

**Intoxication and Liability:
A Criminal Law Cocktail**

by

Stuart Bugg*

- I Policy and Principle: the ingredients.
- II Rational Capacity: the principle and policy modification.
- III Actus Reas: the principle and policy modification.
- IV Mens Rea: the principle.
- V Mens Rea: the principle modified — extended intent.
- VI Mens Rea: the principle modified — basic intent.
- VII Mens Rea: the principle discarded — recklessness revisited.
- VIII The Cocktail Mixed: which principle, which policy?

I. POLICY AND PRINCIPLE: the ingredients.

For drunkenness is the very sepulchre of Manne's wit and his discretion.¹

Chaucer's observation as to the effects of intoxication takes on a certain irony in light of judicial treatment of inebriation and criminal liability. In particular the courts have struggled to determine the state of mind required to allow criminal conviction of the self-intoxicated,² resorting in the process to a number of ostensibly inconsistent approaches ranging from notions of "specific intent"³ to tests of "what should have been obvious"⁴ to the sober person. At times, inevitably, there has been recourse to euphemisms of "common sense":

... in strict logic this view [of the Court] cannot be justified. But this is the view that

* BA, LLB(Hons).

¹ Chaucer, *The Pardoner's Tale* 1.230.

² This work discusses 'self-induced' or 'voluntary' intoxication, whether such a state is caused by alcohol, other drugs, or both.

³ See *Director of Public Prosecutions v Majewski* [1976] 2 All ER 142.

⁴ See *Commissioner of Police of the Metropolis v Caldwell* [1981] 2 WLR 509.

has been adopted by the Common Law of England, which is founded on common sense and experience rather than strict logic.⁵

One thing which has remained clear through all of this is that consideration of the criminal liability of the self-intoxicated takes one to the heart of criminal jurisprudence, for in defining the "intoxicated actor" one must confront the fundamental elements of a crime and criminal liability and it is clear also, it is submitted, that the courts have been prepared to "modify" these fundamental elements in order to preserve criminal liability in the case of the self-intoxicated. Traditional notions of rational capacity, *mens rea* and *actus reus* have been adapted to meet immediate social policy demands: the classic pattern of common law evolution. This is a story of the tension between 'principle and policy',⁶ between a constant, principled, theory of criminal liability on the one hand and a desired 'social output' on the other. As Edmund Burke observes:

There are two, and only two, foundations of law . . . equity and utility.⁷

A central question raised by consideration of this area concerns the validity of the traditional account of criminal liability itself. This paper addresses this question with passing references to the Criminal Code of the Federal Republic of Germany and the proposals of the United Kingdom's Butler Committee.

II. RATIONAL CAPACITY: the principle and policy modification.

Western criminal jurisprudence may fairly be said to rest upon the (rebuttable) presumption that the individual is possessed of a free will; prima facie the actor may be held responsible for his or her actions since they result from the exercise of his or her will. Such is the principle. Yet from early on jurists appear to have recognised the social utility in dealing with the drunken citizen with punitive rigour, often demanding that the intoxicated actor be punished twice — once for the crime committed while drunk and again for being drunk. Blackstone writes:

As to artificial, *voluntarily contracted madness*, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy, our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour.⁸ [emphasis mine]

Similar sentiments are expressed in Hale's *Pleas of the Crown*:

This vice [of drunkenness] *both deprive men of the use of reason*, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simple for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime committed thereby; so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it.⁹

⁵ *Supra*, note 3 at 157.

⁶ Beaumont "Specific Intent: Principle Versus Policy" (1978) January 21st, Justice of the Peace.

⁷ Burke, *Tracts on Property Law* Pt I Ch 3.

⁸ Blackstone, *Commentaries on the laws of England*. Book IV, Ch 2, s III, p 25.

⁹ Hale, *Pleas of the Crown* vol I, p 32.

These comments show that the condition of complete intoxication was regarded as being akin to a state of insanity, and consequently had bearing upon the question of the rational capacity of the individual. Yet the voluntary nature of such madness is perceived as denying it any mitigatory power. Hale continues:

... but by the laws of England such a person shall have no privilege by this *voluntarily contracted madness*, but shall have the same judgment as if he were in his right sense.¹⁰ [emphasis mine]

In so far as drunkenness is treated as bearing upon rational capacity it is important to note the existence of degrees of intoxication. As Lynch notes in his article "The Scope of Intoxication",¹¹ it is important to "distinguish between those who are extremely affected by intoxicants and those who are mildly affected." The "tipsy" individual may still be capable of making moral decisions or recognising the nature of his or her actions — only the motor functions may be impaired, but the "blind drunk" may be in a state of virtual insanity. The point is taken in the decision of the High Court of Australia, *Queen v O'Connor*.¹² Here it was noted that the "state of drunkenness or intoxication can vary greatly in degree" from a state of less awareness or "weakness" of self control to a condition where action and thought become involuntary. The Court thought that it was only in the latter extreme that the state of intoxication would be relevant to the individual's capacity to be criminally liable.¹³

And it was just this extreme which the Court addresses in the leading case *DPP v Majewski*.¹⁴ Speaking with the majority, Lord Elwyn Jones LC stated:

... the accused deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing or even to be conscious that he was doing it.¹⁵

There appear to be two points implicit in Elwyn Jones' description:

- (a) that the person was incapable of understanding the nature and quality of his or her actions, and/or
- (b) that the person was incapable of determining if the act was morally reprehensible.

Within these two propositions we have encapsulated the legal test for insanity, as expressed in *McNaghten's Rules*.¹⁶ In New Zealand a ver-

¹⁰ *Ibid*. An excellent and thoughtful review of this matter which cites these early authorities (*inter alia*) is delivered by Lord Birkenhead when he considers self induced intoxication in the landmark case *DPP v Beard* [1920] AC 479, 490-501.

¹¹ Lynch, "The Scope of Intoxication" [1982] Crim. LR 139.

¹² (1980) 54 ALJR 349; (1980) 20 ALR 449.

¹³ *Ibid*, 352.

¹⁴ *Supra*, note 3.

¹⁵ *Ibid*, 151.

¹⁶ *McNaghten's Case* (1843) 10 CI 4 Fin 200 [1843-60], All ER Rep 229, & ER 71B.

sion of these rules has been codified in s 23 of the Crimes Act 1961. In particular s 23(2) states:

No person shall be convicted of an offence by reason of an act done or omitted by him *when labouring under natural imbecility or disease of the mind* to such an extent as to render him incapable —

- (a) of understanding the nature and quality of the act or omission or
- (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong [emphasis mine]

In the jurisdiction of the Federal Republic of Germany no distinction is drawn for the purpose of determining criminal liability between the completely intoxicated and the insane. Paragraph 20 of the West German Criminal code requires the Court to determine, from the outset, a "capacity for guilt" (*Schuldfähigkeit*). This capacity may be rebutted *inter alia* by:

- (a) Artificially-induced mental disorders (*tiefgreifende Bewusstseinstörung*), or
- (b) Imbecility (*Schwachsinn*), or
- (c) Other sickness of the mind (*krankhafte seelische Störung*)¹⁷

The German courts are required to consider *Schuldfähigkeit* as:

the ability to determine the wrongness of the act and the ability to act according to that determination.¹⁸

The point to note here is that the intoxicated person need only establish "actual incapacity", not sickness or disease of the mind. Paragraph 20 refers to these states as alternative ways in which the requisite incapacity may be constituted and not additional requirements.

Why then does the common law, in sharp contrast to the West German Criminal Code, preserve a firm distinction between the "madness" of intoxication and that arising from a 'bona fide' disease of the mind? The answer lies it is submitted, in a preference for policy over principle.

As we have seen, common law judges have shown a distinct unwillingness to consider total intoxication a 'disease of the mind'. In the leading case of *Queen v Cottle*¹⁹ Gresson P, delivering the judgment of the New Zealand Court of Appeal, commented that:

The adverse effect upon the mind of some happening, for example a blow, hypnotism, absorption of a narcotic or extreme intoxication all producing an effect more or less

¹⁷ Paragraph 20 of *Strafgesetzbuch* (Substantive Criminal Code). *Paragraph 20 St.GB*: "Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewusstseinsstörung oder wegen Schwachsinn oder einer schweren anderen seelischen Abartigkeit unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln" (A person acts without guilt when, because of insanity, artificially-induced mental disorders, imbecility or other sicknesses of the mind, he or she is incapable of recognising the wrongness of the act or acting according to any such recognition.) An authoritative edition and commentary can be found in Dreher/Troendle, *Strafgesetzbuch und Nebengesetze*, 1981.

¹⁸ *Schuldfähigkeit ist die Fähigkeit, das Unrecht der Tat einzusehen und nach dieser Einsicht zu handeln*. D Kienapfel, *Strafrecht Allgemeiner Teil*, (1975) 210.

¹⁹ [1958] NZLR 999.

transitory, cannot fairly be regarded as amounting to, or as producing, disease of the mind.²⁰

This view was reinforced in *Queen v Quick*,²¹ when the Lord Chief Justice was quick to point out that a malfunctioning of the mind must be brought about by "disease" as opposed to external factors such as drink or drugs. It was a definition by exclusion that was given for the meaning of a "disease of the mind", and in particular:

A self-induced incapacity will not excuse . . . (see *Reg v Lipman* [1970] 1 QB 152).²²

*Queen v Lipman*²³ involved the killing of a woman by an accused who was suffering from the effects of an LSD "trip". At the time, the accused said that he was suffering from hallucinations to the extent that he believed his girlfriend (the deceased) to be a snake — which he strangled. The Court of Appeal held that self-induced intoxication was not an excuse to a charge of manslaughter.

Lord Denning notes a caveat to this rule:

If a man by drinking brings on a distinct disease of the mind, such as *Delirium tremens*, so that he is temporarily insane within McNaghten's Rules, that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity. . . .²⁴

Nevertheless the caveat is narrow; the difficulty lies in proving that a "disease of the mind", rather than mere "drunken madness" prevailed.

There has been criticism of the position noted in *Lipman* and *Quick* from both jurists and medical practitioners.²⁵ The distinction between intoxication and 'madness' however has been retained, pursuant it seems to purely consequentialist reasonings: the courts recognise and fear the defence the abolition of this distinction would provide to the intoxicated:

If there be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequences would be appalling.²⁶

The proverbial "flood gates" would be opened:

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 or drink to that condition in my view supplied the evidence of *mens rea*.²⁷

Such was Elwyn Jones LC's view in the leading case of *DPP v*

²⁰ *Ibid*, 1011.

²¹ [1973] QB 910.

²² *Ibid*, 922.

²³ [1970] 1 QB 152.

²⁴ *Attorney General for Northern Ireland v Gallagher* [1963] AC 349, 381.

²⁵ See Smith and Hogan, *Criminal Law* (5th ed 1983) 192-196.

²⁶ *Supra*, note 3 at 158 *per* Lord Salmon.

²⁷ *Ibid*, 150 *per* Lord Elwyn-Jones LC.

Majewski. But with respect there appears to be a problem here; the accused is apparently being punished for abandoning rational capacity, rather than for having committed the *actus reus* of the offence.

Chief Justice Barwick of the Australian High Court²⁸ considered the reasoning of the House of Lords in *Majewski* and observed that whilst society needs protection against the actions of the self-intoxicated, there is little logic in punishing according to the principles enunciated in *Majewski*. Barwick CJ asked what exactly the criminal law was seeking to proscribe: the act of becoming intoxicated, or the criminal offence itself.

It is a problem directly addressed, as we have seen, by Hale;²⁹ ("so that yet the formal cause of punishment is rather the drunkenness than the crime committed in it.") and briefly touched on by Lord Birkenhead in *Beard*,³⁰ "... it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself."

It is submitted that the approach of the Australian Chief Justice in *Queen v O'Connor*³¹ reflects the preferred approach to this question:

I can readily understand that a person who has taken alcohol or another drug to such an extent that he is intoxicated thereby to the point where he has no will to act or no capacity to form an intent to do an act is blameworthy and that his act of having ingested or administered the alcohol or other drug ought to be visited with severe consequences . . . But, though blameworthy for becoming intoxicated, I can see no ground for presuming his acts to be voluntary and relevantly intentional. For what is blameworthy there should be an appropriate criminal offence. But it is not for the judges to create an offence appropriate to the circumstances . . . it must be for the Parliament.

And indeed, such parliamentary reforms have been suggested. In 1975 the so-called "Butler Committee" presented a *Report on Mentally Abnormal Offenders*.³² The Committee was originally set up in September 1972 to consider, in a wide-ranging manner, all legal provisions (including those for treatment) involving the mentally-disordered offender.

The Committee recommended that where an accused can demonstrate a lack of intent (*mens rea*) to commit an offence, due to self-induced intoxication, then an alternative charge of "acting dangerously" while drunk should be laid.³³

In particular the Committee rejected a state of self-induced intoxication as being a question of 'sanity', but rather preferred the approach that an intoxicated actor merely lacked the required *mens rea*.³⁴ Nevertheless, the Butler Committee accepts that the drunken actor might be

²⁸ *Supra*, note 12.

²⁹ *Supra*, note 9.

³⁰ *Supra*, note 10 at 500.

³¹ *Supra*, note 12 at 358.

³² *Report of the Committee on Mentally Abnormal Offenders* (1975) Cmnd 6244. Henceforth 'Report'.

³³ Paras 18-1 to 18-59 *Report*.

³⁴ Paras 18-14 to 18-23 *Report*.

guilty of naught but the act of getting drunk. In this regard, the only logical conclusion would be to:

[make it 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 an offence. . . .³⁵

In the Criminal Code of the Federal Republic of Germany there is a parallel provision to the Butler Committee recommendation. Under paragraph 323a of the West German Criminal Code³⁶ there is a provision for *Vollrausch* or "complete intoxication", whereby if the accused is deemed to be "incapable" of criminal capacity³⁷ due to such intoxication, he or she may be liable for "dangerous intoxication", provided:

- (a) such intoxication arose as a result of intent or recklessness, and
- (b) the accused would have been guilty of some other offence but for the intoxication-induced incapacity.

Such provisions are in line with the Butler Committee's idea that "dangerous intoxication" could be an alternative charge:

If evidence of intoxication were given at the trial for the purpose of negating the intention or other mental element required for the offence, the jury would be directed that they may return a verdict of not guilty of that offence, but guilty of the offence of dangerous intoxication if they find that the defendant did the act (or made the omission) charged, but by reason of the evidence of intoxication they are not sure that at the time he had the state of mind required for the offence, and they are sure that intoxication was voluntary.³⁸

In both the German and common law context, this notion of criminal intoxication acknowledges the fears expressed by both the courts and general public that the intoxicated should not be exempt from criminal liability. However, whilst recognising the policy rationale, the principles of liability remain intact. The accused is not made liable for some action of which he or she had no mental awareness, but rather, to borrow from Hale, "the cause of the punishment is the drunkenness" itself.

And, it is submitted, it is sound enough to punish those who render themselves dangerously intoxicated. In choosing to abandon their rational capacity, they perform an action which, given its potential consequences, is quite properly the subject of proscription by society.

III. ACTUS REUS: the principle and policy modification

We have discussed the individual who is intoxicated to such a degree that his or her mind operates in a distorted manner so that they are unable to make correct judgments and unable to ensure that they act in accordance with those judgments in any case.

There is another situation however: where the mind does not function at all, where there is no link between the body's actions and the

³⁵ *Ibid*, Paras 18-54.

³⁶ Para 323a *Strafgesetzbuch* (StGB).

³⁷ *Schuldfaehigkeit*, *supra*, note 17.

³⁸ Para 18-54 *Report*.

working of the mind. The distinction between this state, commonly called "automatism", and that of incapacity or insanity was discussed by the President of the New Zealand Court of Appeal in *Queen v Cottle*:

The law, in making it essential to a finding of insanity that the mental condition of the accused should be such as not to understand the nature and quality of the act, or not to know that it was wrong, has imposed positive tests, which are difficult to apply where the mind of the doer of the act did not function in control of the action.³⁹

Despite the "difficulty" expressed by President Gresson, the Court of Appeal went on to elaborate the nature of "sane" and "insane" automatism as being two breeds of the same animal. Thus when the "non-functioning" is brought on by a "disease of the mind" it is deemed to be "insanity" and otherwise it is simply a question of automatism *per se*.

In the case of *Queen v Kemp*⁴⁰ the accused was alleged to have violently assaulted his wife whilst suffering arteriosclerosis which induced a temporary unconsciousness by cutting off blood supply to the brain. The Court treated such a condition as being a "disease of the mind" with the result that a defence of automatism was in fact a plea of insanity within *McNaghten's* Rules.

This may seem a clear-cut case, but once again we are faced with the difficulty of defining *McNaghten's* "disease of the mind". As the Butler Committee noted,⁴¹ "although psychiatrists certainly distinguish between forms of mental disorder the terms 'insanity', 'non-insane automatism' and 'disease of the mind', are exclusively legal terms, and the sharp divide . . . is unknown to medical science." Moreover, the Committee goes on to remark, the application of such terms is based largely on the possible consequences or policy-reasoning. The words of Lord Denning from *Bratty v Attorney-General for Northern Ireland*⁴² are cited to support this fact:

It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.⁴³

Bratty's case involved an individual who allegedly "blackened out" before strangling an eighteen year old woman. The accused put forward a defence that (a) he did not know what he was doing and that (b) there was no connection between his mind and his body, in terms of motor control. Although the facts of *Bratty* were not referable to any elements of intoxication, Lord Denning nevertheless took the opportunity to deliver some *obiter* statements on the full extent of automatism as a defence:

. . . [a] thing to be observed is that it is not every involuntary act which leads to a com-

³⁹ *Supra*, note 19 at 1009.

⁴⁰ [1957] 1 QB 399.

⁴¹ Para 18-22 *Report*.

⁴² [1963] AC 386.

⁴³ *Ibid*, 412.

plete acquittal. Take first an involuntary act which proceeds from a state of drunkenness. If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter, or unlawful wounding for which no specific intent is necessary.⁴⁴

So was defined what Lord Denning himself called the "very limited" defence of automatism. Lord Denning's exclusion of self-induced intoxication as a complete "automaton" defence raises two points. Firstly, he regards the primary issue as a question of intent, or *mens rea*, and secondly he adopts reasoning later enunciated in *Majewski's* case of "basic" and "specific" intent. The latter point is dealt with in greater detail later in this paper. For now we should note that it derives from the view that the automaton lacks the *mens rea* of the crime in question. The defence or excuse of automatism, however, appears to relate to a more fundamental issue concerned with the *actus reus*, or the voluntariness of the action.

As Smith and Hogan note, there is a great deal of dispute as to the exact nature of automatism:

On the one hand, it [automatism] is a mental element; on the other it is said that it is an essential constituent of the act, which is part of the *actus reus*.⁴⁵

Smith and Hogan contend that such a distinction is of academic value only since the defence will succeed under either head. But this may not be the case. In two areas at least the exact nature of 'automatism' is crucial to the basis of criminal liability.

First, if automatism relates only to the *actus reus* of the offence, then the 'specific' or 'basic' intent of the crime is totally irrelevant. Thus Lord Denning's *dicta* above in *Bratty's* case would have no basis in principle and all intoxicated actors who acted as automatons would have a total excuse or defence, since the *actus reus* of the crime was not committed.

Second, in the area of so-called "strict liability" offences,⁴⁶ if automatism goes to negate the *actus reus* then it would suffice as a defence. If, however, it was merely a question of intent then automatism would afford the accused no shield.

In *Bratty's* case Lord Denning considered the authority of *Hill v Baxter*.⁴⁷ The latter case involved a prosecution for dangerous driving and failing to stop at a compulsory "Halt" sign. The accused alleged that he could remember nothing at the time of the incident and that he was not conscious of what he was doing.

Lord Goddard CJ summed up the nature of such a potential defence:

⁴⁴ *Ibid*, 388.

⁴⁵ *Supra*, note 25 at 36.

⁴⁶ For a discussion of 'strict liability' see Clarke, "Accident — or What Became of *Kilbride v Lake*", *Essays on Criminal Law in New Zealand* (1971) 47. Also Smith and Hogan, *supra*, note 25 at 35.

⁴⁷ [1958] 1 QB 277.

The first thing to be remembered is that the Road Traffic Act 1930 [under which the accused was charged], contains an absolute prohibition against driving dangerously or ignoring "Halt" signs. *No question of mens rea enters into the offence*; it is no answer to a charge under those sections to say: 'I did not mean to drive dangerously' or 'I did not notice the Halt sign'. The justices' finding [in the inferior court] that the respondent was not capable of forming any intention as to the manner is really immaterial. What they evidently mean is that the respondent was in a state of automatism.⁴⁸ [emphasis mine]

Here, then, is an implied acknowledgement that *mens rea* and automatism are separate issues. The question was whether or not the accused was actually driving; that is, whether there was a mental link between his mind and his body. This is a question of voluntariness — a threshold issue of *actus reus*. ("*Mens rea* may exist without an *actus reus*, but if there be no *actus reus* there can be no crime"⁴⁹). It is fundamental to the free will principle that a criminal action must be willed and voluntary:

In general, no crime is committed unless a person brings about its constituent elements by a voluntary act or omission. A person does not incur criminal liability for acts done in a state of automatism⁵⁰

In *Bratty's* case Lord Denning discusses automatism in relation to *mens rea* and intent. It is submitted that this analytical transposition displays a legal preoccupation with limiting the potential for intoxication as a defence:

A person's conduct may be involuntary owing to intoxication through drink or drugs but such a case falls to be determined by the principles applicable to the defence of drunkenness and ought not to be treated as an instance of automatism.⁵¹

So, when the individual raises a defence based upon the fact of his or her drunkenness the first matter discussed by the Court appears to be the question of intent.

IV. MENS REA: the principle

Actus non facit reum nisi mens sit rea;

The act does not make a person guilty unless his/her mind be guilty.

This maxim enunciates the common law (*prima facie*) requirement for *mens rea* as a constituent part of any offence. Lord Reid notes in the important case *Sweet v Parsley*:

It is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.⁵²

Although in discussing strict liability offences Lord Reid did not avert to the point, the common law had long ago found a "reason" for

⁴⁸ *Ibid.*, 282.

⁴⁹ *Supra*, note 25 at 33.

⁵⁰ *Halsbury's Laws of England* (4th ed 1973-) Vol II para 6, 13.

⁵¹ *Ibid.*

⁵² [1969] 53 Cr App R 221 at 225.

limiting the Crown's burden to prove a full *mens rea*: *Qui peccat ebrius luat sobrius*. Voluntary intoxication was no "excuse" in law.

In the twentieth century the apparent conflict between these two principles is considered by Smith and Hogan.⁵³ They contend that while voluntary intoxication *per se* is no defence, if it can be demonstrated that the defendant lacked the required *mens rea* then there is a defence. That is, the defendant must point to the fact that it has not been proved that he had the required intent:

... if there is material suggesting intoxication, the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent.⁵⁴

Again it is interesting to note that the courts appear to be considering only complete intoxication, so that the accused must be so drunk that he or she is not merely less aware of the circumstances or of his or her actions, but rather the accused must be so intoxicated that he or she cannot be deemed to have intended the act required by the charge.

A drunken intent is nevertheless an intent.⁵⁵

However as Lynch⁵⁶ observes, this desire to confront 'total' rather than 'partial' intoxication has left the distinct possibility that the latter may provide a better defence than the former. This paradox has been caused by the creation of the crime of "basic intent". As we shall see later, total intoxication is no defence to a crime of "basic intent" — even if no intent was present. Yet it may be that the partially intoxicated could successfully argue that, like a sober individual, he or she simply lacked the requisite *mens rea*.

There are two main approaches to establishing an absence of the mental element. On the one hand *Beard's* case seems to stand as authority for the view that the court must consider the *capacity* of the defendant to form the intent:

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

... Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.⁵⁷

Thus the Law Lords considered the test as one of "capacity to have intent" and as functioning to rebut a "natural presumption" of intent. However, it has been demonstrated by more recent authorities that whilst proof of incapacity conclusively demonstrates a lack of *mens rea*, it is not necessary to argue so far. For the sober and drunken person alike the question is whether or not the intent was formed in fact.⁵⁸

⁵³ *Supra*, note 25 at 34.

⁵⁴ *Queen v Broadhurst* [1964] AC 441, 463.

⁵⁵ *Queen v Sheehan* [1975] 1 WLR 739, 744.

⁵⁶ *Supra*, note 11.

⁵⁷ *Supra*, note 10 at 501, 502.

Moreover, it has been held that no individual can be legally presumed to have intended the consequences of his or her actions:

When people say that a man must be taken to intend the natural consequences of his acts, they fall into error; there is no 'must' about it; it is only 'may'.⁵⁹

This approach was adopted in *Kamipeli's*⁶⁰ case, and by the Privy Council in *R v Broadhurst*⁶¹ when the Judicial Committee rejected the suggestion of a burden on the defendant to prove incapacity to form intent. Rather, as counsel for the Crown conceded in the proceedings, it was for the jury to decide whether the evidence of intoxication was weighty enough to leave a reasonable doubt about the defendant's actual intent. In *R v Kamipeli*, McCarthy P delivering the judgment of the New Zealand Court of Appeal, decided that it was the fact of intent rather than the capacity for it that was relevant.⁶²

This, then, is the principle which emerges. *Mens rea* is a necessary ingredient (along with *actus reus*) of a criminal act, and while self-induced intoxication *per se* is not a defence or excuse, it may serve to demonstrate the non-existence of *mens rea*. To that extent the prosecution must prove not the capacity to form, but the actual existence of, a criminal intent.⁶³

There are two important and inherent elements in the maxim *Actus non facit reum nisi mens sit rea*. First, there must be a "guilty mind" which relates directly to the proscribed act — that is, there must be the intent (or recklessness) to do the proscribed act, not some other. So it is clear that requisite intent for assault is not the act of deciding to become intoxicated. Second, there must be a concurrence of the *actus reus* and *mens rea*.

These propositions may seem self evident, but as we shall see the courts have shown a distinct willingness to depart from them when policy reasoning so dictates.

V. MENS REA: the principle modified — extended intent.

While it would appear to be an established principle of criminal liability that both *mens rea* and *actus reus* should coincide in time, in *Thabo Meli's* case⁶⁴ the Privy Council established an important exception. That case involved two individuals (the defendants) who had intended to kill the deceased. The first attempt at "murder" failed (thus no *actus reus*), but the defendants thinking they had achieved their aim, left the "deceased" in a place where he later died of exposure.

The defendants intended to kill at first — but did not; and when they did kill, they did not intend to do so. In the two separate incidents the

⁵⁸ *Queen v Sheehan* supra, note 55, and *R v Kamipeli* [1975] 2 NZLR 610.

⁵⁹ *Hosegood v Hosegood* [1950] 1 TLR 735 at 735.

⁶⁰ *Supra*, note 58.

⁶¹ *Supra*, note 54 at 462–463 per Lord Denning LJ.

⁶² *Supra*, note 58.

⁶³ According to the principles enunciated in *Woolmington v DPP* [1935] AC 462.

⁶⁴ *Thabo Meli v The Queen* [1954] 1 WLR 228.

actus reus did not coincide in time, but the Privy Council responded to this situation:

There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as parts of their plan: and it is much too refined a ground of judgment to say that, because they were at a misapprehension at one stage, and thought that their guilty purpose was achieved before it was achieved, therefore they are to escape the penalties of law.⁶⁵

The policy reasoning is obvious. Judicial fear that criminals would escape liability carried the day. A similar approach, relevant to our inquiry, may be discerned in *AG for Northern Ireland v Gallagher*.⁶⁶

Gallagher's case involved a defendant who had formed an intent to kill his wife, and then got drunk in order to obtain what was called 'Dutch courage':

If a man, whilst sane and sober forms an intention to kill and makes preparation for it . . . and 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 . . . The wickedness of his mind before he got drunk is enough to condemn him coupled with the act which he intended to do, and did do.⁶⁷

Actus reus and *mens rea* may have not coincided. At the time of the killing Gallagher may have been so drunk as not to have had the required intent for murder. Nevertheless, as a matter of public policy, Lord Denning decided that an individual could not attempt to escape liability merely by getting intoxicated; the requisite wickedness of the mind is transferred.

In *Queen v O'Connor*⁶⁸ Chief Justice Barwick appreciated the policy element apparent in *Gallagher's* case, noting that this doctrine of "extended intent" was limited to specific fact situations involving a prior plan and *deliberate drunken pursuit of that plan*. Dr GF Orchard has taken this argument one step further and argued that there is now authority for the proposition that:

if an accused realises there is a significant risk of his committing an offence while intoxicated and he commits the *actus reus* of a foreseen offence of basic intent after having become voluntarily intoxicated he may be convicted even if he finally acted without a required mental element, for he was genuinely reckless in becoming intoxicated.⁶⁹

Under this analysis, it would seem that an individual has "transferred" the *mens rea* to the *actus reus* of an offence if he or she intends, or is reckless as to whether or not he or she commits the proscribed act and voluntarily becomes intoxicated between the formation of this intent or recklessness and the performance of the *actus reus* notwithstanding that the *actus reus* and *mens rea* may not coincide (due to the actor's intoxication).

⁶⁵ *Ibid*, 230, per Lord Reid.

⁶⁶ *Supra*, note 24.

⁶⁷ *Ibid*, 382.

⁶⁸ *Supra*, note 12.

⁶⁹ 'Criminal Responsibility and intoxication — The Australian rejection of *Majewski*' [1980] NZLJ 532, 537-538.

Such a formula equates with that in force in the Federal Republic of Germany. Under the judicially developed doctrine of ALIC, (*actio libra in causa*)⁷⁰, an accused with *Vorsatz* (intent) or *Fahrlaessigkeit* (recklessness) as to the commission of a crime cannot escape liability merely by becoming intoxicated. Consider the following cases:

(i) A intends to kill B but, afraid of the consequences of doing so, sets about getting drunk in order to acquire Lord Denning's "Dutch courage". Totally intoxicated A kills B. Upon A's arrest it is contended that at the time of the killing A was too drunk to know what he or she was doing.

(ii) C has a history of violence when drunk, particularly against D. Knowing of this C gets drunk in D's company and duly assaults D. It is contended that C was too drunk to know what he or she was doing.

It is submitted that in both cases A and C have the required intent for murder and assault respectively. In German law A intended to commit the crime (ie had *Vorsatz*). C was reckless as to whether or not he or she would assault D (ie had *Fahrlaessigkeit*). It is interesting to note that in the latter case *Fahrlaessig* ALIC consists of a two-level objective/subjective hybrid-test that:

- (i) should have known of the risk of assaulting D; and
- (ii) had a personal knowledge of his or her previous actions.

So it is that in both English and West German jurisdictions an extended or pre-existing *mens rea*, may be considered in assessing the liability of the self intoxicated even where *mens rea* (*subjektive Toitbestandsmerkmale* and *Schuld*) and *actus reus* do not coincide.⁷¹ The one caveat that can be placed on this doctrine is that in English law, "extended" *mens rea* born of recklessness may only apply to crimes of "basic intent".

The policy reasoning behind the notion of *Actio libra in causa* has proved very attractive to the English courts and there have been several suggestions for broadening the notion of "extended intent" beyond its original boundaries, so that the act of becoming intoxicated *per se* would supply the required *mens rea* for any and all crimes of "basic intent".

But *Gallagher's* case, it is submitted, is no authority for such a proposition. There is an important and fundamental distinction between being reckless as to whether or not you commit an offence whilst intoxicated and being reckless as to whether or not you become intoxicated simpliciter.

VI. MENS REA: the principle modified — "Basic Intent"

The dual concepts of "specific" and "basic" intent mark one of the

⁷⁰ *Supra*, note 18.

⁷¹ *Objective Tatbestandmerkmale* is the German phrase used to describe the physical action and surrounding circumstances of an offence.

most fundamental policy modifications of the principle that a lack of *mens rea* will negate liability.

The terms first appeared in juxtaposition when used by Lord Birkenhead in *Beard's* case.⁷² His Lordship, when reviewing previous cases, stated that murder was a crime of "specific intent" (capable of being negated by intoxication) whilst manslaughter involved "basic intent". The lack of intent induced by self-intoxication was not a negating factor in crimes of basic intent.

Lord Denning employed the same phraseology in two subsequent landmark cases⁷³ to maintain a dichotomy of mental elements required in murder and manslaughter:

If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary.⁷⁴

Thus the terms were used in a very loose sense to capture the different standards of *mens rea* required for various criminal offences. At times this dichotomy seems to echo the distinction between "ordinary" *mens rea* (ie intent and recklessness) and "general" *mens rea* (ie negligence).

In *DPP v Majewski*⁷⁵ the House of Lords attempted to establish a firm jurisprudential foundation for the principles of "specific" and "basic" intent. On *Majewski's* authority there are two categories of criminal acts: those requiring a "specific" intent and those requiring a "basic" intent. An apparently tautologous definition is offered: a lack of *mens rea* induced by self-intoxication becomes irrelevant in crimes requiring only a basic intent, whereas in crimes of specific intent the *mens rea* must always be proved. But the question still remains; what is a basic or specific intent?

As Smith and Hogan note, it is of great importance that these terms be defined, since they are central to the issue of liability.⁷⁶ The various speeches in *Majewski* give us no exact test, but only a few hints as to what specific intent might mean.⁷⁷ Perhaps the clearest account was given by Lord Elwyn-Jones when he adopted the words of Lord Simon in *Director of Public Prosecutions v Morgan*:

By "crimes of basic intent" I mean those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*. The *actus reus* generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it, but with a crime of basic intent the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in *actus reus*.⁷⁸

⁷² *Supra*, note 18 at 499 to 503.

⁷³ *Supra*, notes 42 and 24.

⁷⁴ *Supra*, note 42 at 410.

⁷⁵ *Supra*, note 3.

⁷⁶ *Supra*, note 25 at 186.

⁷⁷ For a more extensive list of these 'hints' see Beaumont, 'Specific Intent: Principle Versus Policy', *supra*, note 6.

⁷⁸ *Director of Public Prosecutions v Morgan* [1976] AC 182, 216.

This appears to give specific intent a meaning similar to "ulterior" intent, but this construction is expressly rejected by Lord Simon. Moreover, Lord Simon in *Morgan's* case (*supra*) appears to consider murder a crime of basic intent. No *mens rea* beyond intention or foresight as to death, the prohibited consequence, need be proved. Yet murder is defined as a crime of specific intent in *Director of Public Prosecutions v Beard*.⁷⁹

It seems that the only "safe" definition is that proposed by Professor Smith:

... a "crime of specific intent" means a crime of which the courts have decided that evidence of drunkenness may be admitted to negative mens rea and "crime of basic intent" means a crime of which the courts have decided that the mens rea usually required need not be proved when there is evidence that the accused was drunk at the time.⁸⁰

We are back where we started. The jurist must have recourse to the courts' decisions and the lists provided by numerous commentators to determine on which side of the fence a proscribed act might fall.⁸¹ Certainly there seems to be no fixed principle.⁸²

Another and perhaps more serious criticism of *Majewski's* case lies in its abrogation of the principle that the prosecution must prove the *mens rea* of the crime. For now, as Smith and Hogan note,

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 has taken drinks and drugs. By so doing he dispenses the Crown from the duty, which until that moment lay upon them, of proving beyond reasonable doubt that he had *mens rea*.⁸³

VII. MENS REA: the principle discarded — recklessness revisited

One of the policy rationale behind *Majewski* appears to be the view that the voluntarily-intoxicated person has chosen to abandon his or her rational capacity; and that this intent (or sometimes even recklessness) to become intoxicated is sufficient *mens rea* for any subsequent crime of "basic" intent.

A further development comes with two decisions of the House of Lords which were delivered on the same day: *Commissioner of the Metropolis v Caldwell*⁸⁴ and *R v Lawrence*⁸⁵.

Caldwell concerned a defendant charged under s1 of the Criminal Damage Act (UK) with setting alight a residential hotel. By s1 of that Act:

⁷⁹ *Supra*, note 10 at 500-503 per Lord Birkenhead LC.

⁸⁰ See [1977] Crim LR, 561.

⁸¹ *Supra*, note 25 at 192.

⁸² Further criticism of the lack of definition was given by Gibbs J in *Queen v O'Connor*, *supra*, note 12 at 359.

⁸³ *Supra*, note 25 at 195.

⁸⁴ *Supra*, note 4.

⁸⁵ [1981] 2 WLR 524.

(1) A person who . . . destroys or damages any property belonging to another intending to destroy or damage . . . or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence

(2) A person who [intends to, or is reckless as to whether any property is destroyed or damaged] . . . and 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.

The defendant (the respondent before the House of Lords) claimed that he was so drunk at the time of the offence that it did not occur to him that lives might be endangered. He pleaded guilty to a charge under s1(1) of the Act but not guilty under s1(2). The question before the House was whether the defendant had been "reckless" in terms of s1(2). The defendant claimed that he could not have been reckless as he had given no thought at all to the possibility of peoples' lives being endangered.

Their Lordships held, on the authority of *Majewski*, that self-induced intoxication was no defence to a crime in which recklessness was enough to supply the necessary *mens rea*.

The real matter of interest here lies in the reasoning given by the House of Lords in support of *Majewski*. Lords Wilberforce and Edmund-Davies dissented and sought to limit the effect of *Majewski* to crimes of basic intent:

Having revealed in *Reg v Majewski* . . . my personal conviction that, on grounds of public policy, a plea of drunkenness cannot exculpate crimes of basic intent and so exercise unlimited sway in the criminal law, I am nevertheless unable to concur that your Lordships' [the majority] decision should now become the law of the land.⁶⁶

Lord Edmund-Davies then went on to affirm the words of Eveleigh LJ in *R v Orpin*⁶⁷ that supported the dichotomy of "specific-basic" intent:

[T]here is nothing inconsistent in treating intoxication as irrelevant when considering the liability of a person who has willed himself to do that which the law forbids . . . , and yet to make it relevant when a further mental state is postulated as an aggravating circumstance making the offence even more serious.⁶⁸

Gallagher's case⁶⁹ originally put forward the notion that the "Dutch courage" of an intoxicated actor should not negate the transfer of a pre-existing *mens rea* to the time of the *actus reus*. *Majewski* took this proposition one step further. No longer was a pre-existing *mens rea* necessary, but rather the intent (or recklessness) of becoming intoxicated was sufficient *mens rea* for all crimes of basic intent. *Caldwell* and *Lawrence* go further still. In any crime where recklessness is sufficient *mens rea*, self-induced intoxication is no defence.

Of particular interest is the justification given for each step in the reasoning. *Gallagher* and *Majewski* refer to the actor's abandonment of

⁶⁶ *Supra*, note 4 at 523.

⁶⁷ [1980] 1 WLR 1050.

⁶⁸ *Ibid*, 1054.

⁶⁹ *Supra*, note 24.

freewill and capacity, and his or her intent in getting intoxicated. In *Caldwell* and *Lawrence* the House of Lords sought to reassess the meaning of recklessness which was no longer to be regarded as a "term of art". Rather, Lord Diplock sought to apply an "everyday English meaning" unencumbered by labels of "subjective" or "objective". This definition was to be based on the state of mind of the individual actor,⁹⁰ so that Lord Diplock was able to hold that *Caldwell* had been "reckless" because "that risk would have been obvious to him had he been sober".⁹¹

In both *Caldwell* and *Lawrence* (which dealt with reckless driving) Lord Diplock put forward almost identical tests for "recklessness" based on a two-tier "subjective" (ie objective/subjective) hybrid test:⁹²

- (1) Was there a risk of danger that would have been apprehended by the ordinary person?
- (2) Did the accused act without giving thought to that risk, or, having recognised such a risk did the accused act regardless?

If the answer to both of these propositions is in the affirmative, then the individual was "reckless".⁹³

Lord Edmund-Davies in dissent, strongly objected to this two-tier "subjectivism", offering a more traditional objective-subjective dichotomy:

It has therefore to be said that, unlike negligence, which has to be judged objectively, recklessness involves foresight of consequences, combined with an objective judgement of the reasonableness of the risk taken. And recklessness in vacuo is an incomprehensible notion. It *must* relate to the foresight of risk. . . .⁹⁴

The tandem decisions in *Caldwell* and *Lawrence* have caused a great deal of controversy and discussion amongst jurists. As Glanville Williams admits, "[t]he decisions . . . can be read in widely differing ways".⁹⁵

And indeed they have. Professor Glanville Williams has tended to regard Lord Diplock's opinions as being supportive of a "conditional" subjectivism. At the same time he regards them as being somewhat confusing:

Of one thing we may be certain. Lord Diplock's opinions are going to confound judges and juries, be a bore to law students and add to the incomes of practitioners for some time to come.⁹⁶

It is not the writer's intention to reinforce the sentiments of Professor Williams by attempting yet another analysis of the two cases. Rather it is hoped that the decisions have illustrated something of the judicial tightrope between policy and principle. On the one hand the law

⁹⁰ *Supra*, note 4 at 515.

⁹¹ *Ibid*, 517.

⁹² cf the West German Regime p157.

⁹³ *Supra*, note 4 at 516.

⁹⁴ *Ibid*, 519.

⁹⁵ "Recklessness Redefined" CLJ 40(2) Nov 1981, 252.

⁹⁶ *Ibid*, 283.

lords found themselves confronted with a series of analytical devices — of principled “pigeon-holing” — and on the other there was a clear policy rationale. The dogma of the traditional analysis was quickly discarded by Lord Hailsham LC:

[I] share the distaste for the obsessive use of the expressions “objective” and “subjective” in crime.”

and instead the common sense of policy is firmly put in its historical place:

Since the days of Noah, the effects of alcohol have been known to induce the state of mind described in English as recklessness and not to inhibit it and for that matter to remove inhibitions in the field of intention and not to destroy intention.”

That is not to say that *Caldwell* and *Lawrence* totally reject all jurisprudential rationale; on the contrary, the non-subjectivist argument was forcefully put. The true significance of these cases in this article is that they acknowledge an alternative analytical model. By selecting the model they want the law lords to effect pre-determine the result. It was, as Celia Wells puts it, the swatting of the subjectivist bug.⁹⁹

VIII. THE COCKTAIL MIXED: Which principle, which policy?

As we have seen, the criminal law along with most other areas of legal endeavour has been influenced by two often competing considerations; a rationale of principle and an imperative of policy. The notion of self-intoxication in the criminal law is particularly demonstrative of this complicated relationship.

A traditional analysis of criminal liability adopted in common law jurisdictions has been based on a juxtaposition of *mens rea* (“a guilty mind”) and *actus reus* (the action and surrounding circumstances). In addition, jurists have also acknowledged a fundamental issue of free will. If we accept this triadic analysis of criminal culpability it becomes enlightening to apply this criteria to the self-intoxicated actor.

Under this model of criminal liability, the totally-intoxicated may have the same criminal culpability as the legally insane. Indeed, in the jurisdiction of the Federal Republic of Germany, the two states are dealt with in a similar manner. Yet the common law has refused to recognise these similarities and has instead preserved a test of “disease of the mind”.¹⁰⁰ Although this test is divorced from physiological reality, it is a legal fiction that allows self-intoxication to be treated as an exception to the principles of liability.

As a matter of *actus reus* an intoxicated person may sometimes have no motor control over his or her actions and have no consciousness of what he or she is doing. Nevertheless, when this automatism is the result

⁹⁹ *Supra*, note 85 at 529.

⁹⁸ *Ibid*, 530.

⁹⁹ “Swatting the Subjectivist Bug” [1982] Crim LR 209.

¹⁰⁰ *Supra*, note 16 cf para 20 *Strafgesetzbuch* (German Criminal Code) *supra*, note 17.

of self-induced intoxication the courts treat the matter as bearing upon the question of *mens rea* or the intent of the actor. But even here the policy imperative that drunken or narcotic-influenced defendants should not "escape" liability has resulted in many modifications of the basic principle *actus non facit reum nisi mens sit rea*.

Perhaps the most blatant example of policy reasoning is the case of *Majewski* with its specific-basic intent analysis. It is a dichotomy that the Court admitted has no logical foundation. In *Caldwell's* case the traditional subjective-objective approach to intent was brought into question, and even criticised. Both of these cases raise a fundamental question of policy: for what act are we seeking to punish the actor — the act of becoming drunk, or the actual criminal act itself? All too often while principle demands the latter, policy requires the former.

In the light of this conflict and all the judicial contradictions that have followed it is perhaps time to recognise the error in the belief that the traditional common law model of criminal responsibility is a universal truth. A system of analysis is only as effective as the results it produces, and a legal principle must be measured by its social consequences *without* the policy distortions. To this extent the approach of the West German Criminal Code and the submissions of the Butler Committee are examples of alternative, and it is submitted, more viable models.