

CRIMINAL LAW REFORM COMMITTEE

REPORT ON

INTOXICATION AS A DEFENCE
TO A CRIMINAL CHARGE

March 1984
Wellington
New Zealand

CRIMINAL LAW REFORM COMMITTEE

REPORT ON INTOXICATION

To: The Minister of Justice

INTRODUCTION AND SUMMARY

1. We have been asked to consider the law relating to drunkenness as a defence in the criminal law.
2. In recent years this subject has given rise to a number of inconsistent judgments in superior courts in a number of countries. Legislation was recommended in the United Kingdom by the Butler Committee in 1975 and by the Criminal Law Revision Committee in 1980, although neither proposal has yet been implemented, and the topic has been the subject of preliminary investigation by the Law Reform Commission of Canada and the Law Reform Commissioner of Victoria. We have given careful consideration to the various reports and working papers which have been produced by these bodies.

3. In the course of our deliberations we have also consulted with members of the Judiciary, and we have sought information from the Police and members of the legal profession as to the operation in practice of defences based on intoxication. We have also been assisted by discussions with Dr B. James, Director of Mental Health, Department of Health, Dr H. Bennett, Superintendent, Tokanui Psychiatric Hospital and Dr G. M. Robinson, Director of the Alcohol and Drug Centre, Wellington Hospital.
4. In Part I of this report we examine the present law concerning the extent to which intoxication may support a defence, and in Part II we examine various reforms which might be considered.
5. We have reached the conclusion that, with one exception, we should not recommend any change to the existing law, at least at present. Under the present law there are occasional cases when a defendant is acquitted because evidence of intoxication leads to the conclusion that he may not have acted with a state of mind required by the full definition of the offence charged. It is rare for a defence based on intoxication to result in the defendant's acquittal on all charges, and in the few instances where this is the outcome the degree of culpability on the part of the defendant will be at least debatable. It is understandable that such cases have sometimes given rise to a measure of public concern, but such verdicts are so unusual as to pose no threat to public

safety. On the other hand, there are objections to each of the suggested legislative changes, and we have concluded that the difficulties they present outweigh any benefits which might result.

6. The exception concerns cases where intoxication is an element of the alleged offence, and here we recommend that statutes creating such offences should provide that the effects of voluntary intoxication should not be capable of providing a defence to a person proved to have been guilty of the prohibited conduct (paragraphs 73 and 74).

PART I

HISTORY AND PRESENT LAW

HISTORICAL BACKGROUND

7. The early authorities on the common law indicate that before the nineteenth century intoxication was no defence to a criminal charge. Indeed, there were statements that drunkenness, far from being a defence, actually amounted to an aggravation of a crime, although it is not clear whether practical effect was given to this.¹
8. The view that intoxication could not excuse appears to have been first qualified by Sir Matthew Hale, who wrote that although a drunken person "shall have no privilege by his voluntary contracted madness", yet he might have a defence if his intoxication was caused "by the unskilfulness of his physician or by the contrivance of his enemies", or if his drinking caused permanent insanity.²

1. Singh, History of the Defence of Drunkenness in English Criminal Law (1933) 49 LQR 528, 531.
2. Hale, 1 Pleas of the Crown, 32.

A more significant relaxation of the original common law rule emerged in the nineteenth century when in a number of cases Judges accepted that drunkenness could be relied upon to support a defence that the defendant had not formed an intent required by the definition of the crime charged.³ These included cases where the defendant was charged with a statutory offence of injuring with intent to murder,⁴ where he was charged with murder and the question was whether he had acted with the required intent to kill or cause grievous bodily harm,⁵ and where he was charged with attempted suicide and the question was whether he had acted with intent to kill himself.⁶ There were also cases where drunkenness

3. In Majewski [1977] AC 443, 456 Lawton LJ. recorded a pragmatic explanation for this: "Counsel for the Crown pointed out that in the 19th century the judges began to relax the strict common law rule in cases such as murder and serious violent crime when the penalties were harsh (death or transportation) or where there was likely to be much sympathy for the accused (attempted suicide)".

4. Eg Cruse (1838) 8C & P 541; 173 ER 610.

5. Doherty (1887) 16 Cox CC 306.

6. Eg Moore (1852) 3 C & K 319; 175 ER 571.

was accepted as being relevant to the question whether the defendant had acted in the belief that he or his property was in need of defence from a threatened attack.⁷

THE PRESENT LAW

10. There is no statutory provision in New Zealand dealing with the extent to which intoxication may support a defence to a criminal charge, and the position therefore depends on the common law developed by decisions of the courts. In many respects the law in New Zealand is clear, but there are aspects of it which remain somewhat uncertain (see, in particular, paragraphs 17-24).

Drunkenness and other drugs

11. The principles which apply to drunkenness also apply where the defendant was affected by other drugs, or by a combination of alcohol and other drugs.⁸ We therefore use the more

7. Eg Marshall (1830) 1 Lew. 76; 168 ER 965; Gamlen (1858) 1 F & F 90; 175 E.R. 639.

8. Eg Lipman [1970] 1 QB 152; Viro (1978) 141 CLR 88.

general term "intoxication", in preference to "drunkenness", in order to avoid the impression that we are concerned only with cases involving the consumption of alcohol.

Intoxication no defence

12. It must be stressed that intoxication in itself is not and never has been a defence in English or New Zealand criminal law. It is not a defence that intoxication impaired the defendant's judgment of right and wrong, or weakened his inhibitions so that he behaved impulsively or in a way he would not have done had he been sober. It is not a defence that a defendant intentionally committed an offence while intoxicated, even if he cannot later remember what he did: "a drunken intent is nevertheless an intent".⁹ On the other hand, intoxication may impair awareness, perception and foresight, and if intoxication results in the absence of a state of mind required by the definition of an offence the courts have accepted that the absence of that state of mind may provide a defence. Intoxication is never itself a defence, but in some cases it may be evidence relevant to a defence that a required state of mind was absent. The cases in which such a defence is likely to succeed will be unusual, and the true scope of the principle itself remains a matter of some dispute.

9. Sheehan [1975] 2 All ER 960, 964.

Intoxication and Insanity

13. In certain cases a defendant may be acquitted on the ground that he was insane when he acted. This verdict will usually result in the defendant being detained in a psychiatric hospital. The mere fact that a mental disorder may have been temporary does not exclude the possibility of acquittal by reason of insanity, and this verdict is appropriate if intoxication caused insanity.¹⁰ But for a finding of insanity it must be shown that, whatever the cause, the defendant suffered from "natural imbecility or disease of the mind" (section 23(2) of the Crimes Act 1961). The courts have held that "disease of the mind" does not include transitory disorders caused by factors external to the body, such as a blow on the head or drink or drugs.¹¹ It follows that intoxication will not usually result in insanity, even when it causes delusions or hallucinations of the same kind as those associated with psychoses.

Incapacity to form Intent

14. In the past there has been some suggestion that intoxication might justify acquittal only if it rendered the defendant "incapable" of forming a required intent. This was open to

10. Davis (1881) 14 Cox CC 563; DPP v. Beard [1920] AC 479, 501.

11. Eg Cottle [1958] NZLR 999; Quick [1973] QB 910.

the criticism that the defendant might be capable of forming a required intent yet fail to form it in fact. It is now clear that the question is whether the requisite state of mind was in fact present and it is wrong to suggest that intoxication may be relevant only if it deprived the defendant of the ability to form it. In New Zealand the leading case is R. v. Kamipeli¹² where the accused was charged with murder, it being alleged that he killed the victim by knocking him to the ground and kicking him in the head. There does not seem to have been any suggestion that the accused had not intentionally struck the victim, but it was argued that he should be convicted only of manslaughter because he had not acted with the intent required for murder (which in a case such as this requires that the accused meant to kill, or at least meant to cause injury that he knew was likely to cause death, and was reckless whether death ensued). Evidence that the accused was somewhat drunk was relied on in support of this defence, but the trial Judge directed the jury that drunkenness could exclude the required intent only if the accused had been so drunk that his mind had "ceased to function", so that he was "acting as a sort of automaton without his mind functioning". The Court of Appeal held that it was the fact of intent rather than capacity for intent that was in issue, and the trial Judge's direction was wrong because, even if the evidence fell short of establishing the

12. [1975] 2 NZLR 610; cp. Sheehan [1975] 2 All ER 960;
Viro (1978) 141 CLR 88.

degree of drunkenness he described, it remained open to the jury to conclude that the Crown had failed to discharge its onus of proving the intent required for murder. In a case such as Kamipeli a drunken offender might have known what he was doing when he attacked the victim, and he might have intended such an attack, but his intoxication remains relevant to the further question whether he meant to kill or foresaw the risk of causing death. On a retrial Kamipeli was acquitted of murder and convicted of manslaughter.

Burden of Proof

15. In Kamipeli it was also held that, where intoxication is relied on, there is no rule that the defendant has the burden of proving lack of intent; as in other cases, the question for the jury is whether all the evidence (including evidence of intoxication) leaves them in reasonable doubt as to whether the defendant acted with the requisite state of mind.
16. The Court of Appeal further held that although it will often be proper for the jury to infer from the defendant's conduct that he had formed the requisite state of mind, yet the law does not provide any presumption that he intended the natural and probable consequences of his acts. The Court added, however, that it is proper, and often it will be necessary,

for the Judge to warn that absence of intent because of drunkenness is a conclusion not to be lightly reached, and if there is no evidence which could reasonably be thought to raise the issue the Judge can exclude drunkenness from the jury's consideration.¹³

The Specific Intent Rule

17. The concept of "specific intent" has been used by English Courts to confine the scope of defences of lack of intent based on intoxication, and it is at this point that it becomes difficult to state the present New Zealand law with complete confidence.

18. In D.P.P. v. Majewski¹⁴ the accused had been involved in a bar-room brawl, as a result of which he was convicted on charges of assault occasioning actual bodily harm and assault of police constables in the execution of their duty. There was evidence that Majewski had acted under the influence of a combination of voluntarily consumed alcohol and drugs, and it

13. [1975] 2 NZLR 610, 619; and see Meek [1981] 1 NZLR 499, 504, where the Court of Appeal held that the evidence concerning intoxication was not such as to require a specific direction about it.

14. [1977] AC 443.

was suggested that he may not have known what he was doing. The trial Judge ruled, however, that the effect of the drink and drugs could provide no defence. On appeal, this ruling was unanimously approved by the English Court of Appeal and the House of Lords. It was held to be established law in England that the effects of self-induced intoxication could provide a defence only if the offence charged required a "specific intent", and that such intoxication, however gross it might be, could never support a defence when the mental element is no more than a "basic intent".

"In the case of these offences it is no excuse in law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had 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

The offences charged in Majewski required no more than a "basic intent", so that the jury had been correctly directed that intoxication could provide no basis for a defence.

15. Ibid, 476 per Lord Elwyn-Jones LC

19. The rule in Majewski has its most important impact in cases involving personal violence or damage to property. In such cases it allows the intoxicated actor the possibility of a defence of lack of intent in respect of the gravest offences, where the intent of the offender is of primary importance, but the rule ensures that voluntary intoxication cannot support a defence of lack of intent to a variety of lesser charges which will generally be available. For example, a defendant might be acquitted of murder but his voluntary intoxication could not assist a defence to manslaughter, and similarly a charge of wounding with intent to cause grievous bodily harm might be reduced to unlawful wounding or assault.

20. The specific intent rule is controversial. It means that when an offence is classified as one of "basic intent" a person who was intoxicated may be convicted although he may never have intended or foreseen the conduct or consequences for which he is held responsible, and this is so even if he did not know what he was doing. It has been argued that in such cases it is wrong in principle for the courts to impose liability for a truly criminal offence because the defendant will not have had the state of mind required by the definition of the offence, even though it be described as a mere "basic intent"; and if he was not conscious that he was acting at all his conduct will have been "involuntary", and he should be excused on that ground as well. Moreover, the crucial distinction between "specific" and "basic" intent is arbitrary and uncertain.

21. These objections were rejected in Majewski, largely on grounds of public policy. That decision is consistent with the law which generally prevails in the United States, and it was followed by the Supreme Court of Canada in a majority decision in Leary v. The Queen,¹⁶ but it was not followed by the High Court of Australia in The Queen v. O'Connor,¹⁷ another majority decision.

22. In New Zealand the status of Majewski remains uncertain, for in Kamipeli,¹⁸ decided about a year before the House of Lords reviewed the matter, the Court of Appeal concluded that no distinction was to be drawn between offences requiring a "general" and a "particular" intent. The Court also said that:

"the common law, as it must be applied since Woolmington's case, requires the prosecution to prove all the elements in a definition of an offence, including any mental elements such as intention or recklessness. Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intention or recklessness required by

16. (1977) 74 DLR (3d) 103.

17. (1980) 146 CLR 64.

18. [1975] 2 NZLR 610.

the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than capacity for intent which must be the subject matter of the inquiry. The alternative is to say that when drunkenness is raised in defence there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it".¹⁹

23. This judgment seems to mean that voluntary intoxication will support an acquittal whenever it negates any required state of mind, even if that is no more than a "basic intent" or "recklessness". Such a proposition was not necessary to the decision in Kamipeli, and it is irreconcilable with Majewski. On the other hand, the principles stated in Kamipeli are supported by the majority judgments in the High Court of Australia in O'Connor, and by the dissent of Dickson J. in the Supreme Court of Canada in Leary; and the same view appears to have been adopted by the South African Appellate Division in S. v. Chretien.²⁰ Before these

19. Ibid, 616.

20. 1981 (1) S.A. 1097; see J.M. Burchell (1981) 98 SALJ 177.

overseas developments the Court of Appeal has said that the question of the applicability of Majewski in New Zealand must be regarded as open.²¹

24. Although it remains open to the Court of Appeal to adopt the rule in Majewski it seems to be generally accepted that unless and until it does Judges in lower Courts should apply the law as it is stated in Kamipeli.²² The result has been that there have been occasional cases where defendants have been acquitted of "basic intent" offences upon the ground that evidence of voluntary intoxication raised a reasonable doubt whether the required intent to commit the offence was present. An example of this is found in the decision in the District Court in 1980 in Police v. Waiariki.²³ In that case the defendant was charged with breaking and entering a dwelling house with intent to commit a crime therein and also

21. Roulston [1976] 2 NZLR 644, 652-653; Meek [1981] 1 NZLR 499, 504.

22. For example, in Police v. Steinberg, unreported, 18 August 1983, H.C., Christchurch, M313/83, the Crown and Hardie Boys J. accepted that Kamipeli and not Majewski applies in New Zealand; the charge was one of assault on a traffic officer in the execution of his duty.

23. Unreported, 12 September 1980, D.C., Hastings, C.R. No. 002014577-8.

with indecent assault upon the 82 year old woman who lived in the house. The evidence established that the defendant entered the house and committed an indecent act on the woman, but the Judge applied the principles in Kamipeli and dismissed both informations because evidence of the defendant's drunkenness left him in doubt as to whether the defendant had formed the intent required for the offences charged. In such a case the rule in Majewski would lead to a conviction on the charge of indecent assault, which in England is classified as an offence of "basic intent", although burglary requires a "specific intent", so that acquittal would remain appropriate in respect of that charge.

Intoxication and Recklessness

25. When statute does not define the mental element required for a truly criminal offence it is usually held that the defendant must act with either intention or recklessness, and sometimes statute expressly provides that recklessness is sufficient. In the past it has been widely thought that "recklessness" in this context requires that the defendant actually realised that the offence might result from his conduct, and unjustifiably took that risk. This was rejected as too narrow a view in R. v. Caldwell,²⁴ where the House of Lords

24. [1982] AC 341.

had to interpret a modern statute which created an offence of criminal damage, one element of which was that the defendant had been "reckless" as to whether the damage would endanger life. In this case the defendant had set fire to a hotel, but he claimed that he had been so drunk that the thought that this might endanger life never crossed his mind. The House of Lords held that a person damaging property was "reckless" as to danger to life if he actually realised that there was a risk of such danger or if he failed to give any thought to whether there was such a risk, when the risk would have been obvious had he given any thought to the matter. More specifically, it was held that self-induced intoxication could not negate such recklessness, so that it was no defence that, because of his intoxication, the defendant was unaware of the risk of endangering life when that risk would have been obvious had he been sober.

26. When the New Zealand Court of Appeal in Kamipeli referred to the possibility of drunkenness excluding "recklessness", it may be that the Court had in mind only those offences requiring that the defendant actually foresaw some risk. More recently, in R. v. Howe,²⁵ the Court of Appeal has held that, at least in relation to some offences, the concept of recklessness should be given the rather wider meaning approved in Caldwell. Howe was not a case involving intoxication but

25. [1982] 1 NZLR 618.

in those instances when the Court holds that the wider concept of recklessness applies it will no doubt be held that the House of Lords' view that it cannot be excluded by the effects of intoxication also applies.

27. The rule in Caldwell imposes some restriction on the scope of defences based on intoxication. It means that when mere recklessness is a sufficient mental element it will not be a defence that because of his intoxication the defendant failed to foresee the consequences of his conduct. But in the case of many offences mere recklessness is not a sufficient mental element, and even where recklessness as to consequences is enough it will generally be essential that the defendant at least intended to act in the way he did. As long as the principles in Kamipeli stand a defendant will be entitled to acquittal if his intoxication resulted in the absence of such an intention to act, or the absence of consciousness of acting.

Pre-existing Fault

28. There is one very exceptional class of case where it is probable that the effects of voluntary intoxication will never avail a defendant. If a person forms an intention to commit an offence, or realises that he is likely to commit it, and then consumes an intoxicant and commits the prohibited acts under its influence, there is little doubt that he will be responsible for that conduct even in the unlikely event that

at the time of that conduct he was no longer conscious of his actions. If the offence is one where recklessness or negligence is sufficient fault, it will probably suffice that the defendant was reckless or negligent before becoming incapacitated by the intoxicant. These conclusions are supported by overseas authority,²⁶ although the point is of little practical significance, for when the prosecution is able to prove that the requisite fault existed before the intoxication it is most unlikely that there will be any doubt that the defendant remained aware of his conduct and its consequences when he subsequently committed the prohibited acts.

Intoxication and Manslaughter

29. The judgment in Kamipeli suggests that as a general rule on a charge of any truly criminal offence evidence of voluntary intoxication may be relied upon to support a defence that the defendant lacked an intent required by the definition of the crime, or acted unconsciously. Such a general principle is also supported by the judgments of the majority of the High Court of Australia in O'Connor. Manslaughter, however, may be an exception. Before Majewski there was English authority

26. See O'Connor (1980) 146 CLR 64, 73, per Barwick CJ, and 103 per Stephen J, where AG for Northern Ireland v. Gallagher [1963] AC 349, and Egan (1897) 23 VLR 159 are cited in support.

suggesting that whatever the position was in relation to other offences the effects of voluntary intoxication could never support an acquittal of manslaughter.²⁷ This question was left open by the New Zealand Court of Appeal in R. v. Grice,²⁸ and in O'Connor²⁹ Barwick CJ recognised that as yet manslaughter remains as an "entrenched anomaly", although he thought this provided no justification "for any further departure from fundamental principle where voluntariness or requisite intent is absent".

Involuntary Intoxication

30. Cases such as Majewski which confine defences based on evidence of intoxication to offences requiring a "specific intent" are concerned only with "self-induced" or "voluntary" intoxication. Even where the specific intent rule applies there seems to be no doubt that "involuntary" intoxication provides a defence to any offence if it results in the absence of any required state of mind. "Involuntary" intoxication apparently includes cases where the intoxicant is taken

27. DPP v. Beard [1920] AC 479, 499-500; Howell [1974] 2 All ER 806, 810.

28. [1975] 1 NZLR 760, 766.

29. (1980) 146 CLR 64, 86; cp Haywood [1971] VR 755.

pursuant to medical advice and without warning of its possible effect,³⁰ as well as cases where the person was unaware that he was consuming the drink or drugs,³¹ or did so under duress. It is unclear whether it could include a case where the person is unaware of a condition which substantially increases his sensitivity to the intoxicant,³² and difficult unresolved questions arise when intoxication results from a combination of voluntarily consumed drink or drugs and other factors such as medication, or a blow on the head.³³ However, under Kamipeli the distinction between voluntary and involuntary intoxication is immaterial if the intoxication resulted in the absence of a requisite state of mind, except perhaps in the case of manslaughter.

30. Cp King (1962) 35 DLR (2d) 386.

31. Cp Rooke v. Auckland C.C. [1980] 1 NZLR 680; Flyger v. Auckland C.C. [1979] 1 NZLR 161.

32. Cp Report of the Committee on Mentally Abnormal Offenders (the Butler Committee), Cmnd. 6244 (1975), para. 18.56.

33. Mackay, Intoxication as a Factor in Automatism [1982] Crim LR 146.

31. There have also been occasional suggestions which might imply that involuntary intoxication may be a defence even if it does not result in the absence of a requisite intent.³⁴ There is an absence of authority, but practical considerations suggest there will be no such defence in such a case:

"If a man intends to kill and does kill, it can hardly be a defence simply to prove that he has some alcohol in his blood which he did not intend to have. Presumably he has at least to show that he would not have committed the crime but for the alcohol; but this is such a highly speculative matter as to be incapable of satisfactory proof".³⁵

Sentencing

32. In some cases voluntary intoxication may aggravate the offence and justify a more severe penalty than would otherwise be appropriate (for example, driving offences). More commonly, however, intoxication is put forward in mitigation of sentence, for it will often support a claim that an offence

34. Eg In Pearson (1835) 2 Lew. 144; 168 ER 1108, Park J. said that "if a party be made drunk by stratagem, or the fraud of another, he is not responsible"; Cp Hale, 1 PC 32.

35. Smith and Hogan, Criminal Law (4th ed) 189.

was out of character or was unpremeditated. Nevertheless, in England in the context of serious crime it has been said that voluntary intoxication "is rarely recognised as a substantial mitigating factor when standing alone", although it may add some weight to other factors such as the absence of recent offending or provocation; and if it appears that the defendant suffers from alcoholism or drug addiction, the court might order treatment rather than a punitive sentence, if there is a reasonable prospect of success.³⁶ This is consistent with the general practice in New Zealand courts.

36. D. A. Thomas, Principles of Sentencing (2nd ed), 209-211.

PART IIPOSSIBLE REFORMSINTRODUCTION

33. We have given detailed consideration to whether we should recommend legislation dealing with the criminal liability of intoxicated persons, and the form any such legislation should take. Before examining the various possibilities it is necessary to mention two considerations which are relevant to any proposed legislative reform.

The Absence of a Comprehensive Code

34. New Zealand has never had a fully codified criminal law. In particular the Crimes Act 1961, which is commonly regarded as a criminal Code, does not contain a comprehensive General Part dealing with such matters as the need for voluntary conduct or criminal intent, or such defences as automatism and mistake. These matters are largely governed by common law principles. Intoxication, however, is relevant to criminal liability only in as far as it negates voluntary conduct or a required state of mind. It would be possible to codify the principles relating to these matters but there may well be a risk of anomalies and confusion if this was done only in respect of cases involving intoxication.

35. A particular difficulty arises from the fact that New Zealand legislation has not followed a consistent pattern or used consistent terminology in defining the states of mind required for various offences. In some instances the statute is silent as to this factor and the nature of the required mental element depends on common law principles, and when a mental element is specified a variety of terms have been used. For example, some statutory provisions require that an offender "means" to cause a particular result, or acts "with intent" to do this, or with a particular "purpose" or "object", while others require that an offender act "wilfully", "intentionally", "intentionally or recklessly", "with reckless disregard" for certain matters, or "knowing" of specified circumstances or risks. Any legislation which sought to define when the effects of intoxication might or might not provide a defence would have to take account of this diversity in the statutory definition of offences.

The Practical Application of Kamipeli

36. The judgment in Kamipeli suggests that in principle any truly criminal charge may be defended on the ground that a state of mind required for criminal liability was absent as a result of intoxication. In practice, however, the defence is seldom raised and if raised is unlikely to succeed. In some cases an offender may be convicted of a lesser offence than that originally charged (for example, manslaughter rather than murder), and it may not be uncommon for the evidence which

leads to this result to include evidence of intoxication. But it is most unusual for such evidence to result in acquittal of all available charges. We have not discovered any instance in New Zealand where a jury appears to have acquitted of all charges because of lack of intent as a result of voluntary intoxication, and we have details of only some six or seven cases where such a result has followed trial by judge alone. Apart from such particular cases the responses of the legal profession, the police and the judiciary to our enquiries confirmed our impression that it is rare for such a defence to result in complete acquittal.

37. The limited practical success of defences based on intoxication is not hard to understand. As a general rule it is not necessary for criminal liability that an offender be actuated by some wicked or malicious motive, or even that he fully understand the significance of his actions, and an inability to remember committing an offence is no defence. The mental element required by the law is generally expressed in such limited terms as consciousness of acting, awareness of circumstances, intention or foresight. Our discussions with Dr James, Dr Bennett and Dr Robinson confirmed that intoxication will seldom exclude such states of mind as these, and is more likely to lead to uninhibited but intentional offending.

38. We have already noted that in Kamipeli the Court of Appeal held that it was proper for a trial Judge to warn that absence of intent because of intoxication "is a conclusion not to be lightly reached", and that the issue may be removed from the jury's consideration if there is no evidence which could reasonably support such a conclusion (see paragraph 16). In addition, in many cases a complete acquittal will be warranted only if the intoxication caused unconscious involuntary action, or a state of automatism. The courts have recognised that such cases do occasionally occur, but have stressed that such a possibility should not be considered unless there is evidence from which it may reasonably be inferred, and it has been suggested that some expert evidence will usually be necessary. For example, in Hill v. Baxter³⁷ Devlin J said:

"I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent".

39. There is little doubt that it will be quite exceptional for there to be evidence sufficient to justify a complete acquittal as a result of the effects of intoxication, and even

37. [1958] 1 QB 277, 285; cp Bratty v. AG for Northern Ireland [1963] A.C. 386, 413; Burr [1969] NZLR 736; Meek [1981] 1 NZLR 499, 504.

when the issue is genuinely raised other evidence of what the defendant said or did may nevertheless lead to the conclusion that he in fact acted with the required intent. Moreover, there will be an understandable reluctance to allow a self-induced condition to excuse an alleged offender, particularly when it is proved that he acted violently. Such a defence will rarely succeed in practice and this must be kept in mind in assessing the necessity or desirability of legislation in this area.

INTOXICATION NO DEFENCE

40. We have no doubt that the present rule that mere intoxication is not a defence to any crime is right in principle and is essential for the effective operation of the criminal law. We also agree with the present rule that the same principles govern the effects of alcohol and other drugs. These principles are not, however, in doubt and we see no immediate need for legislative confirmation of them.

INTOXICATION AND INSANITY

41. We are not aware of any practical difficulties arising from the relationship between intoxication and insanity. In any event, legislation on this would require a comprehensive review of the defence of insanity.

INVOLUNTARY INTOXICATION

42. It seems to be clear that a person has a defence to any charge if, as a result of involuntary intoxication, he did not have the state of mind required by the definition of the offence (see paragraph 30). Such a person is not guilty of any fault in becoming intoxicated and we believe that this should continue to be a defence. On the other hand, unless there is to be legislation dealing with the effects of voluntary intoxication we see no need for legislation dealing with involuntary intoxication. Such cases are rather uncommon and the existence of the defence does not seem to be in doubt when involuntary intoxication results in the absence of a required state of mind. We do not favour the creation of a broader defence of involuntary intoxication. It would be unavoidably uncertain, and when the defendant has acted with the required criminal intent adequate account can be taken of his involuntary intoxication in sentencing.

VOLUNTARY INTOXICATION

43. The main question is whether there should be legislation defining the extent to which evidence of voluntary intoxication may be relied upon to support a defence that a state of mind that is normally required was absent. We have noted that the present law in New Zealand is to some extent uncertain. This provides some support for codification, but the uncertainty is not such that it results in unfairness to

individual defendants and we are not aware that it has caused significant problems in practice. In view of the difficulties arising from the absence of a comprehensive Criminal Code, and the limited practical importance of the defence, we have concluded that the degree of uncertainty which exists does not itself justify legislation. But it is also necessary to consider whether public policy might require or justify statutory intervention designed to restrict the scope for pleas founded on voluntary intoxication.

Public Policy

44. It has been suggested that there are policy considerations which require a rule ensuring criminal liability for the intoxicated actor, at least in cases involving violence to the person (including sexual interference), or serious property damage. In Majewski two rather different concerns were expressed: first, that to allow an acquittal in all cases where voluntary intoxication resulted in an absence of criminal intent would provide the community with insufficient protection from violence; second, that the criminal law would seriously depart from the common consent which it should command, and would so outrage victims and shock the public as to bring the law into contempt.³⁸

38. DPP v. Majewski [1977] AC 443, 475, per Lord Elwyn-Jones LC 477, per Lord Simon; 484, per Lord Salmon; 494, per Lord Edmund-Davies.

45. The view that a special rule is needed for social protection is questionable. It seems to assume that a potential offender may be deterred by the absence of any defence based on intoxication, but even if the general validity of deterrent theories of punishment is assumed it is scarcely plausible that an intoxicated person will be influenced by such a rule, or that a person who does not intend to offend will be dissuaded from becoming intoxicated.³⁹ A defence of lack of intent as a result of intoxication has been generally available for some years in New Zealand and some States of Australia, but we are not aware of any reason for supposing that it might have contributed to any increase in crime, nor has it led to widespread concern.⁴⁰ We have been informed of a small number of cases where this defence has been successful, but this is not common. Evidence of intoxication will often support an allegation that the defendant intentionally committed the offence while in an uninhibited condition, but it will rarely raise doubts as to intent.⁴¹

39. O'Connor (1980) 146 CLR 64, 102-103, per Stephen J; Leary (1977) 74 DLR (3d) 103, 123-124, per Dickson J.

40. Compare O'Connor (1980) 146 CLR 64, 99-100, per Stephen J.

41. O'Connor (1980) 146 CLR 64, 71, per Barwick CJ; 114 per Murphy J.

46. Although the protection of individuals and the community does not seem to justify a special rule, it may nevertheless be argued that it is socially unacceptable that the effects of voluntary intoxication should lead to complete freedom from criminal responsibility, even in a few cases. This assumes that the intoxicated actor is morally culpable, a view supported in Majewski by suggestions that deliberately becoming intoxicated to a significant degree could be held to be "reckless", or "as wrongful as" recklessness.⁴² The same idea has been succinctly expressed by an American court: "The required element of badness can be found in the intentional use of the stimulant or depressant".⁴³ Similarly, in the United States the framers of the Model Penal Code accepted that deliberately becoming significantly intoxicated involves sufficient "moral culpability" to justify

42. DPP v. Majewski [1977] AC 443, 474-475, per Lord Elwyn-Jones; 479-480, per Lord Simon; 496, per Lord Edmund-Davies.

43. State v. Maik 60 N.J. 203, 214; 287 A 2d 715, 721 (1972).

criminal liability,⁴⁴ and in the United Kingdom the Criminal Law Revision Committee, having noted the difficulty in principle in convicting a violent inebriate who was unaware of what he was doing or causing, concluded:

"Yet his conduct is socially unacceptable and deserving of punishment ... What calls for punishment is getting intoxicated and when in that condition behaving in a way which society cannot, and should not, tolerate".⁴⁵

47. Opinions will differ as to what moral culpability there may be when a person intentionally becomes intoxicated.

Intoxication is commonly associated with criminal conduct, and gross intoxication will often lead to uninhibited and sometimes dangerous behaviour. On the other hand, the consumption of alcohol is widely accepted in our society (although this is not generally so with other drugs) and its effect on behaviour is variable. Moreover views such as those cited above are open to the objection that they draw no distinction between those who should have foreseen the harmful consequences of their ingestion of intoxicants and those who could not be expected to have anticipated them. Some such

44. Model Penal Code, Tent Draft No. 9, Art 2.08, Commentary, p9 (1959).

45. Criminal Law Revision Committee (UK), 14th Report, para 259.

distinction would seem important when it is sought to attribute responsibility for a serious offence to a defendant.⁴⁶ Nevertheless, we accept that many would understandably regard it as wrong that a defendant should be entitled to unqualified acquittal because of lack of intent or awareness resulting from voluntary intoxication, particularly when someone has been subjected to violence. A decision whether such a moral judgment might justify legislation to prevent such acquittals requires an examination of the different forms such legislation might take.

The Specific Intent Rule

48. One possibility would be a statutory provision enacting the rule in Majewski that voluntary intoxication can provide a defence only if it results in the absence of a "specific intent" required for the offence charged. This appears to be the effect of section 17 of the Tasmanian Criminal Code 1924 (which uses the term "specific intent"), and of section 28 of the Criminal Codes of Queensland and Western Australia (where the operative phrase is "an intention to cause a specific result").

46. O'Connor (1980) 146 CLR 64, 73-74, per Barwick CJ; 100-101, per Stephen J; Leary (1977) 74 DLR (3d) 103, 124, per Dickson J.

49. We are satisfied that it should continue to be a defence that a requisite "specific intent" was absent as a result of voluntary intoxication, but the question is whether defences based on voluntary intoxication should be restricted to such cases. The object of such legislation would be to continue to allow the possibility of acquittal of many of the gravest offences (such as murder or wounding with intent) but to ensure that voluntary intoxication could not be relied upon to support a defence to various lesser offences (such as manslaughter or unlawful wounding). Such a lesser offence will not be available in every case, but at least when the defendant has behaved violently such legislation would probably have the effect of preventing complete acquittal when this might be thought to be "unacceptable". Nevertheless, we are opposed to the enactment of the "specific intent" rule.

50. The first objection is that such a rule would be of somewhat uncertain effect. The courts have yet to establish an authoritative definition of what is meant by "specific intent". It is clear from Caldwell⁴⁷ that if mere recklessness is a sufficient mental element the offence will not be one of "specific intent", but in that case Lord Diplock also indicated that even if the definition of an offence requires "intent" rather than mere recklessness, nevertheless

47. [1982] AC 341.

the offence might not be one of "specific intent". In Majewski⁴⁸ Lord Simon thought that an offence requiring a "specific intent" is one which requires a "purposive element", but it is doubtful whether this will always provide reliable or useful guidance: for example, there is little doubt that receiving stolen goods is an offence of specific intent, but no "purposive element" seems to be needed, and Lord Simon was of the view that rape did not require a specific intent, but it has been suggested that it does require a "purpose" to have intercourse.⁴⁹

51. The difficulty arising from the lack of an authoritative definition of "specific intent" should not be exaggerated, and in many cases authorities such as Majewski will provide clear guidance. For example, there is no doubt that "specific intent" is required when the statute requires that the offender "means" some result, or acts with a specified "object" or "purpose", or "with intent" to achieve some

48. [1977] AC 443, 477.

49. Smith and Hogan, Criminal Law (4th ed), 186-187; various courts have differed as to whether rape requires a "specific intent"; for example, it was thought to be necessary in Hornbuckle [1945] VLR 281 and Vandervoort (1961) 130 C.C.C. 158, but not in Boucher [1963] 2 CCC 241, or Leary (1977) 74 DLR (3d) 103.

result. In New Zealand, such offences include murder (sections 167 and 168 of the Crimes Act 1961), various offences in the nature of aggravated wounding, injuring and assault (sections 188(1), 189(1), 191-193, 198-200), theft and robbery (sections 220 and 234), and an attempt to commit any offence (section 72). Secondary parties under section 66(1)(b) and section 66(2) of the Crimes Act 1961 are expressly required to have a specified "purpose" and it is perhaps safe to assume that a specific intent is essential whenever liability as a secondary party is alleged, although the required mental element is not defined in section 66(1)(c) and (d).⁵⁰

52. Conversely, when the statutory provision creating an offence is silent as to the required mental element it is most unlikely that a "specific intent" would be held to be essential. Examples of such offences in the Crimes Act 1961 include manslaughter (section 171); injuring by an unlawful act (section 190), rape (section 128), and indecent acts (sections 139-141, although as will be explained the position becomes doubtful if an assault is charged). Notable examples of this class of offence under the Summary Offences Act 1981 are disorderly and offensive behaviour (sections 3 and 4), and obstructing a public way (section 22). The English

50. Cp Smith and Hogan, op cit 186.

authorities also indicate that a specific intent will not be required when the statute provides that recklessness is sufficient fault (for example, wilful damage contrary to section 11 of the Summary Offences Act 1981), and the same would probably be true when it suffices that the offender acts "with reckless disregard" (for example, wounding and injuring under sections 188(2) and 189(2) of the Crimes Act 1961).

53. It may be that not all of these examples are uncontroversial, and there are certainly other offences where New Zealand statutory provisions raise doubts. In particular, in England the common law offence of assault has been held not to require a "specific intent", but in New Zealand this offence has a statutory definition which requires the "intentional" application of force (section 2 of the Crimes Act 1961 and section 2 of the Summary Offences Act 1981). Again, in England the statutory offence of reckless damage of another's property does not involve a "specific intent", but in New Zealand the definition of the equivalent offences under the Crimes Act 1961 requires that the offender "knew" the probable result of his conduct (section 293). It is uncertain whether the unqualified enactment of the specific intent rule would mean that voluntary intoxication would have to be ignored on the questions whether a defendant acted with the intention or knowledge required by the definitions of these and other offences. The creation of such uncertainty should be avoided.

54. It might be possible to avoid much of this uncertainty by providing a statutory definition of "specific intent", although this would not be easy in view of the diversity in the descriptions of mental elements required by New Zealand statutes (see paragraph 35).
55. In any event, apart from the objection of uncertainty, we are in principle opposed to the specific intent rule. Any version of it would allow intoxicated persons to be convicted of offences notwithstanding the absence of a state of mind (or "basic intent") normally required by the definition of the offence in question. In some cases this would be so even though that state of mind was part of a statutory definition of the offence, unless all such mental elements were deemed to be "specific intents". In so far as the specific intent rule would involve such defendants being deemed to have acted with an unproven state of mind (albeit one described as a mere "basic intent"), we are opposed to it on the ground that it involves an undesirable fiction. Nor do we accept that legislation would be justified which dispensed with the need for a "basic intent" whenever it might be absent as a result of voluntary intoxication. It might be suggested that such a rule could be justified on the basis that such a state of voluntary intoxication is "as wrongful" as the basic intent required in the case of a sober offender,⁵¹ but we do not

51. Cp DPP v. Majewski [1977] AC 443, 479, per Lord Simon.

consider that this will always be true. For example, if the defendant could not have been expected to anticipate the effect an intoxicant had on him it seems wrong to assume that his degree of fault can be equated with that of a person who intentionally offends, and it may be doubted whether it should be regarded as "unacceptable" to allow it to excuse from criminal responsibility, provided there is sufficient evidence to support such a defence.

Intoxication and Recklessness

56. The Criminal Law Revision Committee of the United Kingdom has recommended a statutory provision to the effect that voluntary intoxication would be capable of negating any "intention" required by the definition of an offence, but where "recklessness" is sufficient it would be immaterial that the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober.⁵² This is adapted from a proposal in the Model Penal Code which was also approved by the House of Lords in Caldwell.⁵³

52. Criminal Law Revision Committee (UK), Fourteenth Report, para 267.

53. [1982] AC 341.

57. Such proposals are intended to be similar in effect to the "specific intent" rule, although where an offence is so defined as to require an intent to do some act, and recklessness as to certain circumstances or consequences, the Criminal Law Revision Committee's recommendation would allow an acquittal if intoxication negated the intent to act as well as awareness of circumstances and foresight of consequences. The Committee considered that such cases would be so rare that they could be disregarded.
58. The United Kingdom recommendation is part of a wider report aimed at the codification of the general principles of criminal liability. Such a Code would specify the states of mind generally needed for liability and would define such central concepts as intention and recklessness. We have already noted that in New Zealand the general principles of criminal liability remain largely uncoded. In particular, there is no statutory definition of such states of mind as "recklessness" and there has been no consistent practice of defining offences so that the statute requires "intention" or "recklessness". When a statute creating a truly criminal offence is silent as to the mental element recklessness as to essential circumstances or consequences will probably suffice for liability, but this may not be so when the statute requires that the offender act "intentionally" (as in the case of assault) or when it requires that he "knew" of specified matters (as in the case of criminal damage under the Crimes Act 1961), and doubts may also arise when, as is sometimes the

case, the statute requires that the offence was committed "wilfully", with no definition of that term. In these circumstances the effect of legislation which merely prevented voluntary intoxication being relied upon to negate recklessness would be rather uncertain.

59. Such legislation is also open to the objection that for two reasons its practical effect would probably be minimal. First, pursuant to Caldwell⁵⁴ the courts no longer generally interpret "recklessness" as requiring actual awareness of relevant circumstances or risks, even in the case of a sober actor. Second, such a rule would not prevent acquittals in cases where the intoxicated actor might not have been conscious of what he was doing, or did not intend to act as he did. No doubt such cases will be rare, but when intoxication is relied upon to support a defence to charges not requiring "specific intent" this is often what is suggested.

60. In view of its uncertain effect in the context of New Zealand legislation, and its doubtful practical utility, we do not recommend legislation excluding the possibility of voluntary intoxication negating recklessness.

54. Ibid, cp Howe [1982] 1 NZLR 618.

A Special Offence

61. There have been a number of suggestions that there should be a new offence consisting of conduct which would be an offence but for the absence of some state of mind as a result of voluntary intoxication.⁵⁵ A leading example of such a proposal is found in the Report of the Butler Committee,⁵⁶ which recommended 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 state of mind required for such an offence. A "dangerous" offence was described as one involving death or injury to the person, sexual attack, or the destruction of or damage to property so as to endanger life. It was proposed that the special offence should not be charged

55. Eg O'Connor (1980) 146 CLR 64, per Barwick CJ; Leary (1977) 74 DLR (3d) 103, 125, per Dickson J; Glanville Williams, Criminal Law, The General Part (2nd ed. 1961) para 183; Fingarette (1974) 37 MLR 264, 279; Ashworth (1975) 91 LQR 102, 130; and for discussions of a comparable offence under German legislation see Fletcher, Rethinking Criminal Law (1978) 847-848; Daly (1978) 27 ICLQ 378.

56. Report of the Committee on Mentally Abnormal Offenders (UK), Cmnd. 6244 (1975), paras 18.54-18.59.

in the first instance, but that a defendant should be convicted of it if he was charged with a dangerous offence and was proved to have been guilty of conduct which would have amounted to the offence charged (or an included dangerous offence) but for the fact that he may have lacked a state of mind required for that offence because of voluntary intoxication. It was recommended that the new offence be punishable by a maximum of one year's imprisonment for a first offence, and by up to three years' imprisonment for a subsequent offence.

62. The Butler Committee proposed the following definition of "voluntary intoxication":

"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".⁵⁷

Pursuant to this a person would have a defence to the special offence, if, for example, he had not intended to consume the intoxicant, if he was unaware that it might have an intoxicating effect (for example, where he took a prescribed

57. Ibid, para 18.56.

drug without having been warned of the effect it might produce), or if he suffered from a condition such as hypoglycaemia and he did not know that as a result the ingestion of a small amount of alcohol could produce a state of altered consciousness.

63. Subsequently, the Law Reform Commission of Canada has suggested that voluntary intoxication should be defined so as to exclude intoxication "due to fraud, duress, physical compulsion or reasonable mistake".⁵⁸ In practice this would probably have much the same effect as the Butler Committee's definition, but whereas the Butler Committee proposed that the prosecution should have to prove that the intoxication was voluntary the Canadian Commission would require the defendant to prove it was involuntary.

64. It has been suggested that the offence recommended by the Butler Committee is too narrow, and the United Kingdom Criminal Law Revision Committee and the Law Reform Commission of Canada have each considered the possibility of extending the special offence beyond "dangerous" conduct, so that a defendant could be convicted of it if he was acquitted of any

58. Law Reform Commission of Canada, Working Paper 29, Criminal Law, The General Part: Liability and Defences, page 61.

offence as a result of evidence of voluntary intoxication. ⁵⁹ In the United Kingdom this has been accompanied by a proposal that in order that the record fairly describe what the defendant did the verdict should be not guilty of the offence charged but guilty of the prohibited conduct while in a state of voluntary intoxication. It has also been said that the penalty recommended by the Butler Committee is insufficient for serious offences⁶⁰ and two members of the United Kingdom Committee have suggested that the maximum penalty for the special offence should be the same as that available for the offence charged.

65. The creation of a special offence of the kind outlined above has certain advantages over the other possible reforms we have considered. It would prevent "unacceptable" acquittals when a state of mind required for the offence charged might have been absent as a result of voluntary intoxication, it avoids any need to distinguish offences of "specific" and "basic" intent, and it could provide for liability even when voluntary intoxication was such as to result in unconscious conduct. Moreover, the absence of codified general principles and the

59. Criminal Law Revision Committee (UK), Fourteenth Report, paras 261-263; Law Reform Commission of Canada, ibid, pages 60-63.

60. Eg Criminal Law Revision Committee, ibid, para 261; DPP v. Majewski [1977] AC 443, 477, per Lord Simon.

diversity in the statutory definition of various offences should not present any serious obstacle to legislation which creates an offence rather than seeking to define the scope of a general defence the essence of which is the absence of a requisite state of mind. Such an offence would catch some whose degree of culpability was debatable (for example, those who could not have been expected to foresee the nature of their conduct before they became incapacitated) but adequate account could probably be taken of this on sentencing.

66. On the other hand, the creation of such a special offence would involve a number of disadvantages. The existence of such an offence might well significantly increase the occasions on which defendants would raise the issue of intoxication. At present defences based on intoxication are uncommon and are usually forlorn, but the possibility of convicting the defendant of an offence, albeit one involving only qualified fault, might well make such pleas more acceptable to a jury or a judge, and therefore more attractive to defendants. There would be an associated risk of an increase in the occasions on which juries might be unable to agree on whether a required state of mind might have been absent, and the possibility of an increase in the number of unsatisfactory compromise verdicts. The creation of such an offence would add to the already considerable number of matters which juries often have to consider, and in some cases it would introduce issues of some difficulty and complexity. For example, it would sometimes be necessary to investigate

whether the alleged intoxication was voluntary or involuntary, and serious problems could arise if intoxication was not the only possible reason for the absence of some required intention, foresight or knowledge. In the United Kingdom it has been suggested that in the latter case in order to convict of the special offence the court or jury should be required to conclude that the defendant would have had the required state of mind had he not been intoxicated; and if an excusing mistake is claimed the question would be whether he would have made the mistake had he been sober.⁶¹ These might be thought to be excessively speculative and possibly unrealistic questions, and they certainly introduce a significant degree of complexity. On the other hand, it would be hard to justify basing liability on the mere fact of voluntary intoxication at the time the defendant acted, regardless of other factors which might have led to the absence of a requisite state of mind, or the existence of a mistaken belief.

67. In the United Kingdom, problems of the kind outlined above were amongst the reasons given by a majority of the Criminal Law Revision Committee for rejecting the proposal for a special offence.⁶² We would add that a conviction of the special offence must present a problem in sentencing. The

61. Criminal Law Revision Committee (UK), Fourteenth Report, paras 263, 267.

62. Ibid, para 264.

defendant would have to be dealt with on the basis that although he committed the prohibited acts, he lacked the intent needed for the offence originally charged, and at least in some cases it may not be open to the court to find that the risk of such conduct was obvious or ought to have been foreseen by the defendant before he became intoxicated. If the defendant has a history of offending under the influence of intoxicants, or if it is shown that he suffers from alcoholism or drug addiction and that coercive treatment might be effective, there may be a sound basis for imposing significant penal or rehabilitative measures. But in many cases neither of these conditions will be satisfied, in which case it may be doubted whether any substantial measure would be justified, on any conventional approach to sentencing.

68. We have already stressed that in practice it is rare for evidence of intoxication to result in complete acquittal, and it follows that the benefits that might flow from the creation of a special offence would be limited. We are not persuaded that the introduction of such an offence is presently justified when the limited advantages to be gained are weighed against the difficulties we anticipate would result. We have reached this conclusion only after anxious consideration of the question, for we appreciate that in the occasional cases when evidence of voluntary intoxication does lead to acquittal it may appear that the mere fact of intoxication has provided a defence. It may be that in some cases a defence of lack of intent has been too readily accepted, but it is not a function

of this Committee to review the correctness of decisions in particular cases, and in any event the limited information available to us would preclude such an exercise. However, the absence of criminal responsibility as a result of intoxication is sufficient unlikely to make complete acquittal on this ground inappropriate in the great majority of cases, and if in the future it became common for such defences to succeed there would be a much stronger case for legislative intervention, probably by the creation of a new offence.

69. If it is found necessary to create a special offence we do not consider that it should be available in respect of all conduct which would be criminal if accompanied by a requisite state of mind. Such an offence would go well beyond the needs of public policy and would allow conviction where the essence of the offence originally charged lies in the state of mind (for example, receiving property obtained by crime, and attempts). If there is to be any special offence we are of the view that its scope should be confined along the lines contemplated by the Butler Committee, so that it would require conduct involving personal injury or death, sexual attack, or significant property damage. This would involve drawing somewhat arbitrary distinctions, but this is to be preferred to the creation of an offence of unjustified and excessive breadth. We also agree with the majority of the Criminal Law Revision Committee that it would be wrong for such an offence to have the same maximum penalty as that available for the offence of which the defendant is acquitted because of the

absence of a required state of mind. As to the burden of proof, it would not be practicable to require the prosecution to prove that intoxication resulted in the absence of the requisite state of mind, and it would have to suffice that the defendant was acquitted of the offence charged because this might have been the case; but if there was evidence suggesting that the intoxication was involuntary the prosecution should be required to prove that it was voluntary, for if it was not the defendant would not have been guilty of any fault which might justify a criminal conviction.⁶³

70. The special offences which have been suggested in the United Kingdom and Canada are novel in that it seems that they would be purely "included" offences: a defendant could be convicted of them only when charged with another offence of which he is acquitted, and they could never be charged in the first instance. We have considered whether any new offence should be one which could be charged instead of or as an alternative to some other offence, but have concluded that it should not. Such alternative charges would involve all the difficulties that could arise from the existence of an included offence, and to allow the new offence to be charged in the first instance could encourage plea bargaining. Moreover, unless the prosecution was required to prove that the intoxication led to the absence of a state of mind which

63. Cp R. v. Strawbridge [1970] NZLR 909, 916.

would have justified conviction of another offence, such a charge would enable the prosecution to secure a conviction merely by proving that the defendant committed the prohibited acts while voluntarily intoxicated. We know of no justification for such an erosion of the importance of the mental element in crime, nor the extension of criminal liability it would entail.

Special Verdicts

71. We also considered the possibility of introducing a special verdict of "not guilty by reason of voluntary intoxication", which would empower the court to direct the defendant to undergo treatment for alcoholism or drug addiction, and if necessary order his detention for this purpose.⁶⁴ We do not recommend such an innovation, which would be an addition to procedures available under the Alcoholism and Drug Addiction Act 1966. The availability of such a special verdict might encourage bogus defences by making acquittal more readily acceptable, and in many cases effective treatment will be inappropriate or unavailable.

64. Cp Berner, The Defence of Drunkenness - A Reconsideration (1971) 6 Univ. of British Columbia Law Review 309, 349.

Manslaughter

72. In paragraph 29 we noted that manslaughter may be an exception to the principles stated in Kamipeli, and that it may be that evidence of voluntary intoxication can never support a defence to this crime. The present law is somewhat uncertain, although the weight of authority suggests there is no defence and we know of no case in New Zealand where such a defence has succeeded. Manslaughter is a crime of very broad definition and, as this Committee noted in 1976, in some cases it has the effect of making a person guilty of a major crime even though death may have been unforeseeable and even though there would have been no serious offence but for the chance of death resulting from a defendant's conduct.⁶⁵ This Committee's recommendation that the crime of manslaughter should be abolished has not been implemented, but we are not persuaded that there is any need for legislation which would treat manslaughter as a special case by excluding the possibility of a defence based on evidence of voluntary intoxication.

Cases where Intoxication is an Element of the Offence

73. Statute sometimes makes it an offence to do something while intoxicated, or while there is an excessive concentration of alcohol in the body. Well known examples are driving with an excessive breath-alcohol or blood-alcohol concentration, or

65. Report on Culpable Homicide (July 1976), para 48.

while under the influence of drink or drugs, contrary to section 58 of the Transport Act 1962, and being in charge of a firearm while under the influence of drink or drugs, contrary to section 47 of the Arms Act 1983. Pursuant to the principles in Kamipeli it might be possible to defend such a charge on the basis that as a result of voluntary intoxication the defendant lacked an intent which might be an element of such an offence. Indeed, our attention has been drawn to one New Zealand case where a charge of driving under the influence was dismissed because the evidence indicated that the defendant was so intoxicated that he did not know what he was doing, and therefore might not have formed the requisite intention to drive.⁶⁶

74. We take the view that the fact that Parliament has made intoxication or the presence of an intoxicant an element of the offence is sufficient to justify treating these as special cases. To allow voluntary intoxication to support a defence in such instances appears to be contrary to the policy of the legislation. We therefore recommend that when intoxication or the presence of an intoxicant is an element of an offence the statute in question should also provide that the effects of voluntary intoxication should not be capable of providing a defence to a person who is proved to have been guilty of the conduct in question.

66. Police v. Tolchard, unreported, 26 January 1983, D.C., Christchurch, CRN 2009043111.

Burden of Proof

75. We see no need for any alteration to the present principles relating to the burden of proof, which are described in paragraphs 15, 16 and 38. Were there to be legislation restricting the extent to which voluntary intoxication may support a defence we would favour a rule to the effect that any intoxication should be presumed to be voluntary, but that if there is evidence to the contrary the prosecution should have the burden of proving as a fact that it was voluntary.⁶⁷

CONCLUSION

76. Apart from the rather special issue dealt with in paragraphs 73 and 74 we have reached the conclusion that we should not recommend any change to the existing law. The law as stated in Kamipeli is consistent with general principles of criminal liability. We accept that considerations of public policy may provide a case for a special rule governing the extent to which voluntary intoxication can support a defence but we have concluded that the benefits that might accrue from such legislation are minimal and are outweighed by the practical problems it would involve. This conclusion would have to be reconsidered if at some future time the general principles of

67. Cp Strawbridge [1970] NZLR 909, 916.

criminal liability were to be codified, or in the unlikely event of complete acquittal as a result of evidence of intoxication becoming common.

A handwritten signature in black ink, appearing to read "P. J. Evans", with a stylized, flowing script.

Chairman

Members

Mr P.G.S. Penlington Q.C. (Chairman)

Mr A.A.T. Ellis Q.C.

Mr K. N. Hampton

Mr D. P. Neazor Q.C.

Professor G. F. Orchard

Mr J. C. Pike

Judge A. Satyanand

Superintendent N. B. Trendle

Mr D.A.R. Williams

Dr W. A. Young

Mr J. S. Hammington (Secretary)