly intoxicated, the intoxication is unlikely to prevent him from being aware of anything of which he would have been aware if sober; so the *Majewski* rule will usually make no difference. If the intoxication *does* render him unaware of things of which he would otherwise have been aware, we think the rule should apply—even if the *degree* of intoxication is slight.

#### *Intoxicants*

- 8.6 We therefore propose to define “intoxication” as the impairment of a person's awareness, understanding or control by an intoxicant. Obviously this in turn requires a definition of an “intoxicant”. However, the common law rules relating to the effect of intoxication appear to be the same whether the defendant's faculties are impaired by the effects of alcohol, drugs,<sup>4</sup> solvents or any other substance.
- 8.7 Bearing in mind that the *Majewski* rule will apply only to intoxication which is *voluntary*, which means (among other things) that when the defendant takes the substance in question he must be *aware* that it may impair his awareness, understanding or control,<sup>5</sup> we see no need for a narrow definition of what constitutes an intoxicant. In particular we do not think that a particular substance should fail to qualify as an intoxicant merely because it can only impair a person's faculties if he is peculiarly susceptible to it—whether such susceptibility is temporary or permanent, and whether it exists at the time of taking the intoxicant or (provided that it is attributable to his own conduct) at some later time.<sup>6</sup>
- 8.8 **We recommend that a person should be regarded as “intoxicated” if his awareness, understanding or control is impaired by an intoxicant; and that an “intoxicant” should be defined as meaning alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the**

<sup>4</sup> *Lipman* [1970] 1 QB 152.

<sup>5</sup> See para 8.11 below, and cl 5(1)(a) and 5(3) of the draft Bill at Appendix A below.

<sup>6</sup> See clause 4(2) of the draft Bill at Appendix A below.

capacity to impair awareness, understanding or control (Recommendation 12).

### Voluntary and involuntary intoxication

8.9 The *Majewski* rule applies only to a defendant who is *voluntarily* intoxicated. We have identified the following cases where a person's intoxication is, or at any rate ought in principle to be, regarded as involuntary:

- (a) where he was unaware, when he took the intoxicant, that it might intoxicate him;
- (b) (subject to certain conditions) where he took it for medicinal purposes;
- (c) where it was administered to him without his consent; and
- (d) where he was forced to take it under duress, or otherwise in such circumstances as would afford a defence to a criminal charge.

### *Unawareness of risk of intoxication*

8.10 Our definition of "intoxication",<sup>7</sup> taken in isolation, is wide enough to apply to a person whose faculties are impaired not by alcohol, drugs or solvents, but by a substance (such as food)<sup>8</sup> which is generally considered to be innocuous.<sup>9</sup> However, it seems that under the present law an intoxicated person is not caught by the *Majewski* doctrine unless he at least realised, when he took the substance in question, that it *might* impair his faculties.<sup>10</sup>

8.11 Thus a person who has led an extraordinarily sheltered life, and does not know that alcohol impairs awareness, understanding and control, is not voluntarily intoxicated if he takes alcohol and his faculties are thereby impaired. Nor, we believe, should he be held responsible if, though he knows that the substance in question has the capacity to impair *some* people's faculties, he is unaware that he may be one of those people. The time at which he must be aware of the possibility that he may become intoxicated should, in general, be the time at which he takes the intoxicant; but if he is intoxicated only because of something he does or omits to do *after* taking it, which makes him peculiarly susceptible to it, his intoxication should be regarded as

<sup>7</sup> See para 8.8 above.

<sup>8</sup> As in *Toner* (1991) 93 Cr App R 382. The defendant took no solid food for 41 days in the belief that it would assist him in preparing for a sponsored walk of some 1,500 miles. On the day he broke his fast he consumed a few teaspoonfuls of puréed vegetables and a little bread. Some hours later he attempted to strangle his wife, and struck his son with a hammer. According to medical evidence, the ingestion of carbohydrates could have caused hypoglycaemia.

<sup>9</sup> If the substance does in fact impair the defendant's awareness it must by definition be an "intoxicant", because it obviously has the *capacity* to impair awareness—even if the defendant is the only person in the world on whom it would have this effect. See para 8.7 above.

<sup>10</sup> Cf *Bailey* [1983] 1 WLR 760, 765; *Hardie* [1985] 1 WLR 64, 70C.

voluntary if he is aware at that later time that this may be the effect of what he does or omits to do.<sup>11</sup>

8.12 **We recommend that a person's intoxication should be regarded as involuntary if, when he took the intoxicant, he was not aware that it was or might be an intoxicant; or if he is intoxicated only because he is unusually susceptible to the intoxicant, and was not aware when he took it that he might be so susceptible (or, where he is so susceptible because of anything he did or omitted to do after taking it, if he was not aware at that time that he might become so susceptible) (Recommendation 13).**

8.13 As under the present law,<sup>12</sup> this rule would exempt from the *Majewski* doctrine a defendant who does not know that what he is consuming is an intoxicant, for example where his non-alcoholic drink is surreptitiously "laced" with alcohol or another drug. If, on the other hand, he knows that what he is consuming is an intoxicant, his resulting intoxication will not be rendered involuntary merely because the intoxicant has a more powerful effect than he expected.<sup>13</sup>

8.14 There is, however, a middle case, where the defendant knows that he is consuming an intoxicant but it is mixed with another intoxicant of whose presence he is unaware—for example, where his glass of lager has been surreptitiously laced with vodka. In LCCP 127 we suggested that, under the present law, if the defendant knows that what he ingests contains *any* intoxicant, the resulting intoxication cannot be involuntary.<sup>14</sup> However, in *Kingston* (decided after the publication of LCCP 127) the Court of Appeal suggested that

there may be a difference between a failure to appreciate what might have been appreciated, whether it is the strength of the drink, or the fact that the drinker's threshold is lowered by fatigue and so forth, and ignorance that a drink, alcoholic or not, has been deliberately and artificially laced to make it a trap for the unwary.<sup>15</sup>

8.15 We agree that such a distinction ought to be drawn, and the draft Bill annexed to this report includes a provision to the effect that the victim of the laced drink should be regarded as involuntarily intoxicated if he would not have been intoxicated but

<sup>11</sup> See cl 5(3) of the draft Bill at Appendix A below.

<sup>12</sup> *Kingston* [1994] 3 WLR 519.

<sup>13</sup> *Allen* [1988] Crim LR 698. The defendant consumed some alcoholic drink in a public house. Later, a friend gave him home-made wine, which the defendant did not realise had a high alcoholic content. His intoxicated state was held to have been voluntary.

<sup>14</sup> LCCP 127, para 6.54.

<sup>15</sup> [1994] QB 81, 88H. The House of Lords did not consider this point.

for the intoxicant of which he was unaware.<sup>16</sup> However, we concluded that the protection offered by this provision alone would be inadequate. It might well be that the defendant would still have been *intoxicated* (that is, that his awareness, understanding or control would still have been impaired)<sup>17</sup> even if his drink had not been laced; it does not follow that he ought to be held responsible for acts done in a state of intoxication far worse than would then have been the case.

8.16 Our basic *Majewski* rule requires a voluntarily intoxicated defendant to be treated as having been aware of anything of which he was not in fact aware but of which he *would* have been aware but for the intoxication. To this rule we think an exception should be made in the case of a defendant who, though *voluntarily* intoxicated (because his awareness, understanding or control would still have been impaired even if he had taken *only* the intoxicant he knew he was taking), would have been aware of the risk in question *not only* if he had not been intoxicated at all (which fact brings our basic rule into play) *but also* if he had been intoxicated *only* to the extent that he was intoxicated by the intoxicant that he knew he was taking. He is not caught by the *Majewski* rule if it was the extra, unsuspected intoxicant that made the difference.<sup>18</sup>

8.17 An example may make this clearer. A person thinks he is drinking lager. Unknown to him, his glass has been laced with vodka. He becomes intoxicated and assaults another person, causing serious injury. He would have been intoxicated (within our definition) even if he had drunk only the lager. He is therefore *voluntarily* intoxicated.

8.18 He is charged with an offence under section 20 of the Offences against the Person Act 1861, which requires proof that he either intended to cause some injury or was aware that he might do so.<sup>19</sup> Were our basic rule to be applied literally, he would be deemed to have been aware of the risk of injury if he would have been aware of it had he drunk neither the vodka nor the lager. What we propose is that, by way of qualification to that rule, he should *not* be deemed to have been aware of the risk if he would *still* have been aware of it *but for the vodka*. In other words he should not

<sup>16</sup> Cl 6(3).

<sup>17</sup> See para 8.8 above.

<sup>18</sup> In Law Com No 218 we expressed the view (at para 46.4) that “a provision to make ... explicit” the rule we now propose would be “unduly elaborate”. The provision we propose is certainly elaborate, but we do not believe that a properly directed jury would have great difficulty in grasping the essence of it. Moreover, for the reasons given in the text, we are no longer satisfied that “the right result can be reached by sensible application of the test provided by clause 35(2) [of the draft Bill annexed to Law Com No 218]: was the person intoxicated by an intoxicant which he took ... being aware that it was or might be an intoxicant?” (*ibid*).

<sup>19</sup> *Savage* [1992] 1 AC 699. We have made proposals to replace this offence: see Law Com No 218, paras 12.1-12.35.



be caught by the *Majewski* rule if his lack of awareness is attributable *only* to the fact that his drink has been laced.

8.19 Similarly we think that a person in such a position, even if voluntarily intoxicated within our definition, ought not to be precluded from relying on the defence of automatism if, had his drink not been laced, he would not have been in a state of automatism,<sup>20</sup> and that he ought not to be precluded from relying on a mistaken belief if, had his drink not been laced, he would not have held that belief.

8.20 **We therefore recommend that, where a person has taken two or more intoxicants, being aware that one of them (the “known substance”) is or may be an intoxicant but not being so aware in the case of another (the “undetected substance”),**

- (a) he should be regarded as involuntarily intoxicated if he would not have been intoxicated but for having taken the undetected substance;**
- (b) even if voluntarily intoxicated, he should not be regarded as having been aware of something if he is unaware of it by reason only of having taken the undetected substance;**
- (c) if the intoxication causes a state of automatism, the automatism should negative his liability if it would not have resulted<sup>21</sup> had he taken only the known substance; and**
- (d) if the intoxication causes him to hold a belief which, had it not been caused by intoxication, would have negated his liability, he should not be precluded from relying on that belief if he held it by reason only of having taken the undetected substance (Recommendation 14).**

*Intoxicants taken for medicinal purposes*

8.21 As we explained in paragraphs 3.34-3.36 above, under the present law the full rigour of the *Majewski* approach applies only where the defendant’s intoxication is caused by a substance categorised as “dangerous”. Some drugs, such as valium, are regarded as not being dangerous for this purpose. We regard this distinction as

<sup>20</sup> Or if he would still have been in a state of automatism but it would not have been caused by intoxication: cf cl 6(5)(b) of the draft Bill at Appendix A below. For example, the automatism might result partly from a drug with which the defendant’s drink was laced without his knowledge, and partly from concussion. Even if he would still have been in a state of automatism had his drink not been laced (because of the concussion), he would not have been in a state of automatism *caused by intoxication*. Therefore he can still rely on the automatism as a defence.

<sup>21</sup> Or, if it would still have resulted, would not have been caused by intoxication: see para 8.19, n 20 above.

unsatisfactory, for the reasons given in paragraph 5.42 above, and we do not propose to perpetuate it.

8.22 We have, however, considered how the policy which appears to underlie the distinction might be preserved; and we have concluded, on the basis of such authority as exists, that it is essentially intended to protect from the *Majewski* doctrine the defendant who takes a drug (albeit a potentially intoxicating one) for a legitimate medicinal purpose—including not just the restoration of health but also (as in the case of valium) sedative and soporific purposes. It is this policy that we have attempted to preserve.

8.23 We are satisfied, however, that this exemption should be confined to a defendant who takes the intoxicant in question *solely* for a medicinal purpose. If only a small part of the defendant's purpose is to "get high", the codified *Majewski* principle should apply. We are confident that juries will treat spurious claims that an intoxicant was taken solely for a medicinal purpose with the scepticism they deserve. The judge will also be able to withdraw the issue from the jury if, in his or her opinion, there is no evidence to ground such a claim.

8.24 Moreover we do not think it would be right to permit the defendant to invoke this exemption *merely* because he took the intoxicant solely for a medicinal purpose. We think that he should be required in addition to satisfy one of two conditions. In the first place, we think he should be able to rely on the exemption if, although he was aware when he took the intoxicant that it might *impair his awareness, understanding or control* (for example, by making him drowsy),<sup>22</sup> he was unaware that it might give rise to *aggressive or uncontrollable* behaviour on his part.<sup>23</sup> This criterion appears in the existing authorities on the point,<sup>24</sup> and we believe that in the great majority of cases it will render it unnecessary for the defendant to satisfy the second condition. Most people who take drugs for medicinal purposes do not expect the drugs to make them aggressive or uncontrollable.

8.25 Even in the unusual case where the defendant *is* aware that an intoxicant which he takes for medicinal purposes may give rise to aggressive or uncontrollable behaviour, we think he should still be able to rely on the exemption for medicinal purposes if he can satisfy a second condition: namely that he took the intoxicant on medical advice, and in accordance with any directions given to him by the person providing that advice.

<sup>22</sup> If he were not aware that it might impair his faculties in *any* respect the intoxication would not be voluntary anyway: see paras 8.10-8.12 above.

<sup>23</sup> Unless he subsequently failed to take reasonable precautions against the effect of the intoxicant, being *then* aware that such behaviour might result: see cl 5(2)(b) of the draft Bill at Appendix A below.

<sup>24</sup> *Hardie* [1985] 1 WLR 64, 70; cf *Bailey* [1983] 1 WLR 760, 765.

- 8.26 We have settled on these rules for three reasons. First, they are the closest we have been able to get to the spirit of the present law.<sup>25</sup> Secondly, we think it right that a person should have absolute immunity from the *Majewski* doctrine if he takes an intoxicant solely for a medicinal purpose, on medical advice and strictly in accordance with that advice—*whatever the effect of the intoxicant may be*. Thirdly, however, we think that as a matter of policy the public ought to be protected from individuals who knowingly (albeit for a medicinal purpose) take intoxicants which they realise may cause aggressive or uncontrollable behaviour, by requiring them to obtain, and follow, medical advice if they are to obtain the benefit of the exemption.
- 8.27 We think, moreover, that this latter requirement ought to be an absolute one. If a person fails to obtain, or to follow, medical advice in respect of an intoxicant which he knows may cause aggressive or uncontrollable behaviour, we think it should be clear that he takes the intoxicant at his own risk: he should be subject to the *Majewski* principle in all respects, *whether or not he actually does become aggressive or uncontrollable*.
- 8.28 It might appear somewhat illogical that such a person should be held responsible on the ground that he failed to obtain or to follow medical advice, when the consequences that have actually resulted from his intoxication are such that, had they been the *only* consequences he foresaw, he would have been entitled to take the intoxicant *without* medical advice. But this latter rule amounts to quite a major concession in itself: it will exclude even a defendant who knows that his awareness, understanding and control will be *seriously* impaired, provided he does not expect to become aggressive or uncontrollable. It is plainly irresponsible to take such a risk without obtaining and following medical advice; nevertheless, we do not propose that such a person's intoxication should be regarded as voluntary.
- 8.29 However, we do not accept that this concession inevitably necessitates the further concession that, if a person takes an intoxicant otherwise than on medical advice, and his faculties are (perhaps quite seriously) impaired, with potentially or actually serious consequences, he should *still* be entitled to invoke the exemption on the ground that, although he knew he might become aggressive or uncontrollable, this did not in fact happen. Under the policy we recommend, a person who takes an intoxicant which he knows may make him aggressive or uncontrollable is required to obtain, and to follow, medical advice. If he does not do so, we do not think it unreasonable to hold him responsible for the consequences, whatever they may be—even if the *risk* of the consequences that actually result would not in itself have been enough to justify holding him responsible had that been the *only* risk of which he was aware.

<sup>25</sup> See paras 3.34-3.36 above.

8.30 We recommend that a person's intoxication should be regarded as involuntary if he took the intoxicant solely for a medicinal purpose, and *either* he was not aware that taking it would or might give rise to aggressive or uncontrollable behaviour on his part *or* he took it on medical advice and in accordance with any directions given to him by the person providing the advice (Recommendation 15).

8.31 We attempted to construct a workable definition of "medical advice" for the purpose of this rule, but were confronted by apparently insuperable difficulties at every turn. We considered confining the term to advice given by registered medical practitioners; but it seemed wrong to exclude the advice of others who are authorised to prescribe drugs available only on prescription,<sup>26</sup> or of the pharmacist who may dispense such a drug. If the advice of such persons were included, however, it would be necessary to ask how far a patient is entitled to rely on the advice of a registered practitioner, and how far he can fairly be expected to supplement it with advice from other sources; and what he should do if the latter is inconsistent with the former. We have also been unable to devise a workable scheme to allow for advice given by *foreign* practitioners.

8.32 In view of these difficulties we have reluctantly concluded that the phrase "medical advice" should be left undefined, so that in case of doubt it would be a matter for the jury whether the defendant can be said to have acted on, and in accordance with, such advice. In general it is our view that such potentially grey areas ought to be properly defined, rather than being left to the discretion of the jury;<sup>27</sup> but in this instance we see no realistic alternative. Moreover we would stress that the cases in which the issue arises are likely to be very few indeed.

*Intoxicants administered without the defendant's consent*

8.33 A person's intoxication is obviously not voluntary if the intoxicant is administered to him without his consent. Clause 5(1)(c) of our draft Bill makes this clear.<sup>28</sup>

*Intoxicants taken with justification*

8.34 Although there appears to be no direct authority, a person's intoxication would presumably be regarded as involuntary under the present law if he were forced to take the intoxicant by threats of such a character as would, had he thereby been forced to commit an offence, have afforded him the defence of duress by threats<sup>29</sup>—for example, if he were ordered to drink alcohol at gunpoint. This is the

<sup>26</sup> Namely registered dentists, nurses, midwives and health visitors: Dentists Act 1984 and Medicines Act 1968, s 58(2)(a).

<sup>27</sup> Cf, for example, paras 4.9-4.12 in our recent report *Binding Over* (1994) Law Com No 222, Cm 2439.

<sup>28</sup> See Appendix A below.

<sup>29</sup> See cl 25 of the draft Bill annexed to Law Com No 218: Appendix E below.

position under the American Law Institute's Model Penal Code,<sup>30</sup> and it seems to us to be right in principle. It also seems right in principle (though the situation is admittedly somewhat far-fetched) that the same rule should apply if the circumstances in which the defendant takes the intoxicant are such as would afford him any *other* general defence, such as duress of circumstances.<sup>31</sup> Again this is the position under the Model Penal Code.<sup>32</sup>

- 8.35 **We recommend that a person's intoxication should be regarded as involuntary if he took the intoxicant in such circumstances as would, in relation to a criminal charge, afford the defence of duress by threats or any other defence recognised by law (Recommendation 16).**

*The effect of involuntary intoxication*

- 8.36 If the defendant's intoxication is involuntary, under our proposals the *Majewski* principle would not apply: the jury would be directed that they must take into account the effect of the intoxication when deciding whether the defendant in fact had any required mental element for the offence charged, even if the offence requires only awareness of risk. But if they decide that, in spite of his intoxication, he did have the necessary mental element, they should convict.<sup>33</sup> Automatism caused by involuntary intoxication would be a complete defence;<sup>34</sup> and a mistaken belief attributable to such intoxication could be relied upon by way of defence to the same extent as if it had not been attributable to intoxication at all.

*The burden of proof*

- 8.37 For a defendant to be acquitted on the basis that the *Majewski* principle does not apply because his intoxication was involuntary, this issue must be raised in the course of the trial. There are judicial statements which are in terms to the effect,<sup>35</sup> or which appear to assume,<sup>36</sup> that an evidential burden of raising the issue of involuntary intoxication lies on the defence, although the persuasive burden of proof

<sup>30</sup> Section 2.08(5)(c).

<sup>31</sup> See Law Com No 218, paras 35.1-35.12, and cl 26 of the draft Criminal Law Bill annexed thereto: Appendix E below.

<sup>32</sup> Section 2.08(5)(b): see para 3.33 above.

<sup>33</sup> See *Kingston* [1994] 3 WLR 519, 530H, *per* Lord Mustill:

... once the involuntary nature of the intoxication is added the two theories of *Majewski* fall away, and the position reverts to what it would have been if *Majewski* ... had not been decided, namely that the offence is not made out if the defendant was so intoxicated that he could not form an intent.

<sup>34</sup> Unless partly caused by disease of the mind: see paras 6.46-6.49 above, and cl 2(4) of the draft Bill at Appendix A below.

<sup>35</sup> *Kingston* [1994] QB 81, 90B (CA: reversed on a different point).

<sup>36</sup> *Bailey* [1983] 1 WLR 760, 765; *Hardie* [1985] 1 WLR 64, 69.

lies on the prosecution. This means that the issue will not be left to the jury unless there is evidence before the court capable of giving rise to it. However, once there is an evidential foundation for the claim that the intoxication was involuntary, the prosecution is required to prove beyond reasonable doubt that the accused's intoxication was voluntary. We think this rule is right in principle.<sup>37</sup>

**8.38 We recommend that a person's intoxication should be presumed not to have been involuntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that it was involuntary; but, if such evidence is adduced, it should be for the prosecution to prove that the intoxication was not involuntary (Recommendation 17).**

8.39 We have drawn attention to the fact that section 6(5) of the Public Order Act 1986 appears to impose on the defence the *persuasive* burden of proving that the defendant's intoxication was not self-induced.<sup>38</sup> We have always promoted the principle that there should be consistency within the criminal law wherever possible. We can see no reason why a different burden of proof should apply to offences of public order from that which applies generally in the case of all the other offences to which the *Majewski* principle applies. **We therefore recommend that our proposals should supersede section 6(5) and (6) of the Public Order Act 1986 (Recommendation 18).**

<sup>37</sup> The CLRC, in its Eleventh Report on Evidence (1972) Cmnd 4991, para 140, recommended that burdens on the defence should be evidential only. We deviated from this general rule in Law Com No 218, paras 33.1-33.8, where we recommended that, exceptionally, the defence should bear a persuasive burden of proving duress. We made this recommendation because, on consultation, we were told that reversing the burden of proof in this way would make the extension of the defence to murder, another of our recommendations, more practicable. However, in doing so we had no intention of undermining the important general rule that the prosecution must prove its case.

<sup>38</sup> See para 3.49 above.

## **PART IX OUR RECOMMENDATIONS, AND HOW THEY WOULD WORK**

### **Our recommendations**

- 9.1 This part of the report consists of a list of our recommendations, followed by an explanation of how the legislation we propose would in practice affect the way in which juries are directed. Our recommendations are as follows:

#### *Codification*

1. The present law of intoxication should be codified, with a few significant amendments.<sup>1</sup>

#### *Allegations of intention or purpose*

2. Where the prosecution alleges any intention or purpose, evidence of intoxication should be taken into account in determining whether that allegation has been proved.<sup>2</sup>

#### *Allegations of knowledge or belief*

3. Where the prosecution alleges any knowledge or belief, evidence of intoxication should be taken into account in determining whether that allegation has been proved.<sup>3</sup>

#### *Allegations of fraud or dishonesty*

4. Where the prosecution alleges fraud or dishonesty, evidence of intoxication should be taken into account in determining whether that allegation has been proved.<sup>4</sup>

#### *Allegations of other mental elements*

5. Where the prosecution alleges any mental element of the offence charged other than intention, purpose, knowledge, belief, fraud or dishonesty, in determining whether the allegation has been proved a defendant who was voluntarily intoxicated at the material time should be treated as having then been aware of anything of which he would then have been aware but for his intoxication.<sup>5</sup>

<sup>1</sup> See para 5.48 above.

<sup>2</sup> See para 6.11 above.

<sup>3</sup> See para 6.17 above.

<sup>4</sup> See para 6.19 above.

<sup>5</sup> See para 6.34 above.

### *Automatism*

6. A person who was at the material time in a state of automatism caused by voluntary intoxication should not escape liability on the ground of automatism alone; but Recommendations 2-5 above should apply to such a person as appropriate.<sup>6</sup>
7. Subject to Recommendation 8 below, Recommendation 6 above should apply equally where the automatism is caused partly by voluntary intoxication and partly by some other factor.<sup>7</sup>
8. Automatism caused partly by intoxication and partly by disease of the mind should be dealt with under the existing law of insanity.<sup>8</sup>

### *Intoxicated mistake as a defence*

9. Where a voluntarily intoxicated person holds a belief which, had he not been intoxicated, would have negated his liability for an offence, the belief should not have that effect if he would not have held it but for his intoxication *and* the offence does not require proof of intention, purpose, knowledge, belief, fraud or dishonesty.<sup>9</sup>
10. The same rules should apply to statutory defences as to defences in general.<sup>10</sup>
11. If a person kills in the belief that circumstances exist which, if they existed, would reduce the homicide to manslaughter, he should be guilty only of manslaughter—even if the belief is attributable to voluntary intoxication.<sup>11</sup>

### *The meaning of intoxication*

12. A person should be regarded as “intoxicated” if his awareness, understanding or control is impaired by an intoxicant; and an “intoxicant” should be defined as meaning alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the capacity to impair awareness, understanding or control.<sup>12</sup>

<sup>6</sup> See para 6.38 above.

<sup>7</sup> See para 6.44 above.

<sup>8</sup> See para 6.49 above.

<sup>9</sup> See para 7.12 above.

<sup>10</sup> See para 7.18 above.

<sup>11</sup> See para 7.21 above.

<sup>12</sup> See para 8.8 above.



*Unawareness of risk of intoxication*

13. A person's intoxication should be regarded as involuntary if, when he took the intoxicant, he was not aware that it was or might be an intoxicant; or if he is intoxicated only because he is unusually susceptible to the intoxicant, and was not aware when he took it that he might be so susceptible (or, where he is so susceptible because of anything he did or omitted to do after taking it, if he was not aware at that time that he might become so susceptible).<sup>13</sup>

*Combination of intoxicants*

14. Where a person has taken two or more intoxicants, being aware that one of them (the "known substance") is or may be an intoxicant but not being so aware in the case of another (the "undetected substance"),
- (a) he should be regarded as involuntarily intoxicated if he would not have been intoxicated but for having taken the undetected substance;
  - (b) even if voluntarily intoxicated, he should not be regarded as having been aware of something if he is unaware of it by reason only of having taken the undetected substance;
  - (c) if the intoxication causes a state of automatism, the automatism should negative his liability if it would not have resulted had he taken only the known substance; and
  - (d) if the intoxication causes him to hold a belief which, had it not been caused by intoxication, would have negated his liability, he should not be precluded from relying on that belief if he held it by reason only of having taken the undetected substance.<sup>14</sup>

*Intoxicants taken for medicinal purposes*

15. A person's intoxication should be regarded as involuntary if he took the intoxicant solely for a medicinal purpose, and *either* he was not aware that taking it would or might give rise to aggressive or uncontrollable behaviour on his part *or* he took it on medical advice and in accordance with any directions given to him by the person providing the advice.<sup>15</sup>

<sup>13</sup> See para 8.12 above.

<sup>14</sup> See para 8.20 above.

<sup>15</sup> See para 8.30 above.

*Duress and other defences*

16. A person's intoxication should be regarded as involuntary if he took the intoxicant in such circumstances as would, in relation to a criminal charge, afford the defence of duress by threats or any other defence recognised by law.<sup>16</sup>

*The burden of proof*

17. A person's intoxication should be presumed not to have been involuntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that it was involuntary; but, if such evidence is adduced, it should be for the prosecution to prove that the intoxication was not involuntary.<sup>17</sup>

18. Our proposals should supersede section 6(5) and (6) of the Public Order Act 1986.<sup>18</sup>

**How our recommendations would work in practice**

- 9.2 We end this report by giving some illustrations of the way in which the codified rules that we recommend would operate in practice. We must start by emphasising that in many respects our codification of the *Majewski* principles will make little difference to the directions which juries are already given.

*Offences requiring proof of intention*

- 9.3 In the case of many offences the prosecution must necessarily allege, and prove, that the defendant *intended* to cause a certain consequence. Examples under the present law are murder (which requires an intent to kill or to do serious injury), attempted murder (which requires an intent to kill), and causing danger to road-users (which requires an intention to cause one of several states of affairs specified in the definition of the offence).<sup>19</sup> An example which would be created if the recommendations in Law Com No 218 were implemented is the proposed offence of intentionally causing serious injury,<sup>20</sup> which would require an intention to cause serious injury.
- 9.4 If the recommendations in this report were implemented, the judge would direct the jury in such a case in essentially the same terms as he or she does at present in relation to offences categorised as offences of specific intent—namely, that while “a drunken intent is still an intent”, the jury may take the fact and extent of the

<sup>16</sup> See para 8.35 above.

<sup>17</sup> See para 8.38 above.

<sup>18</sup> See para 8.39 above.

<sup>19</sup> See para 5.37, n 27 above.

<sup>20</sup> Cl 2(1) of the Criminal Law Bill annexed to Law Com No 218: Appendix E below.

defendant's intoxication into account in determining whether he *in fact* acted with the requisite intention. The prosecution may in practice be assisted by the fact that the defendant was intoxicated, in so far as the jury may be satisfied that the defendant's powers of self-restraint were reduced by his intoxication and that he formed an intention which he would not have formed when sober; but the intoxication does not relieve the prosecution of the need to prove that he did in fact form that intention.

- 9.5 It is difficult to be completely sure what effect our proposals would have in these cases, since we cannot be sure whether offences which can only be committed intentionally are *always* offences of specific intent.<sup>21</sup> However, on the assumption that such a correlation exists, our proposals would in practice make no difference at all in this kind of case. If, however, this assumption is unfounded, we believe that our proposals are more rational than the present position.

*Offences capable of reckless commission*

- 9.6 In many other cases, the prosecution need only prove subjective recklessness (which involves awareness of risk) in order to secure a conviction. In these cases the judge would direct the jury in much the same terms as he would adopt at present in the case of an offence of basic intent.
- 9.7 An example under our present law is unlawful wounding, contrary to section 20 of the Offences against the Person Act 1861. The section provides, so far as material:

Whosoever shall ... maliciously wound or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence] ... .

The word "maliciously" is a legal term of art meaning that the defendant must be proved either to have intended to cause a person some physical harm, or to have foreseen that his act might do so.<sup>22</sup>

- 9.8 If at a trial for unlawful wounding it appears that, wholly or partly through voluntary intoxication, the defendant may have been unaware of the risk of causing any physical harm, the judge would direct the jury that, in considering whether the defendant was so aware, they should treat him as having been aware of anything of which he would have been aware but for his intoxication.

<sup>21</sup> See paras 3.17-3.30 above.

<sup>22</sup> *Savage* [1992] 1 AC 699. The defendant need not foresee the risk of a wound or serious physical injury. We have recommended the repeal and replacement of this section in Law Com No 218: see in particular paras 12.1-12.35.

- 9.9 Again it is difficult to assess the effect of this proposal, since it is not clear under our present law whether offences which are capable of reckless commission are *always* offences of basic intent.<sup>23</sup> However, on the assumption that such a correlation exists, our proposals would have no effect at all on the direction properly given to the jury in cases where the offence charged can be committed recklessly. Again, if this assumption is unfounded, we believe that our proposals would represent an improvement on the present position.
- 9.10 If it appears that the defendant may, through intoxication, have been unaware of a risk of which he would have been aware had he not been intoxicated, but that the intoxication may have been involuntary, the jury would be directed not to regard him as having been aware of anything of which he was not in fact aware unless they are satisfied beyond reasonable doubt that the intoxication was voluntary. This too appears to be the present position.
- 9.11 A corresponding offence which would be created if our report Law Com No 218 were implemented is that of recklessly causing serious injury,<sup>24</sup> which would require proof that the defendant was aware of a risk that serious injury might result and that it was unreasonable for him to take that risk.<sup>25</sup> The jury would be directed that, if they were satisfied that the defendant's intoxication was voluntary, they should regard him as having been aware of the risk of serious injury if he would have been aware of it had he not been intoxicated.

*Offences requiring proof of intention or recklessness*

- 9.12 Where a conviction for a particular offence can be secured by proving that the defendant was *reckless* whether he caused a particular consequence, it is a fortiori sufficient to prove that he *intended* to cause it. Under the present law such an offence would probably be classified as one of basic intent, because it *can* be committed recklessly.
- 9.13 Our approach concentrates on what the prosecution *actually* alleges rather than what it would be *sufficient* to allege. If the prosecution were to "nail its colours to the mast" and put its case on the basis of intention rather than recklessness, the jury would be directed to take the intoxication into account in deciding whether the alleged intention actually existed; if the prosecution alleged only recklessness, the jury would be directed to regard the defendant as having been aware of anything of which he would have been aware if sober.
- 9.14 In practice, the prosecution usually alleges both intention and recklessness as alternatives. In that case the question of intention is somewhat academic, but the

<sup>23</sup> See paras 3.17-3.30 above.

<sup>24</sup> Cl 3(1) of the draft Criminal Law Bill annexed to Law Com No 218.

<sup>25</sup> Cl 1(b) of the draft Criminal Law Bill annexed to Law Com No 218.

judge is nevertheless required to direct the jury on both issues. Our proposals would involve no change in this practice.

*Offences requiring proof of intention and recklessness*

- 9.15 Some offences require proof of an intention to cause a consequence *and* recklessness whether another consequence results (or a circumstance exists). One such offence is that of maliciously wounding, or causing grievous bodily harm, with intent to resist or prevent the lawful apprehension or detainer of any person.<sup>26</sup> In respect of the injury, recklessness is sufficient;<sup>27</sup> but in respect of the resisting of arrest, intention is required. Under our proposals the jury would have to consider whether the defendant did in fact intend to resist arrest;<sup>28</sup> but, if he did so intend, there would be no need for the prosecution to prove that he was in fact aware of the risk of injury, if he *would* have been aware of it but for his voluntary intoxication.
- 9.16 Another illustration concerns the offence of attempt, which necessarily involves an element of intention:<sup>29</sup> to be guilty of attempt, the defendant must intend to achieve what is missing from the full offence.<sup>30</sup> In determining whether the defendant did intend to do so, the jury would, as now, be able to take his intoxication into account. In so far as recklessness as to *circumstances* suffices for the completed offence, however, it suffices also for the attempt. In *Khan*,<sup>31</sup> for example, the defendant attempted to have sexual intercourse, being reckless whether the woman consented. He was held guilty of attempted rape. Had he been voluntarily intoxicated, he could not have relied on his intoxicated state in support of a denial of recklessness as to her lack of consent.
- 9.17 Again, it is difficult to tell whether this approach would involve any difference in practice, since it is not entirely clear how such "hybrid" offences are treated under the present law. A leading textbook<sup>32</sup> suggests that the approach we have

<sup>26</sup> Offences against the Person Act 1861, s 18.

<sup>27</sup> See para 9.7 above.

<sup>28</sup> As under the present law: *Davies* [1991] Crim LR 469.

<sup>29</sup> Section 1(1) of the Criminal Attempts Act 1981 provides:

If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

<sup>30</sup> *A-G's Reference (No 3 of 1992)* [1994] 1 WLR 409.

<sup>31</sup> [1990] 1 WLR 813. More recently, in *A-G's Reference (No 3 of 1992)* [1994] 1 WLR 409, the Court of Appeal held that, on a charge of attempted arson in the aggravated form contemplated by s 1(2) of the Criminal Damage Act 1971, it was sufficient to prove (i) that the defendant intended to cause damage by fire and (ii) that he was reckless as to whether life would be thereby endangered.

<sup>32</sup> J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 223.

recommended may represent the present state of the law; but, despite the logic of this approach, we are unaware of any case in which an offence has been held to be an offence of specific intent in one respect, but of basic intent in another.

*Offences of Caldwell recklessness*

- 9.18 There remain the two offences of criminal damage (one “simple”, the other “aggravated”).<sup>33</sup> In either offence the damage may be committed in a state of *Caldwell* recklessness<sup>34</sup> (as well as intentionally), as may the further element of endangering life which distinguishes the aggravated offence.<sup>35</sup>
- 9.19 In most cases of criminal damage done in a state of intoxication, there is no need for the *Majewski* principle. If the defendant gives no thought to the possibility of a risk of damage, when that risk is in fact obvious, he is “reckless” in the *Caldwell* sense; and this is so whether his failure to consider the possibility is due to intoxication or to some other factor. In this situation the scheme we recommend will not affect the present law.
- 9.20 There may, however, be some cases of criminal damage in which, if it is *not* due to voluntary intoxication, the defendant’s actual mental state may be relevant. In particular it seems that if, having considered whether there is a risk, he decides that there is none (or only a negligible risk), he is not reckless even in the *Caldwell* sense. In this case<sup>36</sup> the *Majewski* principle (and hence the codified version of it that we now recommend) will apply if the defendant’s mistake is due to voluntary intoxication: he is treated as having been reckless if, had he not been intoxicated, he would have been aware of the risk.
- 9.21 Similarly (and as under the present law), a defendant charged with the offence of destroying or damaging property with intent to endanger life will be able to claim that, because voluntarily intoxicated, he had no such intention; but if it is alleged that he was merely *reckless* whether life was endangered, he will be regarded as having been aware of that risk if he would have been aware of it had he not been intoxicated.

<sup>33</sup> Criminal Damage Act 1971, s 1(1) and (2).

<sup>34</sup> See paras 2.14–2.16 above.

<sup>35</sup> However, in relation to this latter element, intention and recklessness cannot be charged as alternatives in a single count: if the prosecution rely on intention and recklessness in the alternative, there should be two counts, one of which charges intent to endanger life and the other recklessness as to endangering life: *Hoof* (1980) 72 Cr App R 126; *Hardie* [1985] 1 WLR 64.

<sup>36</sup> Sometimes described as the “lacuna”; see para 2.15 above.

*“Non-dangerous” drugs*

9.22 At present a person who becomes intoxicated as a result of taking a drug regarded as “non-dangerous”, such as valium, is not held responsible under the *Majewski* doctrine if he had no reason to expect the consequences that in fact result.<sup>37</sup> Under our proposals the jury would be directed to apply the codified *Majewski* rule if satisfied *either*

- (a) that he did not take the drug solely for medicinal purposes, *or*
- (b) that
  - (i) he was aware that taking it might give rise to aggressive or uncontrollable conduct, *and*
  - (ii) he did not take it on medical advice, and in accordance with any directions given to him by the person providing any such advice.

*Negligence and strict liability*

9.23 Our Recommendation 5, which would assist the prosecution in establishing that a voluntarily intoxicated defendant was aware of a risk, would have no bearing on offences which do not require proof of such awareness. Some such offences require *negligence* on the part of the defendant, such as driving without due care and attention;<sup>38</sup> for most of them (known as offences of strict liability) even negligence is not required. The relevant act is prohibited irrespective of fault. In neither case does the prosecution need to prove that the defendant was in fact aware of the risk in question; therefore it has no need of the assistance of the *Majewski* rule in proving that fact.

9.24 Leaving aside offences of which intoxication is actually an *element*, such as the excess alcohol offences<sup>39</sup> (which we do not consider in this report), intoxication is relevant to such offences only when it causes either automatism or a mistaken belief which, if it were not caused by intoxication, would afford a defence. In these cases the element of voluntary intoxication precludes the defendant from relying on what would otherwise be a defence, provided that awareness of risk is sufficient mens rea for the offence in question. A fortiori, he cannot rely on it where awareness of risk is not required.

9.25 If, therefore, charged with an offence of strict liability, the defendant claims that he was in a state of automatism—in other words, that he had no control over his actions—our proposals would require the jury to reject that defence if satisfied that,

<sup>37</sup> See paras 3.34-3.36 above.

<sup>38</sup> Road Traffic Act 1988, s 3.

<sup>39</sup> Road Traffic Act 1988, s 5.

if he *was* in a state of automatism, it was wholly or partly caused by voluntary intoxication.<sup>40</sup> Similarly he would not be entitled to rely on a mistaken belief as a defence to such a charge if, had he not been voluntarily intoxicated, he would not have held that belief. Again we believe that these proposals represent the existing law.

*Summary*

- 9.26 In practical terms, therefore, the changes we propose would be minimal. They would, however, have the great merit of making the law consistent, coherent and much easier to apply, in cases where at present it is uncertain.

(Signed) HENRY BROOKE, *Chairman*  
ANDREW BURROWS  
DIANA FABER  
CHARLES HARPUM  
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*  
28 November 1994

<sup>40</sup> See paras 6.38-6.45 above.





# APPENDIX A

## Draft Criminal Law (Intoxication) Bill

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### ARRANGEMENT OF CLAUSES

Clause	
1.	Effect of intoxication: general.
2.	Effect of intoxication: automatism.
3.	Effect of intoxicated belief as regards negating liability.
4.	Meaning of expressions relating to intoxication.
5.	Involuntary intoxication: general.
6.	Special rules where person is not fully aware of intoxicants consumed by him.
7.	Consequential provisions.
8.	Short title, commencement and extent.

DRAFT

OF A

# B I L L

INTITULED

An Act to make provision with respect to the effect of intoxication on criminal liability. A.D. 1994.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 *Effect of intoxication on criminal liability*

1.—(1) This section applies where it is alleged that any mental element of an offence was present at any material time in the case of a person who was then intoxicated.

Effect of intoxication: general.

(2) If the person's intoxication was voluntary and the allegation is in substance an allegation that at the material time he—

- (a) acted intentionally with respect to a particular result,
- (b) had a particular purpose in acting in a particular way,
- (c) had any particular knowledge or belief, or
- (d) acted fraudulently or dishonestly,

15 evidence of his intoxication may be taken into account in determining whether the allegation has been proved.

(3) If the person's intoxication was voluntary and the allegation is not one to which subsection (2) applies, then, in determining whether the allegation has been proved, he shall be treated as having been aware at the material time of anything of which he would then have been aware but for his intoxication.

(4) If the person's intoxication was involuntary, then (whether the allegation is or is not one to which subsection (2) applies) evidence of his intoxication may be taken into account in determining whether the allegation has been proved.

(5) For the purposes of this section a person acts "intentionally" with respect to a result when—

- (a) it is his purpose to cause it, or

# EXPLANATORY NOTES

## Clause 1

This clause deals with the effect of the defendant's intoxication on an allegation by the prosecution of any mental element of the offence charged.

Subsections (2) and (3) provide for the effect on such an allegation of the defendant's *voluntary* intoxication. Subsection (2) provides that, in the case of an allegation of any of the kinds of mental element there specified, voluntary intoxication may be taken into account in determining whether the allegation has been proved. The reasons for selecting the kinds of mental element specified are explained in paragraphs 6.9-6.19 of the Report.

Subsection (3) provides that, in determining whether an allegation of any mental element *other* than those specified in subsection (2) (such as recklessness) has been proved, a defendant who was *voluntarily* intoxicated at the material time is to be treated as if he had then been aware of anything of which he would have been aware but for his intoxication. This rule is central to the *Majewski* approach. The reasons for formulating it in this way are explained in paragraphs 6.22-6.34 of the Report.

Subsection (4) provides that *involuntary* intoxication may be taken into account in determining whether an allegation of *any* mental element has been proved. The effect of involuntary intoxication is explained at paragraph 8.36 of the Report.

One of the mental elements specified in subsection (2) is that of *intention* with respect to a particular result. Subsection (5) defines intention for this purpose in terms identical to those of clause 1(a) of the Criminal Law Bill annexed to Law Com No 218: the definition is explained in paragraphs 7.1-7.14 of that Report. Subsection (5) also provides in effect that references in subsection (2) to allegations that a person *acted* in a particular state of mind include allegations that he *omitted to act* in that state of mind.

- (b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result;

and this section applies in relation to omissions as it applies in relation to acts. 5

Effect of  
intoxication:  
automatism.

2.—(1) This section applies with respect to the liability for an offence of a person who was at any material time in a state of automatism wholly or partly caused by intoxication.

(2) If the person's intoxication was voluntary, then (subject to subsection (4))— 10

(a) the fact that he was at the material time in a state of automatism shall operate to rebut any relevant allegation to which section 1(2) applies; but

(b) that fact shall otherwise be disregarded and, in the case of any other relevant allegation, section 1(3) shall accordingly apply in relation to him as a person who was at that time in a state of voluntary intoxication; 15

and for this purpose "relevant allegation" means an allegation falling within section 1(1) and relating to that time.

(3) If the person's intoxication was involuntary, the fact that he was at the material time in a state of automatism shall (subject to subsection (4)) operate to negative liability for the offence. 20

(4) If any such state of automatism was caused partly by such disease of the mind as would, if it had been wholly so caused, require a verdict of not guilty by reason of insanity, then— 25

(a) it shall be treated as if it had been wholly so caused; and

(b) subsection (2) or, as the case may be, subsection (3) above shall not apply.

Effect of  
intoxicated belief  
as regards  
negating  
liability.

3.—(1) Where at any material time a person—

(a) was intoxicated, but 30

(b) held a particular belief which, had he not been intoxicated, would have operated to negative liability for an offence,

then, unless subsection (2) applies, that belief shall so operate whether the intoxication was voluntary or involuntary.

(2) That belief shall not so operate if— 35

(a) the person's intoxication was voluntary; and

(b) but for his intoxication he would not have held that belief; and

(c) liability for the offence can be established without proof of any allegation to which section 1(2) applies.

(3) Where at any material time a person charged with murder— 40

(a) was intoxicated, but

(b) held a particular belief which, had he not been intoxicated, would have operated to reduce the homicide to manslaughter,

that belief shall so operate whether the intoxication was voluntary or involuntary. 45

# EXPLANATORY NOTES

## Clause 2

This clause deals with the effect on the defence of automatism of the fact that the defendant's state of automatism was wholly or partly caused by intoxication. The reasons for applying these provisions to automatism only *partly* so caused are explained in paragraphs 6.40-6.45 of the Report.

If the intoxication was *voluntary*, subsection (2) precludes the defendant from relying on the defence of automatism, and clause 1(3) continues to apply. The only effect of the automatism is that it is impossible for any of the mental elements specified in clause 1(2) to be proved. These rules are explained in paragraphs 6.38-6.39 of the Report.

If the intoxication was *involuntary*, subsection (3) provides that the automatism is to negative the defendant's liability. The effect of involuntary intoxication is explained at paragraph 8.36 of the Report.

Subsection (4) provides in effect that automatism caused partly by intoxication and partly by disease of the mind is to be subject to the law of insanity and not to this clause. The reasons for this provision are explained in paragraphs 6.46-6.49 of the Report.

## Clause 3

This clause deals with the effect of a belief held by an intoxicated defendant which, had he not been intoxicated, would have negated his liability.

If the intoxication was *involuntary*, or the defendant would still have held the belief even if he had not been intoxicated, or the offence requires proof of any of the mental elements specified in clause 1(2), subsection (1) provides that the belief is to negative the defendant's liability (in spite of the intoxication). The effect of involuntary intoxication is explained at paragraph 8.36 of the Report. The reasons for extending the rule to offences requiring proof of a mental element specified in clause 1(2) are explained in paragraphs 7.9-7.15.

If the intoxication was *voluntary*, and but for the intoxication the defendant would not have held the belief, and the offence does not require proof of any of the mental elements specified in clause 1(2), subsection (2) provides that the belief is *not* to negative the defendant's liability. The reasons for this rule are explained in paragraph 7.8 of the Report.

Subsection (3) provides that a belief which would otherwise reduce murder to manslaughter shall have that effect even if the defendant was at the material time intoxicated, whether voluntarily or not. The reasons for this rule are explained in paragraphs 7.20-7.21 of the Report.

(4) Any enactment which (in whatever terms) provides for a person holding a particular belief to have a defence to a criminal charge shall have effect subject to the provisions of this section.

*Intoxication*

5 4.—(1) For the purposes of this Act—

(a) “intoxicant” means alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the capacity to impair awareness, understanding or control; and

10 (b) a person is “intoxicated” if his awareness, understanding or control is impaired by an intoxicant;

and “intoxication” shall be construed accordingly.

(2) For the purposes of subsection (1)(a) it is immaterial that a particular substance has the capacity to impair awareness, understanding or control only if taken by a person with an increased or abnormal  
15 susceptibility thereto attributable to—

(a) his physical or mental condition at the time when it is taken into his body, or

(b) anything done or omitted to be done by him at any time thereafter;

20 and for the purposes of subsection (1)(b) it is immaterial that a person’s awareness, understanding or control is impaired by a particular substance by reason only of any such increased or abnormal susceptibility thereto.

(3) For the purposes of this Act—

25 (a) references to a person being “involuntarily intoxicated” shall be construed in accordance with sections 5 and 6(3) and (5); and

(b) references to a person’s intoxication being “involuntary” shall be construed accordingly;

and a person’s intoxication if not involuntary is “voluntary” for the purposes of this Act.

30 (4) In this Act references to a person “taking” an intoxicant or other substance include references to its being administered to him with his consent.

5.—(1) Subject to subsection (2), an intoxicated person is involuntarily intoxicated if—

35 (a) at the time when he took the intoxicant he was not aware that it was or might be an intoxicant; or

(b) he took the intoxicant solely for medicinal purposes; or

(c) the intoxicant was administered to him without his consent; or

40 (d) he took the intoxicant in such circumstances as would, in relation to a criminal charge, afford the defence of duress by threats or any other defence recognised by law.

Meaning of expressions relating to intoxication.

Involuntary intoxication: general.

## EXPLANATORY NOTES

Subsection (4) applies the provisions of this clause to any *statutory* defence that the defendant held a particular belief. Any provision that the belief need not be justified, such as section 5(3) of the Criminal Damage Act 1971 (see paragraphs 3.42-3.44 of the Report), is to be read subject to the rule in subsection (2). The reasons for applying the rule to all such defences are explained in paragraphs 7.16-7.18 of the Report.

### Clause 4

This clause defines “intoxication” and related expressions.

Subsections (1) and (2) define “intoxicant”, “intoxicated” and “intoxication”. These definitions are explained at paragraphs 8.2-8.8 of the Report.

Subsection (3) provides that intoxication is “involuntary” in the circumstances set out in clauses 5 and 6(3) and (5), but is otherwise “voluntary”.

Subsection (4) provides that references to a person taking an intoxicant include references to its being administered to him with his consent.

### Clause 5

This clause sets out five situations in which a person’s intoxication is “involuntary”. Four are described in paragraphs (a)-(d) of subsection (1), and the fifth in subsection (3).

Under subsection (1)(a) a person’s intoxication is involuntary if when he took the intoxicant in question he was not aware that it was or might be an intoxicant. This rule is explained at paragraphs 8.10-8.13 of the Report.

Under subsection (1)(b) a person’s intoxication is involuntary if he took the intoxicant solely for medicinal purposes (which by subsection (4) is defined to include sedative and soporific purposes). However, subsection (2) provides that he cannot rely on subsection (1)(b) if he was aware that the intoxicant might give rise to *aggressive or uncontrollable* behaviour on his part, *and* he did not take it on, and in accordance with, medical advice. These rules are explained in paragraphs 8.21-8.32 of the Report.

Under subsection (1)(c) a person’s intoxication is involuntary if the intoxicant was administered to him without his consent. This rule is explained in paragraph 8.33 of the Report.

Under subsection (1)(d) a person’s intoxication is involuntary if he took the intoxicant in such circumstances as would afford a defence in relation to a criminal charge—for example, if he was forced to take it by threats of serious injury. This rule is explained in paragraphs 8.34-8.35 of the Report.



(2) A person is not involuntarily intoxicated by virtue of subsection (1)(b) if—

(a) he took the intoxicant being aware that, as taken by him, it would or might give rise to aggressive or uncontrollable behaviour on his part, or 5

(b) having taken the intoxicant, he failed to take reasonable precautions to counteract its effect on him being aware that his failure to do so would or might give rise to any such behaviour,

and (in either case) the intoxicant was taken by him—

(i) otherwise than on medical advice, or 10

(ii) (if taken on medical advice) otherwise than in accordance with any directions given to him by the person providing the advice.

(3) Where an intoxicated person—

(a) was aware at the time when he took the intoxicant that it was or might be an intoxicant having the capacity to impair awareness, understanding or control only if taken as mentioned in section 4(2), and 15

(b) is intoxicated by reason only of any such increased or abnormal susceptibility to the intoxicant as is mentioned in that provision, he is nevertheless involuntarily intoxicated if— 20

(i) (where the susceptibility was attributable to his physical or mental condition at the time when he took the intoxicant) he was not then aware that he had or might have any such susceptibility, or

(ii) (where the susceptibility was attributable to anything done or omitted to be done by him at any time thereafter) he was not then aware that any such act or omission would or might result in any such susceptibility. 25

(4) In this section—

“the intoxicant”, in relation to an intoxicated person, means the intoxicant by virtue of which he is intoxicated; and 30

“medicinal purposes” includes sedative and soporific purposes.

(5) A person’s intoxication shall for the purposes of this Act be presumed not to have been involuntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that it was involuntary. 35

Special rules  
where person is  
not fully aware of  
intoxicants  
consumed by him.

6.—(1) This section applies where at any material time referred to in sections 1 to 3—

(a) a person was intoxicated following the taking of a combination of two or more intoxicating substances, and

(b) at the time of taking them he— 40

(i) was aware that any one or more of them was or were, or might be, an intoxicating substance or intoxicating substances, but

(ii) was not so aware in the case of the other or others.

(2) In this section— 45

“intoxicating substance” means any substance which is or contains an intoxicant;

## EXPLANATORY NOTES

Under subsection (3) a person's intoxication is involuntary if it is attributable to a peculiar susceptibility on his part of which he was unaware when he took the intoxicant (or, if it arises from anything he did or omitted to do *after* taking the intoxicant, when he did or omitted to do that thing). This rule is explained in paragraphs 8.11-8.12 of the Report.

Under subsection (5) the defendant's intoxication is presumed to have been voluntary unless the evidence adduced is such as to raise the possibility that it may have been involuntary. This rule is explained in paragraphs 8.37-8.38 of the Report.

### Clause 6

This clause deals with the special case of a person who has taken a combination of intoxicating substances, being aware that at least one of them was or might be an intoxicating substance but not being so aware in the case of the other or others. By virtue of subsection (2) an intoxicating substance of which he was aware is referred to as a "known substance", and one of which he was unaware as an "undetected substance".

“known substance” means any substance falling within subsection (1)(b)(i); and

“undetected substance” means any substance falling within subsection (1)(b)(ii).

5 (3) The intoxicated person shall be treated as involuntarily intoxicated at the material time if he would not have been intoxicated but for having taken the undetected substance or substances.

10 (4) If subsection (3) does not apply to the intoxicated person in relation to the material time referred to in section 1, he shall not, by virtue of section 1(3), be treated as having then been aware of something if he was unaware of it by reason only of his having taken the undetected substance or substances.

15 (5) If subsection (3) does not apply to the intoxicated person in relation to the material time referred to in section 2, his intoxication shall nevertheless be treated for the purposes of that section as having then been involuntary if—

(a) he would not then have been in a state of automatism, or

(b) his state of automatism would not have been wholly or partly caused by intoxication,

20 had he taken only the known substance or substances.

(6) If subsection (3) does not apply to the intoxicated person in relation to the material time referred to in section 3, section 3(2) shall not apply in relation to him if he held the belief in question by reason only of his having taken the undetected substance or substances.

25 *Supplemental*

7.—(1) The rules of the common law relating to the effect of intoxication on criminal liability shall cease to have effect.

Consequential provisions.

30 (2) In section 6 of the Public Order Act 1986 (mental element of new offences relating to public order) subsections (5) and (6) (which deal with the effect of intoxication) are hereby repealed.

1986 c. 64.

8.—(1) This Act may be cited as the Criminal Law (Intoxication) Act 1995.

Short title, commencement and extent.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

35 (3) Nothing in this Act applies in relation to any offence committed before the coming into force of this Act.

(4) This Act extends to England and Wales only.

## EXPLANATORY NOTES

If the defendant would not have been intoxicated *at all* but for the undetected substance or substances, subsection (3) provides that his intoxication is involuntary.

If he would have been intoxicated to *some* extent even if he had taken only the known substance or substances, subsections (4), (5) and (6) operate to modify the application of clauses 1, 2 and 3 respectively.

Under subsection (4), he is not to be treated by virtue of clause 1(3) as having been aware of something if he was unaware of it by reason only of having taken the undetected substance or substances.

Under subsection (5), his intoxication is to be treated as involuntary for the purposes of clause 2 if he would not have been in a state of automatism had he taken only the known substance or substances, or if in those circumstances he would still have been in a state of automatism but it would not have been wholly or partly caused by intoxication.

Under subsection (6), he is not to be precluded by clause 3(2) from relying on a belief held by him if he held it by reason only of having taken the undetected substance or substances.

These rules are explained in paragraphs 8.13-8.20 of the Report.

### Clause 7

Subsection (1) provides that the common law rules on the effect of intoxication on criminal liability are to cease to have effect.

Subsection (2) repeals section 6(5) and (6) of the Public Order Act 1986, which are superseded by the provisions of the present Bill. The reason for this change is explained in paragraph 8.39 of the Report.

### Clause 8

This clause provides for the short title of the Bill, its commencement, its prospective effect, and its extent.

## APPENDIX B

### Extract from the Report of the Butler Committee on Mentally Abnormal Offenders (1975) Cmnd 6244

18.51 Since our remit concerns mentally disordered offenders, it could be interpreted to include intoxicated offenders. In general we have not concerned ourselves with drunkenness and drug addiction, but we have made an exception for one topic, partly because it falls within the question of criminal responsibility with which we have been concerned, and partly because a solution of it is necessary for the purposes of the projected criminal code.

18.52 On a charge of an offence, the general principle is that the defendant may give evidence that he was intoxicated at the time, for the purpose of supporting a defence that he lacked the intent necessary for the alleged offence. Although the rule is clearly right on principle, it would, if logically applied, mean that a person who is habitually violent when in drink may escape any criminal charge. Of course, an intoxicated person will generally know well enough that he is making an attack on another, and if so he is subject to conviction; but the evidence of drunkenness may occasionally be sufficient to create a doubt in the minds of the jury or magistrates. The drunkard may also escape conviction on the argument that in his fuddled condition he mistakenly believed that he was being attacked,<sup>1</sup> and in Canada and Australia it has been held that a person charged with rape could give evidence of drunkenness for the purpose of supporting a defence that he believed that the woman was consenting, although no sober person would have believed it. The difficulty does not arise if death has been caused, because a charge of manslaughter does not require proof of an intent to kill or even to attack. Moreover, in order to avert a complete failure of the prosecution the courts have developed the doctrine that the offence of assault does not require a "specific intent" that can be rebutted by evidence of intoxication. However, the phrase "specific intent" has never been defined. The courts recognise that assault requires an intention to apply force to another or (possibly) recklessness as to such force,<sup>2</sup> so that it is illogical to exclude the evidence of intoxication on a charge of assault; and the practice is not immune from attack if an appeal is taken to the House of Lords, particularly because it seems to be directly contrary to section 8 of the Criminal Justice Act 1967.

18.53 In our view, the courts should be given by statute clear power to convict those who become violent when voluntarily intoxicated. The object is not necessarily to punish them. An alcoholic or drug addict may after conviction be persuaded to accept treatment. But not all these offenders are addicts (the violence may be committed on an occasional drunken spree), and in any case powers of punishment are necessary for those who will not accept treatment and who cannot otherwise be controlled.

18.54 We propose that it 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

<sup>1</sup> *R v Gamlen* (1858) 1 F & F 50.

<sup>2</sup> *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.

intoxication they are not sure that at the time he had the state of mind required for the offence, and they are sure that his intoxication was voluntary.

18.55 A dangerous offence for this purpose should be defined as one involving injury to the person (actual bodily harm) 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. A dangerous offence is to be regarded as charged if the jury can convict of it under the indictment.

18.56 "Voluntary intoxication" would 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. The concluding words would provide a defence to a person who suffers from hypoglycaemia, for example, who does not know that in that condition the ingestion of a small amount of alcohol can produce a state of altered consciousness, as well as to a person who has been prescribed a drug on medical grounds without warning of the effect it may produce. We do not think it necessary to define intoxication, drink or drug, because this offence would be a fall-back offence, relevant only when the defendant has been acquitted on another charge by reason of evidence of intoxication.

18.57 These provisions would mean that the offence would be one of strict liability (not requiring proof of a mental element or other fault) in respect of the objectionable behaviour, but would require the fault element of becoming 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.

18.58 We have not found the recommendation of an appropriate penalty altogether an easy matter. If the penalty is too severe it becomes unfair. On the other hand, if it is too light then in cases such as wounding with intent to cause grievous bodily harm (where in everyday experience in the courts the vast majority of defendants blame drink for their actions) the existence of a "fall-back" verdict will encourage time-consuming unsuccessful defences to be run in inappropriate cases. On balance, we have come to the view 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 offence. It should be left to the judge to satisfy himself that the offence is a second or subsequent one. On summary trial the maximum sentence of imprisonment should be six months. Magistrates who try an information for one of the dangerous offences should be enabled to convict of dangerous intoxication without a fresh information. In considering the scale of punishment, it must be realised that we are not proposing an arrangement whereby drunken offenders obtain the benefit of a reduced punishment. The new offence is needed only when the defendant has been acquitted of the offence originally charged, so that apart from the new offence he would not be subject to any control. 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 have been produced by him at the trial in answer to the main charge. In our view, it should be made obligatory on the defendant to give the same notice of his evidence of intoxication as we propose in relation to evidence of mental disorder ... . It should also be provided ... that if the defendant gives evidence contesting his state of mind the prosecution may reply with evidence of mental disorder.

18.59 It may well be that the new offence should ultimately be included in a new Offences against the Person Act, but we hope that as an interim measure it will be included in any legislation passed to give effect to our recommendations, should that come before Parliament before the Criminal Law Revision Committee has completed its work on offences against the person.

## APPENDIX C

### Extract from the Fourteenth Report of the Criminal Law Revision Committee: Offences against the Person (1980) Cmnd 7844

#### PART VI. VOLUNTARY INTOXICATION

##### 1. Offences committed while under the influence of drink and/or drugs voluntarily taken

257. By intoxication we mean intoxication due to drink or drugs or both. Intoxication has never in itself been a defence. When an offender adduces evidence of intoxication, he does so in order to show that he did not have the necessary mental element for the offence. He is denying that the prosecution has proved its case. Involuntary intoxication (as for example where a person laces another's drink without telling him, or where a person becomes affected by a medicine without having been warned by the doctor) is a defence if it negatives the mental element. Voluntary or self-induced intoxication, when it leads to actual insanity, including temporary insanity, may amount to a defence under the *McNaghten* rules. Voluntary or self-induced intoxication<sup>1</sup> not amounting to insanity is not generally a defence even where it negatives the mental element. The reason why the courts have been fearful of giving the defence too wide a scope is the possibility that those who inflict serious injury to the person or damage to property, or who bring about dangerous situations, would escape the sanctions of the criminal law by relying on a defence of intoxication. Consequently, in *Director of Public Prosecutions v Majewski* [1977] AC 443, the House of Lords confirmed the rule expressed in previous cases that, while evidence of self-induced intoxication can negative a crime requiring a "specific" intent, it cannot negative one requiring a "basic" intent. It is a rule of substantive law that where an offender relies on voluntary intoxication as a defence to a charge of a crime not requiring "specific" intent, he may be convicted notwithstanding that the prosecution has not proved any intention or foresight, or indeed any voluntary act. In practice, this means that intoxication will generally not be any defence where an offence can be committed recklessly. Section 8 of the Criminal Justice Act 1967 therefore has no application.<sup>2</sup>

258. It appears from some of the opinions delivered in *Majewski* that their Lordships decided the case as they did on grounds of public policy. Nevertheless, the rule now settled as representing the common law involves a number of difficulties. One result, which many lawyers including several of our members consider wrong, is that the present law requires an intoxicated person to be convicted of an offence which as it is defined by statute he has not been proved to have committed, because there was no proof that he had the necessary mental element. For example, criminal damage contrary to section 1(1) of the Criminal Damage Act 1971<sup>3</sup> is committed by a person who, *intentionally or recklessly*, destroys or damages property belonging to another. The mental element is an essential element of the crime, no less than the physical element. It requires at least recklessness whether the property of another be damaged or not: *Stephenson* [1979] 2 All ER 1198. An intoxicated person may be convicted although on the evidence there remains a doubt whether he has been reckless in this sense. Another weighty

<sup>1</sup> For the proposed definition see paragraph 273 below.

<sup>2</sup> Section 8 requires the court to have regard to all the evidence relevant to the question whether the defendant did intend or foresee the result of his actions.

<sup>3</sup> We take criminal damage as an example because it is an offence where Parliament has spelt out *expressly* the mental element required yet the courts hold persons liable who do not have the mental element; the position is the same under section 20 of the Act of 1861 because "maliciously" means intentionally or recklessly.

objection is that it is not always clear what crimes are crimes of "basic" and "specific" intent. In some areas the distinction between the two intents is clear but in others it is not. An example is provided by rape, over which there have been differences of judicial opinion.<sup>4</sup> It is this latter defect, as we see it, that is most in need of attention and that our proposals seek to repair.

259. Ever since the law started to punish offenders for what was in their minds when they did an act instead of simply for what they did, the commission of criminal acts while intoxicated has been difficult to label. The drunken man who kicks and punches a publican who tries to eject him from his establishment may not know what he is doing; and even if he has enough understanding to appreciate that he is punching and kicking out, he may not be able to appreciate that he is exposing the publican to risk of injury. Yet his conduct is socially unacceptable and deserving of punishment. As we have stated above it seems to some people wrong in principle to convict him of a crime when by reason of his drunkenness he lacked the state of mind ordinarily required for its commission. What calls for punishment is getting intoxicated and when in that condition behaving in a way which society cannot, and should not, tolerate. An offence which covers this situation must make some reference to the harm caused, and cannot be expressed simply in terms of getting dangerously intoxicated, however gross the intoxication may have been. Furthermore, the harm needs to be identified to some extent: the drunken man who on arrest punches a police officer should not be labelled with the same offence as the alcoholic who kills a child when trying to interfere with her sexually. It is doubtful whether any solution to the problem based solely upon legal principle would be generally acceptable. Policy has to be taken into account. Probably the best that can be done is to follow principle as far as possible without producing a result which affronts common sense. Violent drunks have to be restrained and punished.

260. The Butler Committee considered offences committed while voluntarily intoxicated (paragraphs 18.51-18.59 of their report), and they proposed the creation of a strict liability offence where a person while voluntarily intoxicated does an act (or makes an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for that offence. Their proposal is that the offence should not be charged in the first instance. On indictment the jury would be directed to find on this offence in the event of intoxication being successfully raised as a defence to the offence originally charged. A bench of magistrates dealing summarily with an offence would have to direct themselves. For convenience in the rest of this section of the report we have referred only to juries. On this proposal the jury would have no option but to convict of the dangerous intoxication offence. On conviction of the offence on indictment, the maximum penalty suggested is 1 year's imprisonment for a first offence or 3 years' imprisonment for a second or subsequent one; on summary trial the maximum sentence of imprisonment would be 6 months.

261. One of the defects in the Butler Committee proposal is, in our opinion, the problem of the nomenclature of the offence. A conviction of the Butler Committee offence would merely record a conviction of an offence of committing a dangerous act while intoxicated. This is insufficient. The record must indicate the nature of the act committed, for example whether it was an assault or a killing. It would be unfair for a defendant who has committed a relatively minor offence while voluntarily intoxicated to be labelled as having committed the same offence as a defendant who has killed. The penalty suggested is also in our opinion insufficient to deal with serious offences such as killings or rapes while voluntarily intoxicated by drink or drugs.

262. Professors Smith and Glanville Williams support the proposal of a separate offence because in the first place they consider it to be a fundamental principle that a person should not be convicted of an offence requiring recklessness when he was not in fact reckless. In such a case the verdict of the jury and the record of the court do not represent the truth. Secondly,

<sup>4</sup> *Majewski*, per Lords Simon of Glaisdale and Russell of Killowen, and *Leary v R* (1977) 74 DLR (3d) 103.



they think it important that the verdict of the jury should distinguish between an offender who was reckless and one who was not because that is relevant to the question of sentence. In their opinion there is a great difference between, for example, a man who knew that he 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 agree 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 think that often the two cases ought to be dealt with differently.

263. For these reasons Professors Smith and Glanville Williams provided an improved version of the Butler Committee proposal for the consideration of the Committee. In the interests of conciseness and clarity their proposal is set out in the following propositions: it is not intended to be a final legislative draft.

- (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
  - (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) the 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 of 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 the law for the offence charged.

264. If there is to be a separate offence of doing the *actus reus* of an offence while voluntarily intoxicated we are all agreed that the proposal set out above is to be preferred to that of the Butler Committee. The majority of us feel, however, that that proposal would also create

problems. 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, and some of us feel that the separate offence would make the jury's task even more difficult than it is at present in some cases, particularly where the charge is murder. We also see difficulties arising if for example six members of the jury are of opinion that the defendant was intoxicated so as not to be reckless whilst the other six members are of opinion that he was reckless even though he had had too much to drink. It seems likely, moreover, that if the separate offence is created there would be many more trials in which defendants would raise the issue of drunkenness, and the majority of us foresee cases where there is 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 (as for example rape), or because the special offence might tend to be regarded as a less serious offence. Such pleas would place the prosecution and the judge, who have to consider whether to accept them, in great difficulties. It should also be remembered that all these problems would apply equally in the magistrates' courts. We also consider that it is artificial and undesirable to have a separate offence for which conviction is automatic but which carries the same maximum penalty as the offence for which a defendant would have been convicted but for the lack of proof of the required mental element due to intoxication. It is also important to consider the public reaction to the creation of a separate offence: we are of opinion that they would be confused by it. An example of the type of case in which there is frequently evidence of intoxication is rape. We think the public would find it difficult to understand a verdict to the effect that the defendant was not guilty of rape but guilty of the act. This can only mean that he was guilty of having sexual intercourse without the woman's consent while voluntarily intoxicated, when as far as the victim was concerned she had been raped.

265. In practice juries and courts are reluctant to accept that a defendant was so drunk that he did not form any special intent which may be required or foresee any consequences of his conduct. The *Majewski* situation is rarely met but when it is the courts can, if the circumstances justify it, mitigate the penalty to such extent as is felt appropriate: in some cases the fact of drink may mitigate the offence, in other cases it may well aggravate the offence.

266. We all agree that the present law is right in requiring that the defendant should be acquitted of intentionally causing the *actus reus* if, on account of voluntary intoxication, a requisite "specific intent" cannot be established. Furthermore, we consider that the present law needs amendment in so far as it relates to so called offences of "basic" intent. The majority of us therefore went on to consider whether we could improve upon the common law principle and avoid the problems of "specific" and "basic" intent. We found the germ of our eventual proposal in the American Model Penal Code, Article 2, section 2.08(2) of which provides:

When recklessness establishes an element of the offence, 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 unawareness is immaterial.

267. Our recommendation is that the common law rules being rules of general application should be replaced by a statutory provision on the following lines:

- (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.

268. The provision in (1) 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, for example the intent in our proposed offence of causing serious injury with intent to cause serious injury. Murder, however, has to be specifically mentioned because, if our recommendation is adopted, it will 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, (2) above will apply and lack of appreciation of the risk of causing death will be immaterial.

269. Under (2) above, 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 is assault, he may nevertheless be found guilty. In such cases the defendant can adduce the evidence of intoxication for the purposes of mitigation.

270. The test in (2) 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 he had been sober. For similar reasons it would be unjust that a subnormal person should be judged on the same basis as one of average intelligence.

271. Where a defendant is 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.

272. In making our proposals we appreciate that in a few rare cases, mostly sexual offences committed while under the influence of hallucinatory drugs, it might be possible to take advantage of the defence under (1) above. For example in the case of rape, if the defendant alleges that he thought the woman was consenting when she was not this would come within (2) because recklessness as to whether she was consenting is a sufficient mental element and evidence of voluntary intoxication would not be admissible as a defence, but if he 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) because he must intend to have sexual intercourse; recklessness is not a sufficient mental element for that part of the offence. However, the likelihood of the jury believing his story seems to us so remote that it can be disregarded.

273. The Butler Committee recommended in paragraph 18.56 of their report that "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". We agree that voluntary intoxication should be defined along these lines.

274. In substance our recommendations reproduce the common law as laid down in *Majewski* and, we consider, strike a fair balance between the need to protect society and the desirability on occasions of distinguishing the intoxicated offender from the man who commits an offence while sober.

275. Our recommendations on voluntary intoxication, if acceptable, could hardly be applied only to offences against the person: they must, we think, be applicable to criminal offences generally.

## **2. Evidence of voluntary intoxication in relation to defences**

276. The foregoing discussion concerned cases in which the defendant, because of voluntary intoxication, did not have the mental element specified in the definition of the offence. It remains to consider those cases in which the defendant, because of a mistake arising from intoxication, held a belief which, in the case of a sober person, would be a defence to the charge. We are proposing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or his property or that of any other person. Similarly the Law Commission has proposed that the defence of duress should be available to a person who believes, whether reasonably or not, that he is threatened with death or personal injury (Law Com No 83, 2.27). Thus a sober person who mistakenly believes that he, or another, is the victim of an unlawful and deadly attack and kills the supposed attacker by the use of force which would be reasonable if his belief were true has a defence. The defendant need only introduce some evidence of the constituents of the defence and the Crown then has to satisfy the jury that those constituents did not exist.

277. The question is whether the same defence should be available where the belief was wholly or partly induced by drink or drugs. In our opinion it should be in the case of murder or any other offence in which intention is required for the commission of the offence. But 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 held by a sober man, would be a defence to the charge, but which the defendant would not have held had he been sober, the mistaken belief should be immaterial. In short, we are of opinion that evidence of voluntary intoxication adduced in relation to a defence should be treated in the same way as evidence of voluntary intoxication adduced to negative the mental element.

278. Our recommendation as to voluntary intoxication in relation to defences may be illustrated by a case of mistaken belief as to relevant facts in relation to a defence which, if held by a sober man on a charge of murder, would lead to his acquittal. The effect of our proposals would be that the same belief held by reason of voluntary intoxication would also lead to acquittal of murder but the defendant might be convicted of manslaughter. For example, a householder who mistakenly believes that a police officer, who has entered his house to look around on finding the front door open, is a burglar about to attack him and strikes him down in self-defence would probably be acquitted on the indictment. But if his mistaken belief was due to voluntary intoxication the effect of our proposals would be that he would be acquitted of murder but convicted of manslaughter.

### *Recommendations*

279. 1. The common law rules should be replaced by a statutory provision on the following lines:
- (a) 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
  - (b) in offences in which recklessness does constitute 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 a lack of appreciation is immaterial (paragraphs 267-271).
2. Voluntary intoxication should be defined on the lines recommended by the Butler Committee (paragraph 273).

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 (paragraphs 276-278).
4. Our recommendations on voluntary intoxication should be applicable to criminal offences generally (paragraph 275).

# APPENDIX D

## Extracts from the Draft Criminal Code

### *Fault terms*

18. For the purposes of this Act and of any offence other than a pre-Code offence ... a person acts—

- (a) “knowingly” with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;
- (b) “intentionally” with respect to—
  - (i) a circumstance when he hopes or knows that it exists or will exist;
  - (ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;
- (c) “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 the risk;

and these and related words (such as “knowledge”, “intention”, “recklessness”) shall be construed accordingly unless the context otherwise requires.

### *Intoxication*

22. —(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 an exempting circumstance (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, 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 ...; or
- (b) to the case ... 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 medicinal 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 medicinal 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 ... that it was involuntary.

*Automatism and physical incapacity*

33. —(1) A person is not guilty of an offence if—

- (a) he acts in a state of automatism, that is, his act—
  - (i) is a reflex, spasm or convulsion; or
  - (ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of the act; and
- (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.

(2) A person is not guilty of an offence by virtue of an omission to act if—

- (a) he is physically incapable of acting in the way required; and
- (b) his being so incapable is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.

# APPENDIX E

## Extracts from the draft Criminal Law Bill annexed to Law Com No 218

### PART I: NON-FATAL OFFENCES AGAINST THE PERSON

#### *Definition of fault terms*

1. For the purposes of this Part a person acts—

- (a) “intentionally” with respect to a result when—
  - (i) it is his purpose to cause it, or
  - (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result; and
- (b) “recklessly” with respect to—
  - (i) a circumstance, when he is aware of a risk that it exists or will exist, and
  - (ii) a result, when he is aware of a risk that it will occur,and it is unreasonable, having regard to the circumstances known to him, to take that risk;

and related expressions shall be construed accordingly.

#### *Effect of voluntary intoxication*

21. —(1) For the purposes of this Part a person who was voluntarily intoxicated at any material time 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) as not having believed in any circumstance which he would not have believed in had he not been intoxicated.

(2) The expressions “voluntarily intoxicated” and “intoxicated” in subsection (1) shall be construed in accordance with section 35.

### PART II: GENERAL DEFENCES AND OTHER PROVISIONS

#### *Application of this Part*

24. The provisions of this Part apply in relation to all offences under the law of England and Wales, including those under Part I.



*Effect of voluntary intoxication*

33. —(1) For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated as not having believed in any circumstance which he would not then have believed in had he not been intoxicated.

(2) The expressions “voluntarily intoxicated” and “intoxicated” in subsection (1) shall be construed in accordance with section 35.

PART III: SUPPLEMENTARY PROVISIONS

*Provisions as to voluntary intoxication*

35. —(1) Whether a person is “voluntarily intoxicated” for the purposes of this Act shall be determined in accordance with the following provisions.

(2) A person is voluntarily intoxicated if he takes an intoxicant, otherwise than properly for a medicinal 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 medicinal purpose, is not properly so taken if the intoxicant—

- (a) is not taken on medical advice, or
- (b) is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice,

and 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.

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 shall 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.

# APPENDIX F

## List of persons and organisations who commented on Consultation Paper No 127

Lord Chancellor's Department  
Home Office  
Crown Prosecution Service  
General Council of the Bar  
Criminal Bar Association  
The Law Society  
Institute of Legal Executives  
Metropolitan Stipendiary Bench  
Magistrates' Association  
Association of Chief Police Officers  
Police Federation of England and Wales  
Society of Public Teachers of Law  
Cardiff Crime Study Group, University of Wales

The Judges of the Queen's Bench Division  
The Council of Her Majesty's Circuit Judges  
The Birmingham Crown Court Judges  
The Rt Hon Lord Justice Stuart-Smith  
The Hon Mr Justice Alliot  
His Honour Judge J W Rant QC, the Judge Advocate General (6 judicial officers, severally)

Mr C M V Clarkson  
Miss Gráinne de Búrca  
Mr Scott F Dickson  
Mr David Faulkner, CB  
Mr Simon Gardner  
Mr Jonathan Goodliffe  
Mr R D Mackay  
Mr Gerald Orchard (article at [1993] Crim LR 426)  
Dr Keith J B Rix, MPhil MD FRCPsych  
Professor Sir John Smith, CBE QC LL D FBA  
Mr Graham Virgo (article at [1993] Crim LR 415)  
Professor Martin Wasik

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