REPORTS

Sobering Up? The Law Commission on Criminal Intoxication

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The Law Commission has now published its final report on intoxication and criminal liability.[1] Its new proposals are a vast improvement on those originally proposed in the initial Consultation Paper.[2] In the Consultation Paper, the Law Commission found itself unable, as a matter of principle, to make sense of the distinction between crimes of basic and of specific intent that has underpinned the common law governing voluntary intoxication (more or less ambiguously) for one hundred years or longer. At common law, intoxication is evidence that can be employed to deny *mens rea* in crimes of specific intent. Such evidence is, though, inadmissible for this purpose where crimes of basic intent are in issue, even where the *mens rea* in question involves an element of subjective awareness.[3] I shall pursue this issue below. So, wedded to an unyielding subjectivism, the Commission tentatively proposed to make redundant the distinction between crimes of basic and of specific intent by allowing evidence of intoxication to be employed wherever this tended to show that the accused lacked the requisite (subjective element of) *mens rea*. Well aware, however, that such a boldly subjectivist proposal would meet with fierce opposition, not least from the general public, the Commission proposed that a separate offence of 'criminal intoxication' should be created. One would be convicted of this offence when, having become 'deliberately intoxicated to a substantial extent,' one caused certain listed kinds of harms whether one was acting with *mens rea* or not, and even if one was acting in a state of automatism.[4] This ill-conceived proposal was, to use the Commission's own words (1.26), 'rejected outright with cogent and persuasive reasons' by almost all influential groups working in the criminal justice system. I shall not waste space by adding my own criticisms to the proposal here. So with what does the Commission's final Report replace its own initial proposals?

Finding that juries do not experience much difficulty with the present law, and that a majority of those groups working in the criminal justice system thought the law worked fairly and without undue difficulties (1.28), the Commission now proposes to enact the present law, with certain important amendments and clarifications. In particular, the Commission rightly pays attention to the relatively unexplored problem of what 'voluntary' intoxication — the state (of mind?) that gives rise to all the difficulties — really means (1.34; 8.35). This issue will be

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1 Law Com No 229, *Legislating the Criminal Code: Intoxication and Criminal Liability* (February 1995). References to this Report will subsequently be to paragraph numbers in brackets in the text.
2 *Intoxication and Criminal Liability*, Consultation Paper No 127 (1993).
3 See eg *Aitkin* [1992] 1 WLR 1006.
4 Law Com No 127, *op cit* n 2, para 6.31.

explored in more detail below. The relevant provisions dealing with *mens rea* are to be as follows:

> Effect of Intoxication on Criminal Liability
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> 1(1) This section applies where it is alleged that any mental element of an offence was present at any material time in the case of a person who was then intoxicated.
>
> (2) If the person's intoxication was voluntary and the allegation is in substance an allegation that at the material time he
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> (a) acted intentionally with respect to a particular result,
> (b) had a particular purpose in acting in a particular way,
> (c) had any particular knowledge or belief, or
> (d) acted fraudulently or dishonestly,
>
> evidence of his intoxication may be taken into account in determining whether the allegation has been proved.
>
> (3) If the person's intoxication was voluntary and the allegation is not one to which subsection (2) applies, then, in determining whether the allegation has been proved, he shall be treated as having been aware at the material time of anything of which he would have been aware but for his intoxication.
>
> (4) If the person's intoxication was involuntary, then (whether the allegation is or is not one to which subsection (2) applies) evidence of his intoxication may be taken into account in determining whether the allegation has been proved.[5]

Despite the radical change of direction since the Consultation Paper, one thing has not changed in the Commission's final Report. This is, ironically, the attitude of uncomprehending hostility towards the common law's attempt to express, in its division of crimes between those of basic and of specific intent, the very distinctions between offences on which the Commission's new proposals are broadly based. Despite the views of those working in the criminal justice system that the current law works *fairly*, as well as without difficulty, the Commission makes little effort to discern any deeper principles underlying the common law that might explain why its rules can be regarded as fair. They endorse the view that 'the designation of crimes as requiring, or not requiring, specific intent is based on no principle at all' (3.27; 5.36). How is it, then, that the Commission has thought it right to track the designation so closely in its own proposals? For the kinds of *mentes reae* mentioned in clause 1(2), allegations of which may be met by leading evidence of voluntary intoxication, bear a striking resemblance to the *mentes reae* of crimes of specific intent, allegations of which can presently be rebutted by such evidence at common law.

The answer is that the Commission regards the case for restricting the ability of a defendant to deny *mens rea* through pleading voluntary intoxication as founded on pure and simple policy considerations. They side with J.C. Smith in taking the view that 'the real reason for punishing [the defendant, by applying *Majewski*] is the outrage that would quite reasonably be felt if serious injury caused to an innocent person by a drunk were to go unpunished' (5.23). In a sense, thus, the Commission's proposals are purely defensive. The main bulk of the provisions are designed to fend off public criticism rather than to provide a principled basis on which the law can operate.[6] If this is true (as it seems to be), then to allow evidence of voluntary intoxication to negative *mens rea* in *any* crime, particularly a serious crime of violence, looks perverse. Yet the policy-driven Commission proposals contain a large set of circumstances in which evidence of voluntary intoxication can be so used. Voluntary intoxication may, for example, negative

5 See also clause 3 for the provisions dealing with intoxicated beliefs.

6 With the honourable exception of the provisions defining voluntary intoxication and those making it clear that what triggers the admissibility of evidence of voluntary intoxication is an *allegation*, rather than a crime, of specific intent (5.38).

mens rea on a murder charge,[7] but not on a charge of criminal damage. But it can hardly be claimed authoritatively that public outrage would be more provoked by an acquittal — based on evidence of voluntary intoxication — in the latter case than in the former. So why draw the distinction if defensive policy considerations are what are to shape reform? By allowing a concern for policy to dominate its thinking, the Commission simply clears the way for a Government obsessed with 'crime control' to take that concern to its logical conclusion, which is that the Commission's proposals should be ignored and voluntary intoxication should make no impact whatsoever on criminal liability. Yet this is the very conclusion the Commission and its consultees thought most undesirable (1.29).

The root of the problem lies with the Commission's commitment to subjectivism. As a subjectivist, one may retain one's integrity in proposing to enact objectivist reforms, if policy rather than principle is what is said to drive them. Unfortunately for subjectivists, there are deeper legitimating principles underlying the broad distinction between crimes of basic and of specific intent, even if the formulation of the distinction is not without its difficulties.[8] There are reasons derived from these principles to permit defendants to plead intoxication as a denial of *mens rea* where there is an allegation of specific, but not of basic, intent. Ignoring the legitimating principles weakens the case for reform along the lines that the Commission proposes, since the principles actually support these reforms. So what are the principles?

Distinguishing crimes according to the wrong

In an attempt to establish control over the admissibility of evidence of voluntary intoxication, the courts have been driven to divide crimes into categories where such intoxication will and will not be admissible: hence an issue of the admissibility of a certain kind of evidence has come to shape theories of the structure of the substantive law itself. In this regard, the courts have relied principally on a controversial distinction between crimes of 'basic' and crimes of 'specific' intent.[9] Much understandable confusion has been caused by this distinction, and in particular by the unappealing notion that evidence of voluntary intoxication itself constitutes or supplies evidence of *mens rea* in crimes of basic intent, even if not in crimes of specific intent.[10] This notion will not be defended here. The courts' use of the distinction between crimes (or, hereinafter, allegations) of basic and of specific intent may be interpreted in a different way, as a distinction bearing on the admissibility of certain kinds of evidence rather than on what evidence may in itself amount to proof of *mens rea* (5.44). I shall take the present law to be that evidence of voluntary intoxication may be relied on as tending to show that one did not have *mens rea* respecting crimes or allegations of specific intent, but such evidence is simply inadmissible for this purpose where

7 See further clause 3(3): 'Where at any material time a person charged with murder (a) was intoxicated, but (b) held a particular belief which, had he not been intoxicated, would have operated to reduce the homicide to manslaughter, that belief shall so operate whether the intoxication was voluntary or involuntary.'

8 See n 6 *supra* on the distinction between crimes and allegations of specific intent.

9 See *Majewski* [1977] AC 443.

10 For this understanding of the basis for the distinction, see *Majewski* [1977] AC 443, 474–475. It is important to note at this point that I will later be challenging the notion that it is 'voluntary' intoxication (whatever this means) which should be the main focus of attention.

crimes or allegations of basic intent are in issue.[11] Many commentators have attacked both the very idea that one should attempt to control the admissibility of evidence of voluntary intoxication where it is relevant to a denial of *mens rea*, and the more particular distinction between crimes of basic and of specific intent which is meant to establish a legal basis for that control.[12] The Law Commission's Report also contains trenchant criticisms along these lines (1.35–1.42). But the distinction between crimes of basic and of specific intent has never been fixed or arbitrary. Rather, it should have been regarded by the Commission as a first — albeit faltering — step at common law towards a principled basis for the admission or exclusion of evidence of intoxication as a denial of *mens rea*.

The distinction between crimes or allegations of 'specific' and of 'basic' intent is one of principle rather than one of rule, and so it is not surprising that critics of the distinction have found no rule to govern it.[13] The proposition that comes closest to being the rule is the notion that an allegation that a crime was committed with basic intent is an allegation that it was committed by gross negligence or recklessness, whereas an allegation that a crime was committed with a specific intent is an allegation where nothing less than proof of the particular intention (or specific knowledge or belief[14]) at issue will suffice as proof of *mens rea* (5.44). This proposition comes closest to being the rule governing the distinction because it is the easiest exemplification of the principle. The principle underpinning the distinction is that, because intoxication involves a risk of blunting one's sensitivity to the consequences of one's admittedly voluntary conduct — in short, to make one liable to blunder — voluntary intoxication will not be admissible evidence where a crime may be and is alleged to have been committed largely by blundering; for admissibility in such circumstances would make little moral sense.[15] Part of what is excusatory about blundering into harm is that it is unexpected. The harm done will have surprised the blunderer just as much as the victim. The more spontaneous and unexpected the blunder, the greater the claim (other things being equal) to excuse. But my blundering into harm can hardly be said to be spontaneous or unexpected if I have knowingly done that which is — as is taken to be common knowledge — liable to make me blunder.[16]

The subjectivist may reply that, whether true or not, this is irrelevant. He may argue that pleading an 'excuse' is not the same as denying *mens rea*, and hence that evidence of voluntary intoxication should be admissible to deny the latter. This argument will then be of relevance to crimes where, whether the accused has 'blundered' or not, the law insists on at least subjective recklessness as the *mens rea* element.[17] For whilst evidence of voluntary intoxication could hardly excuse

11 One can find a majority of Law Lords in *Majewski* who support this way of expressing the legal position rather than the less attractive way of expressing it by saying that evidence of intoxication 'supplies' the *mens rea* (*op cit* n 10 above). See more recently *R* v *Woods* (1981) 74 Cr App R 312. For further discussion, see text at n 28 below.

12 See eg Williams, *Textbook of the Criminal Law* (London: Stevens, 2nd ed, 1983) pp 466–482.

13 Possible variations on a form of the rule are set out in the Consultation Paper, *op cit* n 2, paras 2.3–2.18.

14 As in the case of handling stolen goods: the knowledge or belief that the goods are stolen. See text at n 22 below.

15 For an argument to this effect along slightly different lines, see Gardner, 'The Importance of *Majewski*' [1994] 14 OJLS 279.

16 See further text at n 34 below; see also Gardner, *ibid.*

17 Such as rape, and crimes contrary to s 47 and s 20 of the Offences Against the Person Act 1861; although, as Gardner points out (n 16 above, at p 280), whenever the courts have insisted on subjective recklessness, they have seen no conflict between this insistence and the survival of the *Majewski* doctrine. And rightly so: see text at n 25 below.

gross negligence *per se* (it seems merely to explain it), surely such evidence may bolster a straight denial of *mens rea* where that involves a subjective awareness of risk. The weakness in this argument lies in the fact that the line between a denial of *mens rea* and an excuse is blurred in crimes of basic intent.[18] The blurring occurs because the relevant wrong in such crimes (unlawfully inflicting a wound, an assault, non-consensual sexual intercourse and so forth) is done to the victim whenever D commits the *actus reus*, whatever the degree of his fault. When one speaks of excusing the wrongdoing in crimes of basic intent, it is thus natural to include under the heading of 'excuse' not merely doctrines such as duress, but also denials of (sufficient) fault in bringing about the wrongdoing, like a failure to advert to the possible consequences or the absence of (gross) negligence. In specific intent crimes, by way of contrast, a denial of the *mens rea* is a denial of the relevant wrong in itself. If I take more than merely preparatory steps towards killing you, but do this (for whatever reason) without ever intending to kill you, then the relevant wrong — attempted murder — is never perpetrated. It follows that, because a denial of *mens rea* is a denial of the relevant wrong in crimes of specific intent, excuses for such wrongdoing never merge with denials of *mens rea*, because without the *mens rea* there is no wrongdoing to excuse. Let us consider further this point about the variable nature of wrongs.

Commentators, perhaps misled by the terminology, have sometimes been unnecessarily confused about the nature of specific intent crimes.[19] Crimes involving allegations of specific 'intent' are not just crimes defined by a requirement of proof of a purposive element,[20] or of *mens rea* going beyond the *actus reus*,[21] although they may include such crimes. Crimes of specific intent are crimes where the element of intention, knowledge, foresight or belief in question is integrally bound up with the nature and definition of the wrong itself, and is not a fault element attached to an independently defined wrong. For example, whilst murder requires proof neither of direct intention nor of *mens rea* going beyond the *actus reus*, on the current definition one is not to become a murderer simply by risk-taking, that being the province of a different wrong, namely involuntary manslaughter. Although every murder must involve the posing of an unjustified risk, the intent (direct or oblique) to kill or inflict grievious bodily harm is itself partly *constitutive* of the wrong of murder. A denial of the intent is a straight denial of the wrong in question and not merely a denial of fault in bringing about that self-same wrong. It is otherwise with involuntary manslaughter, which is a different wrong. The wrong here is killing *by* posing an unjustified risk. So, if D kills V through some drunken mistake, the wrong remains intact whether or not — given her drunken error — D is (to whatever degree) at fault in perpetrating that wrong. The issue is now simply whether the degree of D's fault is sufficient for criminal liability. For, whatever the degree of fault, the wrong of unjustified killing is plain and unambiguous.

Other crimes treated by the courts as involving allegations of specific 'intent' can be analysed in a similar way. In theft, for example, the combination of dishonesty and an intention permanently to deprive is so fundamental to the nature

18 See Gardner, *op cit* n 15, at pp 281–284.

19 Virgo, for example, seems to think that there ought to be a 'logical' distinction between crimes of basic and crimes of specific intent: see his 'Reconciling Principle and Policy' [1993] CLR 415, at pp 418–419.

20 *Majewski* [1977] AC 443, 479 (*per* Lord Simon); cf Ward, 'Making Some Sense of Self-Induced Intoxication' (1986) 45 CLJ 247.

21 *DPP* v *Morgan* [1975] 2 All ER 347, 363 (*per* Lord Simon).

of the wrong that it is impossible to conceive of this crime being committed through blundering or mere risk-posing, without entirely changing its normative significance. The wrong in question is completely transformed (from a criminal to — at most — a civil wrong) by the absence of the specific *mens rea*. Understanding *mens rea* in this way, as an element that may be constitutive of the criminal wrong itself and not a fault element attached to an independently defined wrong, enables us to shed light on supposedly more difficult cases. Consider handling stolen goods, contrary to section 22(1) of the Theft Act 1968. This can be regarded straightforwardly as a crime of specific 'intent,' even though no direct or oblique intent forms part of the *mens rea*,[22] because proof of actual knowledge or positive belief that the goods handled were stolen is intrinsic to the nature of the wrong. So, the handler who is too drunk to realise that goods may be stolen could not be guilty of handling without radically changing the scope and nature of the crime itself for cases where the handler takes a reckless chance are not included within the scope of the criminal wrong.[23]

Now contrast the position in the crimes of rape or assault. The courts are not agreed whether crass blundering is *per se* sufficient to amount to the *mens rea* of rape,[24] and there have been differences of opinion on this question in relation to assault occasioning actual bodily harm.[25] What this suggests is that, whether or not it is right to require subjective recklessness as the *mens rea* in these crimes, to hold that one can be guilty of rape or assault through a crass blunder does not change the nature of the wrong in question in the way it would do with the crimes mentioned above. Indeed, some commentators have held that the forcing of non-consensual intercourse on a victim through a crass blunder is close to being a central case of rape, rather than a case at the moral periphery.[26] Whether this is true or not, the nature of the wrongs done to the victim in these cases does not change if D is held guilty where he blundered into the *actus reus*, any more than the wrong done (unjustified killing or damage) in involuntary manslaughter or criminal damage changes where D blunders into the *actus reus*.

What are the consequences of this analysis for the admissibility of evidence of intoxication? It is easy to see why such evidence is admissible to meet an allegation of specific intent. For the evidence is relevant to whether a wrong of the kind alleged took place, proof of *mens rea* being intrinsic to this question. In crimes of basic intent, however, a wrong of the kind alleged can take place whether or not D was subjectively aware of the possible consequences. A theory of criminal wrongs thus provides a foundation for the distinction drawn between basic and specific intent on the question of admissibility of intoxication evidence. For if the wrong remains unchanged whether D is aware of the wrong he is doing or not, his (lack of) awareness is relevant only to the degree of fault involved in the commission of the wrong. At this point, of course, the subjectivist will object that subjective awareness is not a matter of 'degrees' of fault. It is, like the existence of an

22 *Durante* [1972] 3 All ER 962.

23 *Grange* [1974] 1 All ER 928; *Griffiths* (1974) 60 Cr App R 14; cf Williams, 'Handling, Theft and the Purchaser who Takes a Chance' [1985] CLR 432. The purpose of the crime would change were it possible to handle stolen goods recklessly, because what would then be struck at was trying to benefit someone simply by risking *association with* criminal activity, rather than trying to benefit someone *through* (another's) criminal activity: see Smith and Hogan, *Criminal Law* (London: Butterworths, 2nd ed, 1993) pp 647–648.

24 Contrast *Pigg* [1982] 2 All ER 591 with *Satnam* (1983) 78 Cr App R 149; and see Gardner, 'The Limits of Reckless Rape' [1991] CLR 172.

25 Contrast *DPP* v *K* [1990] 1 All ER 331 with *Spratt* [1991] 2 All ER 210.

26 See Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) pp 167–173.

intention, an all-or-nothing matter; either D was or was not aware of the risk. This is true, but not the whole of the truth about *mens rea* in crimes of basic intent. It is not merely (lack of) awareness that matters, but the reasons for the (lack of) awareness.

Suppose I see someone in a museum brush past a priceless vase, upsetting it. I dive to break its fall, realising that in so doing I may crash into V, a passer-by. This is exactly what happens and V prosecutes me for assault occasioning actual bodily harm. I might plead necessity, but it is unclear whether that doctrine applies where serious harm did not threaten. I should simply be able to rebut an allegation of recklessness by pointing to the fact that an ethically well-disposed agent might have responded in like manner to this kind of sudden emergency.[27] For the real issue is what level of fault will suffice to justify *criminal* liability for the unlawful wrong, and subjective awareness is only part of this story. Accordingly, matters are no different where one is denying subjective awareness of the risk of wrong. As the 'priceless vase' example suggests, the reasons for one's (lack of) awareness of the risk are of crucial significance to whether the *mens* was *rea*. An inquiry into these reasons by its nature merges excusatory claims with denials of *mens rea* 'properly so-called,' because the wrongdoing is unaffected by the presence or absence of either: a point made earlier. This being so, 'I did not realise' has an inescapably excusatory flavour to it in such cases, because this claim merely seeks to mitigate blame for an admitted wrong and is not the denial of the wrong itself that it would be in a case (say) of handling stolen goods. This affects the admissibility of evidence of voluntary intoxication in a fundamental way, because there is a general rule that one may not rely on an excuse where one must oneself bear responsibility for creating the conditions in which one came to be relying on it.[28]

In this regard, a last refuge is sought by subjectivists in section 8 of the Criminal Justice Act 1967 (3.6). As is well known, section 8 requires that in determining whether a person has committed an offence, 'A court or jury ... shall decide whether he did intend or foresee [the] result [in question] by reference to all the evidence.' It has been strongly argued that, in deciding whether D intended or foresaw something, the section precludes the exclusion of intoxication evidence where such evidence is pleaded as a denial of foresight or intention. It is argued that this is simply because the section insists that '*all* the evidence' (my emphasis) relating to intent or foresight must be considered by the court or jury, whether courts rule a particular kind of evidence legally inadmissible or not.[29] This would be an extraordinary result if it were literally true. It would logically entail, for example, that D ought to be able to rely on hearsay evidence — where relevant — as to his or her intent, even though such evidence has been generally inadmissible for centuries.[30] In fact, the relatively narrow but important purpose of section 8, as the section itself makes clear, is to prevent a court or jury being required to infer

27 The House of Lords has begun the task of setting out the reasons for which ethically well-disposed agents take risks and are hence not reckless irrespective of foresight: see *Reid* [1992] 1 WLR 793.

28 I am principally thinking of duress: see eg *Sharp* [1987] QB 853. At common law, self-induced provocation could also not be relied on to partially excuse murder. S 3 of the Homicide Act 1957 changed this absolute rule as much by accident as by design: see Smith and Hogan, *op cit* n 23, pp 364–365. The notion of 'bearing responsibility' for the conditions of an excuse is explored below when I attack the way the distinction between voluntary and involuntary intoxication is used.

29 See Williams, *op cit* n 12, pp 473–474.

30 Williams, *op cit* n 12 denies this, but offers only assertion rather than argument that s 8 covers evidence of intoxication but not hearsay evidence.

that D intended or foresaw something simply because it was a natural and probable consequence of his or her conduct.[31] On the view being maintained here, evidence of voluntary intoxication does not raise a conclusive presumption that D intended or foresaw the result in question.[32] It is simply evidence on which D cannot rely in claiming that he or she did not foresee a result, because this claim involves (*ex hypothesi*) reliance on an excusing condition for the existence of which D must bear responsibility. So section 8 provides no analogy and is rightly regarded as irrelevant in law.[33] Naturally, in some — probably quite rare — cases, it may be that if D cannot rely on evidence of voluntary intoxication in denying *mens rea*, D will have no other evidence at all to explain his state of mind, and so to prevent D from relying on intoxication is effectively to invite the jury to find that D had the *mens rea* because he has no other excuse for his wrongdoing. Even so, there are important procedural and moral differences between preventing defendants from adducing certain kinds of evidence in denying the case for the prosecution and changing the case for the prosecution in itself. The rules about voluntary intoxication concern the former, but need not concern the latter.

The Commission gave a ringing endorsement to subjective recklessness as the species of recklessness (where this is relevant) constituting *mens rea* in their new non-fatal offences against the person.[34] The Commission nonetheless felt it right to set alongside this endorsement a set of proposals for the working of the intoxication rules, applicable to those offences, based broadly on the decision in *Majewski*.[35] This is a welcome recognition that one can perfectly consistently do both of these things at the same time. It is ironic and unfortunate, however, that the Commission has construed *Majewski* as if the most principled reading of it, in the light of subsequent case law and commentary, entailed treating the decision as having set up just the kind of presumption struck at by section 8. It will be recalled that clause 1(3) — cited above — declares that, in crimes that may be committed by recklessness, the defendant 'shall be treated as having been aware at the material time of anything of which he would then have been aware but for his [voluntary] intoxication.'[36] As the Explanatory Notes to this clause make clear, it is intended to catch crimes that may be committed by recklessness. So far so good, in that it is these crimes that may be committed by the kind of blundering into which intoxication may lead one. Yet the clause needlessly courts a controversy over section 8 by saying that D is to be *treated* as having the relevant *mens rea* if he or she would have had that state of mind if not voluntary intoxicated. As commentators have pointed out,[37] this way of putting the matter requires the jury to ask a counterfactual hypothetical question that is a distraction from the simple

31 The section is intended to do little more than overturn the supposed result of *DPP* v *Smith* [1961] AC 290, a decision not concerned with evidence of intoxication at all.

32 See n 11, *pace* Smith and Hogan, n 23, p 227, n 2; see further text at n 10.

33 *Majewski* [1977] AC 443, at p 476A (*per* Lord Elwyn-Jones LC); see also *Woods* (1981) 74 Cr App R 312.

34 Law Com No 21, *Offences Against the Person and General Principles* (1993) para 14.1ff.

35 *op cit* n 34, paras 44.7–44.9.

36 See, to similar effect, clause 21(1) of the proposals for reform of non-fatal offences against the person (Law Com No 218, *op cit* n 34):

> For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated
> (a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and
> (b) as not having believed in any circumstance which he would not have believed in had he not been intoxicated.

37 See eg Smith and Hogan, *op cit* n 23, p 224.

issue to which section 8 firmly directs a court's or jury's attention: is there any reasonable doubt, on all the evidence that is legally relevant in deciding this question, that D had *mens rea*?

Constructing the 'problem' of intoxication

By subsection (1), clause 1 applies only to a person who 'at any material time . . . was then intoxicated.' Consequently, some definition of 'intoxication' is required and is found in clause 4:[38]

> 4(1) For the purposes of this Act —
>
> (a) 'intoxicant' means alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the capacity to impair awareness, understanding or control; and
> (b) a person is 'intoxicated' if his awareness, understanding or control is impaired by an intoxicant;
>
> and intoxication shall be construed accordingly
> 5(1) Subject to subsection (2), an intoxicated person is involuntarily intoxicated if —
> (a) at the time when he took the intoxicant he was not aware that it was or might be an intoxicant; or
> (b) he took the intoxicant solely for medicinal purposes; or
> (c) the intoxicant was administered to him without his consent; or
> (d) he took the intoxicant in such circumstances as would, in relation to a criminal charge, afford the defence of duress by threats or any other defence recognised by law.[39]

These provisions make a much-needed attempt to provide a principled structure for deciding when someone is 'intoxicated.'[40] Despite the width of clause 4(1)(a), however, there are nonetheless remaining ambiguities that point to deeper difficulties. Suppose by simply visiting or working in a brewery one knows that one is thereby inhaling alcoholic fumes that may impair one's awareness or understanding. Is this 'intoxication'?[41] If it is 'intoxication,' given that taking intoxicants for medicinal purposes is involuntary intoxication under clause 5(1)(b), would intoxication stemming from a visit to a brewery also be regarded as involuntary even if it did not fall under clause 5(1)(a)? The deeper difficulty this example leads one towards is this. Taking an intoxicant for medicinal purposes is not a case of involuntary intoxication at all. If anything, it is a case of justified intoxication. The same will often be true of intoxication taken under duress or necessity within clause 5(1)(d). Yet all private consumption of legal intoxicants is justified in the sense of being permitted, so it is not easy to see how one could confine a clause concerned with 'justified' intoxication appropriately without cutting across the distinction between voluntary and involuntary intoxication. Yet that is exactly what should be done. The key focus, instead, should be on a broad

38 Contrast the following definition with the discussion in the Commission's Consultation Paper, *op cit* n 2, paras 6.49–6.61.

39 See further clause 5(2)–5(5). Clause 5(1)(d) seems rather too narrow. Why should intoxication only be regarded as involuntary when the intoxicant has been taken under duress, when the duress was such as would amount to a defence to a criminal charge in itself, namely a threat of death or grievous bodily harm? Surely, whenever D has received a credible threat that she will be harmed — whatever the degree of the harm — unless she or he takes an intoxicant, this should make the intoxication involuntary if it is taken in response to the threat.

40 The Report also contains important provisions dealing with a defendant's peculiar susceptibility to intoxication, or to its effects [clause 4(2); clause 5(2)], and with the problem of defendants who take a mixture of substances, knowing only that one (or a few) of them are intoxicants [clause 6].

41 Clause 4(4) says: 'In this Act references to a person "taking" an intoxicant or other substance include references to its being administered to him with his consent.' But this does not quite cover the point.

distinction between offences, and 'confession and avoidance' defences and self-defence.

What matters is when one should and when one should not be permitted to adduce evidence of intoxication to deny subjective recklessness (offence), or in support of a claim to lower the standard to be set for what is to be expected of the reasonable person ('confession and avoidance' defences; self-defence). The key to liability for a basic intent offence should be knowledge of one's intoxication, howsoever caused.[42] The key to the ability to plead a 'confession and avoidance' defence or self-defence should be the fairness of the opportunity (if any) to avoid overreacting due to one's intoxication, howsoever caused. Consider the 'offence' issue first. In the brewery example, irrespective of its voluntariness, as soon as one knows — and perhaps also as soon as it ought to be obvious to one — that one has become intoxicated, one should take special care to avoid risky conduct or situations, if this is still possible. By 'possible,' I mean that one had the physical and mental capacity to take special care to conform one's conduct to the law. When someone forcibly intoxicates me, I will (usually) now know that I am intoxicated. I may then have to make a special mental effort to see and avoid risks, but that is no more than is expected, for example, when (through no fault of my own) I am tired. Someone who knows they have been intoxicated should not, for example, decide to go out for a drive and cannot expect to be allowed to adduce evidence of their intoxication to rebut an allegation of recklessness in driving if they do. It is knowledge of intoxication, not its involuntariness, that is the key in such cases. Naturally, I could be so intoxicated that I am unable to make special efforts to see and avoid risks. In such cases I should plead automatism, an issue dealt with below.

Where 'confession and avoidance' defences (duress; provocation) and self-defence are concerned, what matters is the fairness of the opportunity that I have to take care not to overreact.[43] One of the features of these defences is usually the unexpectedness of the circumstances giving rise to them: the defendant is caught by surprise. Even if D knows of his intoxication, if D is caught in some sudden emergency (or by a provoked loss of self-control) he may unwittingly overreact due to that intoxication. For example, he may claim that intoxication led him to overestimate the amount of force needed to repel V (self-defence), to overestimate the gravity of the provocation or to misunderstand what was required to avert the threat (duress). In such cases, it may be unreasonable not to allow D to adduce evidence of intoxication, whether it be voluntary or involuntary, to bolster a claim that he acted within the bounds of reasonableness. Given the unexpectedness of the situation, the opportunity to avoid overreacting may not have been fair.[44]

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42 Clause 5(1)(a) does not deal with this satisfactorily because it confines the relevance of knowledge to the time that the intoxicant is taken.

43 I have phrased this carefully. Mistaking, due to intoxication, the need for self-defence or action under duress in the first place, should be dealt with as if it were a *mens rea* issue, since as soon as one knows one is intoxicated one should take special care (where possible) to avoid such mistakes: see further clause 3. The law is entitled to evaluate the defendant's wrong-headed understanding of a situation as an emergency (or as provocative) in a different way to its evaluation of his conduct in responding to a real emergency (or to a real provocation).

44 This suggests that *R* v *McCarthy* [1954] 2 QB 105, which rules voluntary intoxication to be irrelevant to a provocation plea, may have been wrongly decided; but the matter is a complex one. Suppose D is provoked to lose his self-control and kill while intoxicated. Even if the unexpectedness of the provoked loss of self-control deprives him of a fair opportunity to make special efforts to retain control, juries clearly need to be sceptical of claims that reasonable people, even when drunk, kill when provoked to lose self-control by nothing more than a trivial provocation. The same point needs to be made to juries about self-defence and duress. Gross overreactions are unlikely to be made unwittingly by reasonable people, even when drunk.

Intoxication and automatism

Clause 2 reads as follows:

> 2(1) This section applies with respect to the liability for an offence of a person who was at any material time in a state of automatism wholly or partly caused by intoxication.
> (2) If the person's intoxication was voluntary, then (subject to subection (4)) —
>
> (a) the fact that he was at the material time in a state of automatism shall operate to rebut any relevant allegation to which section 1(2) applies; but
> (b) that fact shall otherwise be disregarded and, in the case of any other relevant allegation, section 1(3) shall accordingly apply in relation to him as a person who was at that time in a state of voluntary intoxication.
>
> (4) If any such state of automatism was caused partly by such disease of the mind as would, if it had been wholly so caused, require a verdict of not guilty by reason of insanity, then
>
> (a) it shall be treated as if it had been wholly so caused; and
> (b) subsection (2) or, as the case may be, subsection (3) above shall not apply.

Given the policy-driven character of the Commission's proposals, no distinction is drawn between someone seeking to employ evidence of voluntary intoxication to deny *mens rea* and someone seeking to employ such evidence to deny the *actus reus* on the grounds of automatism (6.38–6.49). Clause 2 clearly catches defendants such as *Lipman*.[45] Lipman, who had taken LSD, had an hallucination that he was being attacked by snakes at the centre of the earth. Whilst in a concurrent state of automatism, he crammed a bed sheet into his companion's mouth and struck her hard on the head, killing her. He was convicted of manslaughter and the conviction was upheld on appeal, although the grounds on which the appeal was upheld are not as clear as they might have been. Central to the justification for the conviction seems to have been the direction of the judge at first instance, to the effect that[46]: '[the defendant] must have realised, before he got himself into the condition he did by taking the drug, that acts such as those he subsequently performed which resulted in the death were dangerous.' Presumably, what is meant by this mystifying direction is that if D must have realised, before taking the intoxicant, that he might (or had been grossly negligent as to whether he might) become dangerously violent, the taking of the intoxicant itself provides the (illegal) voluntary conduct upon which a manslaughter conviction can be based. If so based, the conviction was sound, in that it reflects no more than an extension to cases of gross negligence/recklessness, and cases of unlawful and dangerous acts, of Smith and Hogan's 'innocent agent' theory (6.50): D has recklessly or grossly negligently made himself an innocent agent through whom harm is done.

But clause 2 in fact goes much further than this, in two ways. First, the connection between intoxication and automatism may not be well understood by most people, unlike the supposed connection between intoxication and reduced powers of perception, judgment and control. So the justification usually given for disallowing evidence of voluntary intoxication, namely that everyone can be taken to know its likely effects, does not apply here with so much force. In this regard, clause 2 overlooks the fact that the denial of the *actus reus* (which a claim of automatism involves) is a qualitatively different — much more radical — denial of liability than a denial that one had the *mens rea*. For when one admits the *actus reus* but denies that one had the *mens rea*, one admits that the victim suffered

45 [1970] 1 QB 152.
46 Cited by Widgery LJ in *Lipman* (*op cit* n 45) p 155.

wrongdoing at one's hands but denies that that wrong exemplified the criminal wrong with which one had been specifically charged. When one denies the *actus reus*, however, one denies wronging the victim at all. Suppose one passes out through intoxication and thus collapses involuntarily against a bystander. One will then be guilty of assault by virtue of clause 2(2)(b), even though the risk of suddenly becoming unconscious through intoxication may not have been all that obvious in the circumstances,[47] and even though the harm caused to the bystander is in one sense just bad moral luck, like being hit by someone who has stumbled over an unseen obstacle. This raises a second point. Clause 2 draws no distinction between automatism cases where intoxication produces action-failure, as in the hypothetical example just mentioned, and automatism cases where intoxication produces the simulacrum of an action (as through hallucination), as in *Lipman*. These cases should be dealt with differently. For whilst the harm resulting in a case of action-failure (as where one simply falls down unconscious) is largely a matter of chance, there may be method in the madness where hallucinations lead one to perform the simulacra of violent actions, as the facts of *Lipman* or *Quick and Paddison*[48] may very well demonstrate.

There is a case for being much more restrictive about the cases where automatism can be ignored in determining liability, even where one was responsible for inducing it. What should matter is whether, in the circumstances, one ought to have been (a) aware of an obvious and serious risk of becoming an automaton, and (b) aware of a substantial risk that one might thereby bring about the particular kind of harm in question.[49] So an air traffic controller who drinks thirty pints of beer before coming on duty and then passes out, with the result that an unguided aircraft crashes, is guilty of the manslaughter of those on board, because both (a) and (b) are satisfied. By way of contrast, the man who becomes unconscious through drink and bumps into a bystander as he falls may satisfy neither (a) nor (b). *Lipman* and *Quick and Paddison* are more difficult cases, in that whilst Lipman and Quick may have satisfied (a), it is not so clear that they satisfied (b). One might add, though, to such a reformulation of the law, that where the automatism induced by intoxication takes the form of hallucination-driven conduct, as in *Lipman*, the court should have the power to direct that the accused's plea be dealt with as if it were a plea of insanity, by analogy with clause 2(4).

The problem of *R* v *Kingston*

The Law Commission felt that the House of Lords' decision in *R* v *Kingston*[50] came too late for detailed consideration in the Report and was, in any event, outside their remit (1.8), despite the plea for such consideration from Lord Mustill in the case itself.[51] The case dealt with the issue of whether involuntary intoxication could be a defence, even where a defendant admitted both the *actus*

47 Subject to what is provided in clause 5(2) and 5(3).
48 [1973] 3 All ER 347.
49 There may be rare cases in which both of these conditions are satisfied, but where there was no fair opportunity to avoid becoming an automaton and hence causing the harm. Suppose D is forcibly intoxicated to a high degree and then left in sole charge of a moving vehicle. He passes out before he can stop the car and it crashes, killing someone. His plea should be necessity, not automatism: see *Kitson* (1955) CAR 66.
50 [1994] 3 WLR 519.
51 *op cit* n 50, p 537H.

reus and the *mens rea*, on the grounds that the defendant was led by the intoxication to do something he would not otherwise have done. Quite rightly, the House of Lords held that no such defence was known to English law.[52] Nonetheless, it is odd that the Commission did not see fit to deal with the matter, since the proposals do tackle the troublesome border between intoxication and insanity (6.46–6.49; clause 2(4)) which is close to the heart of the matter. I have argued elsewhere that in some — rare — cases involuntary lack of capacity may leave one still able to act, but unable to evaluate one's actions or relate them to one's goals.[53] In such cases, a verdict of not guilty by reason of (temporary) insanity is perhaps the closest one can come to doing justice, although one must remain vigilant to ensure that such a verdict is not reached in cases where defendants merely had difficulty in controlling themselves. Difficulties in compliance affect culpability, but do not negate liability.[54]

Conclusion

In general, there is much to commend in the Commission's Report. It is perhaps the most thoughtful and well-crafted Report yet published in the rolling programme of reform proposals ultimately aimed at codification. In particular, a sound foundation is laid for a distinction between the kinds of allegations where evidence of intoxication may be used to deny *mens rea* and the kinds where it may not. Even so, the verdict must still be 'good, but could try harder.' The continued reliance on a crude distinction between voluntary and involuntary intoxication leaves problems unresolved. More importantly, the Commission has still to shake off the ill-effects of a now outdated subjectivism that insists on an unyielding — and unthinking — uniformity of approach towards *mens rea*, conceding ground to objectivism only on 'policy' grounds that in fact threaten to envelop this entire area of the law.

52 See *Kopsch* [1925] 19 Cr App R 50, and *Beard* [1920] AC 479; Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52 CLJ 298.
53 *op cit* n 52.
54 *Issit* [1978] RTR 211, 216 (*per* Lawton LJ).