tion to those portrayed in abusive images of children, and the second is that even after seven years it has not been brought into force.

Until the decision in *Godwin* and *Gazette* are revisited and the 1999 Act tightened it is difficult to argue with the conclusion of Kay LJ that child protection is not being enhanced by the law in this area.

Intoxicated Mistakes about the Need for Self-Defence

Gavin Dingwall[1]

It is popularly assumed that the consumption of alcohol and other intoxicants can affect people in a number of ways. Research has consistently shown that a high proportion of offenders have drunk alcohol prior to offending,[2] but, equally, it is apparent that finding a direct causal link is highly problematic.[3] One way in which it has been argued that intoxication may increase an individual's likelihood of offending is that it may impair his ability to reason with the result that an intoxicated individual may be more likely to misread a situation.[4] This paper is concerned with one way in which this might occur, namely the ability of an intoxicated person to assess the danger of a situation. The criminal law has had to respond to a number of cases where an intoxicated individual attacked someone (and often killed him) in the allegedly mistaken belief that the victim was about to attack him. Recently, the Court of Appeal has considered the issue again in *R* v *Hatton*.[5] Believing that they were bound by the earlier decision in

1 Reader in Law, De Montfort University. Some of the research for this paper was completed whilst I was a Visiting Scholar at Flinders University of South Australia. An earlier version of this paper was presented as a staff research seminar at the School of Law, University of Wales, Swansea. I would like to thank my colleagues Alisdair A. Gillespie and Michael Hirst and an anonymous reviewer for their comments and assistance with this paper. Any errors remain my responsibility.

2 See generally G. Dingwall, *Alcohol and Crime* (Cullompten: Willan, 2006) chapter 2. T. Budd, *Alcohol-Related Assault: findings from the British Crime Survey* (London: Home Office, 2003) states that the offender was judged to be 'under the influence of drink' in 40% of reported incidents of violence. See further M. Maguire and H. Nettleton, *Reducing Alcohol-Related Violence and Disorder: an evaluation of the 'TASC' project* (London: Home Office, 2003).

3 See H. Parker, 'Young Adult Offenders, Alcohol and Criminological Cul-De-Sacs' (1996) 36(2) BJCrim 282; K. Pernanen and S. Brouchu, *Attributable Fractions for Alcohol and Other Drugs in Relation to Crimes in Canada: literature search and outlines of data banks* (Ottawa: Canadian Centre on Substance Abuse, 1997); J. Rumgay, *Crime, Punishment and the Drinking Offender* (Basingstoke: Palgrave Macmillan, 1998) 13.

4 See P. N. S. Hoaken, P. Giancola and R. O. Pihl, 'Executive Cognitive Functions as Mediators of Alcohol-Induced Aggression' (1998) 59 *Journal of Studies on Alcohol* 599; T. A. Ito, N. Miller and V. E. Pollock, 'Alcohol and Aggression: a meta-analysis on the moderating effects of inhibitory cues, triggering events, and self-focused attention' (1996) 120 *Psychological Bulletin* 60.

5 [2005] EWCA Crim 2951.

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R v *O'Grady*,[6] it was held that, if the defendant mistakenly believed that force was necessary to defend himself and that this mistake was caused by voluntarily induced intoxication, the defendant could not rely on self-defence.[7] This is not the first time that the Court of Appeal has found *O'Grady* binding. In *R* v *O'Connor*[8] a similar conclusion was reached, although in that case the appeal succeeded on another ground.

It will be argued here that such a conclusion is unsound. This paper is not the first to highlight flaws in this line of jurisprudence. Previous criticism has focused on two issues, both of which will be developed here. First, commentators have highlighted the inconsistency between the way in which the law deals with intoxicated acts of aggression and intoxicated mistakes about self-defence.[9] Secondly, inconsistencies in the law on intoxicated mistake – which can take a variety of forms – have been noted.[10] This article though widens the critique to consider the full implications of *Hatton*. By way of conclusion, two alternative approaches will be mapped out. The first has the benefit of consistency with the general approach towards intoxication and substantive criminal liability in England and Wales but is inconsistent with the usual approach to mistaken belief in self-defence. Conversely, the second position, which has the benefit of being consistent with the general approach taken towards mistaken belief in self-defence, is inconsistent with the approach currently adopted towards intoxication and substantive criminal liability.

INTOXICATED MISTAKES, SELF-DEFENCE AND THE CRIMINAL LAW

The law with regard to intoxicated mistakes and the availability of self-defence in England and Wales can be summarised and critiqued with ease. *Hatton* is, on one level, no more than the latest example of a flawed principle which can be traced back to *O'Grady*. However, it extends that flawed principle even further. Although the victim was killed in each of the main cases, *Hatton* differs in that the Court of Appeal applied the principle to a murder case.[11] This is a major development in that it has the effect of introducing an inconsistency into the law between the standard rules regarding substantive criminal liability where the defendant is intoxicated and the rule where intoxication leads to a mistaken belief in the need for self-defence. In order to analyse the impact of *Hatton* fully it is

6 [1987] QB 995.
7 [2005] EWCA Crim 2951 at [23].
8 [1991] CrimLR 135.
9 M. Allen, *Textbook on Criminal Law* (Oxford: Oxford University Press, 8th ed, 2005) 150–151; A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 4th ed, 2003) 215; H. P. Milgate, 'Intoxication, Mistake and the Public Interest' (1987) 46(3) CLJ 381; D. Ormerod, *Smith & Hogan Criminal Law* (Oxford: Oxford University Press, 11th ed, 2005) 284; A. P. Simester and G. R. Sullivan, *Criminal Law: theory and doctrine* (Oxford: Hart, 2nd ed, 2003) 564–566; J. C. Smith, 'Comment on *R* v *O'Grady*' [1987] CrimLR 706.
10 *R* v *Richardson and Irwan* [1999] 1 Cr.App.R. 392; *Jaggard* v *Dickinson* [1980] 3 All ER 716 take a different approach. See comment by Allen, n 9 above, 151; Ormerod, n 9 above, 283; Simester and Sullivan, n 9 above, 564–565.
11 [2005] EWCA 2951 at [23].

necessary first to consider both the general position with regards to intoxication in the criminal law and the general position towards a mistaken belief in the need for self-defence.

Intoxication and substantive criminal liability

Detailed accounts of the way in which intoxication can impact on criminal liability are available elsewhere. As the law appears settled (though as shall be seen it remains unsatisfactory to many academic commentators), what follows represents a brief summary. Traditionally the common law deemed evidence of intoxication inadmissible in determining whether the defendant satisfied the mens rea requirement for an offence.[12] In the course of the 19th century this position began to change in some murder cases. This shift has been explained largely on the basis that it mitigated the mandatory death penalty for that offence rather than on account of doctrinal concerns. In *Beard* the Lord Chancellor summarised the position at the time in the following terms:

> [Where] a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.[13]

A distinction was therefore drawn between those offences which required a 'specific' intent – where evidence of intoxication could be considered in order to determine whether the defendant had the required mens rea – and the remainder of offences (usually referred to as 'basic' intent offences) where such evidence was deemed inadmissible. This distinction was challenged unsuccessfully in *Majewski*,[14] although the inconsistency in the judicial reasoning demonstrates that it is difficult to support a distinction between 'basic' and 'specific' intent doctrinally.[15] To understand *Majewski*, one needs to understand the House's concern that, if they allowed the appeal, public safety would be jeopardised and the law would

12 Sir M. Hale, *A History of the Pleas of the Crown* (1736) stated, at 32, that a 'person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness'. Historical accounts are provided by R. U. Singh, 'History of the Defence of Drunkenness in English Criminal Law' (1933) 49 LQR 528 and D. McCord, 'The English and American History of Voluntary Intoxication to Negate Mens Rea' (1992) 11 *Journal of Legal History* 372.

13 *DPP* v *Beard* [1920] AC 479, 499, per Lord Birkenhead.

14 [1977] AC 443.

15 See, e.g. D. Farrier, 'Intoxication: legal logic or common sense?' (1976) 39(5) MLR 578; J. C. Smith, 'Comment on *Majewski*' [1976] CrimLR 375; J. C. Smith, 'Intoxication and the Mental Element in Crime' in P. Wallington and R. Merkin (eds), *Essays in Honour of F. H. Lawson* (London: Sweet & Maxwell, 1987); G. Virgo, 'The Law Commission Consultation Paper on Intoxication and Criminal Liability Part I: reconciling principle and policy' [1993] CrimLR 415; A. R. Ward, 'Making Some Sense of Self-Induced Intoxication' (1986) 45(2) CLJ 247; S. White, 'Offences of Basic and Specific Intent' [1989] CrimLR 271 and G. Williams, *Textbook of Criminal Law* (London: Stevens, 2nd ed, 1983) especially at 472–473. Not all commentators are quite as critical, see especially S. Gardner, 'The Importance of *Majewski*' (1994) 14(2) OJLS 279.

be brought into disrepute.[16] *Majewski* received little academic support and the Law Commission recommended an alternative approach in a 1993 consultation paper.[17] However, after receiving what they described as 'cogent' criticisms of their proposals, they advocated retaining the distinction between crimes of 'basic' and 'specific' intent in a mildly amended form in their final report.[18] It is difficult to envisage further reform at present given the Government's desire to be seen to be tackling 'alcohol-related' crime and disorder.[19]

Two things need to be noted about the current approach for the purposes of this paper. First, it is offence-specific. Evidence of intoxication can be considered for certain offences but not for others. The categorisation of the offence in question should therefore be of crucial importance in any given case. Secondly, with regards to crimes of 'specific' intent, if the evidence shows that the defendant lacked mens rea then the fact-finder must acquit. However, as the fact-finder has to interpret the evidence to determine whether the defendant lacked mens rea, evidence of possible intoxication *allows* the fact-finder to conclude that the defendant did not possess the required mens rea, but it does not *compel* them to reach such a conclusion. It has the effect of making evidence *potentially* relevant.

Mistake, self-defence and substantive criminal liability

Before considering the interaction between intoxication and mistaken self-defence, it is necessary also to consider the general position regarding mistaken belief and self-defence. The crucial concern has been whether a belief in the need for self-defence has to be objectively reasonable as well as genuinely held. Early case law established that there was a requirement that the belief had to be objectively reasonable.[20] In *Williams (Gladstone)*[21] the Court of Appeal removed the reasonableness requirement and held that a defendant could rely on self-defence if his belief in its necessity was genuine.[22] This decision represented a decisive shift towards subjectivity in the law of self-defence, although it is tempered by the requirement that the

16 'To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences' per Lord Simon of Glaisdale [1977] AC 443, 476; see also Lord Salmon at 484; Lord Edmund-Davies at 495; Lord Russell of Killowen at 498.

17 Law Commission, *Intoxication and Criminal Liability* (Consultation Paper No. 127, London: HMSO, 1993) para 4.4.

18 Law Commission, *Intoxication and Criminal Liability* (Report No. 229, London: HMSO, 1995). The Commission recommended codifying the existing law and using the availability of recklessness as a means of distinguishing between crimes of 'basic' and crimes of 'specific' intent (para 6.6); they concede that this 'may' represent the existing law (para 6.7).

19 Prime Minister's Strategy Unit, *Alcohol Harm Reduction Strategy for England* (London: Prime Minister's Strategy Unit, 2004); Department for Culture, Media and Sport, Home Office and Office of the Deputy Prime Minister, *Drinking Responsibly: the government's proposals* (London: Department for Culture, Media and Sport, 2005).

20 *R* v *Forster* (1825) 1 Lew CC 187; *R* v *Weston* (1879) 14 Cox CC 346; *R* v *Rose* (1884) 15 Cox CC 540; *R* v *Chisam* (1963) 47 Cr.App.R. 130; *R* v *Fennell* [1971] 1 QB 428.

21 (1984) 78 Cr.App.R. 276.

22 (1984) 78 Cr.App.R. 276, 280–281.

force employed has to be objectively proportionate to the perceived threat.[23] The subjective approach towards the initial belief is now well-established,[24] even if some have argued that it is incompatible with Article 2 of the European Convention on Human Rights.[25] This means that, provided the force employed was objectively proportionate to the perceived threat, a defendant can rely on a genuine though objectively unreasonable belief in the need to defend himself.

Despite the Privy Council supporting the subjective approach in *Beckford* v *R*,[26] the Court of Appeal limited the effect of *O'Grady* in *Martin (Anthony)*.[27] This is regrettable for the restriction is unwarranted and based on conceptual misunderstanding. At trial Martin was convicted of murder and wounding with intent. He did not dispute shooting two individuals, both of whom were in the process of burgling his remote farmhouse, but he tried to argue that he had done so in self-defence. The Court of Appeal noted correctly that '[it] does not matter if the defendant was mistaken in his belief as long as his belief was genuine'[28]: it followed that the jury must have concluded 'he was either not acting in self-defence or, if he was, he used excessive force'.[29]

However, the Court of Appeal then confused matters by stating that evidence that the defendant suffers from a psychiatric condition could only be admitted in non-specified 'exceptional' cases if that evidence was 'especially probative' in determining whether excessive force had been used.[30] This is problematic as the relevant issue should be whether the defendant genuinely believed that he was acting in self-defence, in which case evidence of a psychiatric condition may well help the jury determine whether such a belief was genuine. However, as the effect of *Martin (Anthony)* is, in the ordinary course of events, to exclude evidence that the defendant was suffering from a psychiatric condition which may have affected his perception regarding the need to defend himself, an alternative interpretation has to be sought. One possibility is that the Court would be prepared to allow the jury to consider evidence of a psychiatric condition if it was especially extreme but, respectfully, this misses the point. As Allen notes, 'the genuineness of that belief does not depend on the seriousness of the psychiatric condition which might have given rise to it'.[31] In *R* v *Canns*[32] the Court of Appeal candidly admitted that they found it impossible to identify when it would be appropriate to take the defendant's psychiatric condition into account in self-defence cases; on the facts they refused to do so despite the fact that Canns was clearly suffering from a very acute condition.

這種信念的真實性並不取決於可能引發它的精神狀況的嚴重性'.

23 *R* v *Owino* [1996] 2 Cr.App.R. 128; *DPP* v *Armstrong-Braun* [1999] CrimLR 416.
24 *Beckford* v *R* [1987] 3 All ER 425.
25 Compare J. C. Smith, 'The Use of Force in Public or Private Defence and Article 2' [2002] CrimLR 958 with F. Leverick, 'The Use of Force in Public or Private Defence and Article 2: a reply to Professor Sir John Smith' [2002] CrimLR 963.
26 [1987] 3 All ER 425.
27 [2001] EWCA Crim 2245.
28 [2001] EWCA Crim 2245 at [5].
29 [2001] EWCA Crim 2245 at [8].
30 [2001] EWCA Crim 2245 at [67].
31 Allen, n 9 above, 189.
32 [2005] EWCA Crim 2264.

Intoxication, self-defence and substantive criminal liability

What then of situations in which the defendant mistakenly believed that he was about to be attacked, where his mistake was caused by intoxication? Applying the subjective approach in *Williams (Gladstone)* one might conclude that, provided his belief was genuine, he should be allowed to plead self-defence even if his belief was objectively unreasonable. Certainly there is nothing in *Williams (Gladstone)* which would suggest that its reasoning was limited to situations where the defendant was sober at the time. A comparison can be made with another case of general application, *R* v *G*.[33] In that case the House of Lords specifically stated that the principle established did not apply in intoxication cases. Nevertheless, in *O'Grady*, the Court of Appeal noted, correctly, that *Williams (Gladstone)* did not involve an intoxicated defendant[34] and then concluded that:

> [Where] the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is called specific intent, such as murder, and offences of so called basic intent, such as manslaughter. Quite apart from the problem of directing a jury in a case such as the present where manslaughter is an alternative verdict to murder, the question of mistake can and ought to be considered separately from the question of intent.[35]

The effect of this is that an intoxicated individual who kills in mistaken self-defence is potentially in a worse position than an intoxicated individual who kills without this belief. The position is further complicated in that evidence of intoxication may still reduce the charge from murder to manslaughter as there has to be proof that the defendant intended to kill or cause grievous bodily harm. If this cannot be established the charge has to be manslaughter, regardless of whether the defendant believed he was acting in self-defence.[36] However, if it is established that he did intend to use that degree of force to defend himself but that he was mistaken about the need to defend himself, then intoxication cannot allow him to rely on self-defence regardless of whether the charge is murder or manslaughter. It should be noted that allowing a defendant to rely on intoxicated mistake in the need for self-defence in murder cases does not mean that he also has a complete defence to manslaughter. The Court in *O'Grady* commented that '[reason] recoils from the conclusion that in such circumstances a defendant is entitled to leave the Court without a stain on his character'.[37] Yet there is no reason why he should not be convicted of manslaughter if he was grossly negligent in making the mistake.[38]

33 [2004] 1 AC 1034.
34 [1987] QB 995, 999, per Lord Lane.
35 [1987] QB 995, 999, per Lord Lane.
36 This was the reason why the appeal against a murder conviction was successful in *R* v *O'Connor* [1991] CrimLR 135.
37 [1987] QB 995, 1000.
38 Allen, n 9 above, 151; A. Ashworth, 'Comment on *R* v *Hatton*' [2006] CrimLR 353, 356; Ormerod, n 9 above, 284; Smith, n 9 above, 707.

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The reasoning in *O'Grady* rests on the fallacy that mistake and intent can, and should, be considered separately. It fails to appreciate that both mistake and intent relate to the same underlying issue: whether the defendant possessed the necessary mens rea for the offence. Evidence of mistaken belief is evidence from which it can be inferred that the defendant did not have the necessary mens rea. The effect of *O'Grady* is that evidence that goes to the heart of proving intent has to be ignored if the evidence relates to an intoxicated mistake in self-defence. Perhaps the Court in *O'Grady* believed that, as the mistake went to the lawfulness of the killing, it related not to the mens rea but to the actus reus. It is, of course, the case that part of the actus reus of homicide offences is that the killing has to be unlawful. A killing in self-defence may be lawful and therefore would not be criminal. As was recognised in *Williams (Gladstone)*, unlawfulness is part of the actus reus of the offence, in relation to which the prosecution must then prove that the defendant had mens rea. According to Lord Lane:

> The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.[39]

Despite this, the effect of *O'Grady* is that the mental element *can* be substantiated by simply showing an intent to apply force and no more. This cannot be correct. An intent to kill is not synonymous with an intent to murder as a defendant who intends to kill may nonetheless intend to kill lawfully. *O'Grady* misses this crucial distinction. An intention to apply force or kill is required if it forms part of the offence, hence in *O'Connor*,[40] where such an intent could not be proved, the conviction was for manslaughter. The quotation from *Williams (Gladstone)* makes clear though that the *mens rea* is an intent to apply *unlawful* force to the victim and not simply an intent to apply force to the victim. *O'Grady* requires proof only that the defendant intended to kill or cause grievous bodily harm. Despite a clear statement to the contrary in *Williams (Gladstone)*, there is no requirement to prove that the defendant intented to kill or cause grevious bodily harm *unlawfully* if he was intoxicated. *O'Grady* is not the first case which has had the effect of removing unlawfulness from the definition of an offence. In *Albert* v *Lavin*[41] the Divisional Court stated that it was tautologous and not part of the offence of assaulting a police officer in the course of his duty. That decision though was expressly disapproved both in *Williams (Gladstone)* and by the Privy Council in *Beckford* v *R.*[42]

The facts in *Hatton* itself are somewhat vague. The appellant had consumed over 20 pints of beer over the course of the evening of the 21st June 2003. In the early hours of the next morning he met a Richard Pashley in a Sheffield nightclub. Pashley suffered from manic depression and earlier had been behaving in a strange manner by striking martial arts poses and falsely claiming to be an SAS officer. After meeting in the club, they drove to Hatton's flat. Hatton phoned the police several hours later and told them that he had returned to his flat and found the

39 (1984) 78 Cr.App.R. 276, 280.
40 [1991] CrimLR 135.
41 [1982] AC 546.
42 [1988] AC 130.

body of a stranger. Pashley had been killed by multiple injuries to his head, chest and abdomen from a sledgehammer that was found close to his body. A stick, which had been carved to resemble a samurai sword, was also found by the body.

Although Hatton told the police that he had found a stranger's body when he returned to his flat, he made the following statement during his trial:

> I have a vague recollection of being involved in an altercation and a vague recollection of the stick involved. I think I was hit with that stick. I believe Mr. Pashley hit me with it. I must have believed I was under attack.[43]

Counsel for Hatton wished to argue that his client may have been acting in self-defence. He argued that Pashley may have attacked Hatton with the stick, perhaps in the mistaken belief that Hatton was homosexual. There was evidence from earlier in the evening that someone else had assumed that Hatton was homosexual[44] and that Pashley had exhibited a hatred of homosexuals.[45] Counsel for Hatton argued that his client, in an intoxicated state, may have believed both that Pashley was an SAS officer and that Pashley was attacking him with a samurai sword.[46] If such a belief was genuine, then counsel for the defence argued that the force used could be seen as objectively reasonable. In the absence of the jury, he informed the trial judge that, unless he ruled otherwise, he intended to tell the jury that they could take into account the fact that the quantity of alcohol consumed 'may have given him a wholly warped perception of reality'.[47] Holland J. ruled that the defendant could not rely on a mistake induced by intoxication when seeking to establish self-defence.

In the Court of Appeal, counsel for the appellant argued that the judge's ruling and subsequent direction to the jury were defective. He argued that 'if the appellant might have mistaken the nature of the attack because of his drunkenness, he was entitled in law to defend himself in a manner that was reasonable having regard to his drunken perception of the danger to which he was exposed'.[48] The defence accepted that this was inconsistent with *O'Grady* but submitted that the 'observations in that case were wrong in principle and were obiter dicta'.[49] From the discussion above it should be clear that there is considerable force to both of these submissions.

Rather than considering whether the observations in *O'Grady* were correct as a matter of principle, the ruling in *Hatton* concentrated on whether they were binding in the present case. The Court recognised that *O'Grady* had been subject to academic criticism by Professor John Smith in the *Criminal Law Review*[50] but concentrated on Smith's comments about whether the observations in *O'Grady* were *obiter*. Smith's argument was that, as O'Grady was convicted of manslaughter, anything said about murder in that case was unnecessary and therefore *obiter*.

43 [2005] EWCA Crim 2951 at [5].
44 [2005] EWCA Crim 2951 at [4].
45 [2005] EWCA Crim 2951 at [3].
46 [2005] EWCA Crim 2951 at [6].
47 [2005] EWCA Crim 2951 at [6].
48 [2005] EWCA Crim 2951 at [9].
49 [2005] EWCA Crim 2951 at [10].
50 [2005] EWCA Crim 2951 at [16].

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This argument failed to convince the Court. It was held that *O'Grady* was binding because the Court had certified that its decision had raised a point of law of general public importance, namely:

> Is a defendant who raises the issue of self-defence entitled to be judged upon the basis that he mistakenly believed it to be the situation when that mistaken belief was brought about by self-induced intoxication by alcohol or other drugs?[51]

It is worth making a brief further comment about precedent in this area. The Court of Appeal stated that they were not bound by *Williams (Gladstone)* in *O'Grady*,[52] and yet concluded that they were bound by *O'Grady* in *Hatton*.[53] Although *Williams (Gladstone)* appears to establish a general principle with regards to mistaken belief in self-defence cases, in *O'Grady* it was held not to apply to cases where that mistake involved intoxication. This was because the court in *Williams (Gladstone)* were deciding a general issue and were not dealing with a case involving intoxication.[54] Yet, in *Hatton*, the Court of Appeal held that they were bound by *O'Grady* because the earlier case was dealing with a general point of law that was not limited to manslaughter.[55] It appears difficult to reconcile these two approaches. One possible distinction is that *Williams (Gladstone)* made no reference whatsoever to intoxication whereas *O'Grady* at least stated that the position was of general application.[56] But this does not get round the fact that, just as the court in *Williams (Gladstone)* was not dealing with an intoxication scenario, the court in *O'Grady* was not dealing with a 'specific' intent offence. It is surely the case that the comments in *O'Grady* were *obiter* and that the Court of Appeal were wrong to regard them as binding in *Hatton*.[57]

One further point deserves brief mention. The Court of Appeal in *Hatton* shared the trial judge's belief that self-defence could not be left to the jury on the facts of the case.[58] As self-defence is an affirmative defence,[59] the defendant has an evidential burden which entails producing sufficient evidence to convince the judge that the issue should be put before the jury.[60] In *Hatton*, the 'only relevant evidence was the appellant's vague recollection of being hit by Mr. Pashley with the stick' – the scenario where Hatton believed that he was being attacked by an SAS officer with a samurai sword was 'pure conjecture' by counsel.[61]

51 [2005] EWCA Crim 2951 at [23].
52 [1987] QB 995, 999.
53 [2005] EWCA Crim 2951 at [23].
54 [1987] QB 995, 999.
55 [2005] EWCA Crim 2951 at [23].
56 [1987] QB 995, 999.
57 The Law Commission regarded the comments as dictum in *Criminal Code for England and Wales* (London: HMSO, 1989, 177) para 8.42. Ormerod, n 9 above, 284 states that it is 'plainly obiter' and Simester and Sullivan, n 9 above, 565 describe it as 'clearly obiter'.
58 [2005] EWCA Crim 2951 at [24].
59 *R* v *Lobell* [1957] 1 QB 547.
60 In *R* v *Gill* (1963) 47 Cr.App.R. 166, 172 it was stated that '[the] accused, either by the cross-examination of prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as make duress (or whatever defence the accused seeks to put forward) a live issue, fit and proper to be left to the jury'.
61 [2005] EWCA Crim 2951 at [24]. A parallel can be drawn with *R* v *Acott* [1977] 2 Cr.App.R. 94, a provocation case, where it was held at 102 that '[if] there is no such evidence, but merely the

CONCLUSION

It is suggested that *Hatton* is indefensible as a matter of principle. Consistency in the criminal law is a virtue. Yet, after *Hatton*, the current position is inconsistent both with the general principles regarding substantive criminal liability for intoxicated acts and with the general principle regarding genuine though objectively unreasonable mistakes in self-defence.

It is unnecessary to rehearse the extensive criticisms of the current approach in England and Wales to attributing criminal liability to those who are intoxicated.[62] However, the law on intoxicated mistake and self-defence could be brought into line without any great difficulty. Case law has established which offences are to be regarded as requiring a 'specific' intent and which only require a 'basic' intent. All one would need to do is state that an intoxicated mistake in self-defence should be considered with regard to offences requiring a 'specific' intent – such as murder – but should not be considered if the offence is one of 'basic' intent. Applied correctly, this would not necessarily avail someone like Hatton facing a murder charge. The jury would be at liberty to accept that his belief was genuine or would be at liberty to conclude that it was not. Crucially though potentially relevant evidence relating to intention would be considered. By excluding such evidence in all self-defence cases where intoxication is an issue, an intoxicated defendant who genuinely believes that he is about to be attacked by a person coming towards her is in a worse position than an intoxicated person who attacks someone with the genuine belief that the person is a shop dummy. *Hatton* makes the crucial mistake of allowing the nature of the genuine mistake to become determinative when it should not be. Some might argue that it is appropriate to distinguish between the two scenarios on the basis that '[part] of what is excusatory about blundering into harm is that it is unexpected':[63] it may be reasonable to say that someone should consider the possibility that he may make a mistake about somebody attacking him before becoming intoxicated but it is unreasonable to insist that he should consider the possibility that he will make a mistake involving a shop dummy. It is undeniable that the first is more foreseeable than the second, but it seems unduly harsh to say that an intoxicated individual should be convicted of murder rather than manslaughter if he genuinely believed that he was under attack.

Hatton also fails the consistency test with regards to how the criminal law generally views genuine though objectively unreasonable beliefs in self-defence. As the standard approach is subjective,[64] this would entail allowing evidence of a mistaken belief to be considered both for offences requiring a 'specific' intent and for those requiring a 'basic' intent. If the approach is truly subjective there would

speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation'. It is perhaps worth noting though that in *Hatton* there was evidence that the victim had purported to be an SAS officer, had exhibited homophobic tendencies and that the defendant had earlier been mistaken for a homosexual.

62 See n 6 above.

63 J. Horder, 'Sobering Up? The Law Commission on Criminal Intoxication' (1995) 58(4) MLR 534 at 537.

64 *R* v *Williams (Gladstone)* (1984) 78 Cr.App.R. 276.

appear to be no reason to artificially distinguish between offences. This, of course, is inconsistent with the way in which the criminal law responds to intoxication. By rejecting the artificial distinction between 'specific' and 'basic' intent offences, such an approach would be more liberal in that it would allow the fact-finder to consider evidence of intoxication in more cases. Again though, this approach would be permissive rather than mandatory. The fact-finder would not be required to accept the evidence, merely to consider it. Extending the situations in which evidence of intoxication could be considered to 'basic' intent offences would bring the law into line with several common law jurisdictions which have jettisoned the distinction between 'specific' intent and 'basic' intent offences.[65] It will be recalled that the House in *Majewski* recoiled from so doing for fear that public safety would suffer.[66] However, empirical evidence from jurisdictions which allow intoxication to be considered with regards to 'basic' intent offences has demonstrated that juries seldom acquit on the basis of intoxication.[67] This lack of empirical support suggests that public safety does not demand the retention of a distinction between offences of 'specific' and 'basic' intent.

A broader issue, which cannot be fully explored in a paper of this length, relates to the inconsistent manner in which the criminal law deals with mistakes of fact and defences. *Williams (Gladstone)* established that a defendant's genuine belief about the need to use some force in self-defence did not have to be objectively reasonable for him to be able to rely upon self-defence. When it comes to a mistake about the existence of circumstances which would be legally adequate to constitute duress though the courts have insisted that the belief must not only be genuine but must be reasonable.[68] Accordingly someone who, whilst intoxicated, made a mistake about the existence of circumstances which would be legally sufficient to amount to duress would not be able to rely on duress. *Hatton* brings intoxicated mistakes about the need for self-defence into line with the law regarding intoxicated mistakes about circumstances amounting to duress, though it does not do so explicitly. However, a drunken mistake concerning provocation can still afford a defence.[69] It is best not to try and seek any rationale for the difference of approach between defences. Simester and Sullivan account for them on the following basis:

> The reason for the different approaches appears to be the happenstance that typifies our uncodified criminal law. The element of unlawfulness which must, axiomatically, be present for the commission of any new offence may, as in *Williams (Gladstone)*, be treated as something integral to the definition of the offence. Where that analysis is employed, the wholly subjective approach taken in *Morgan* will prevail and any genuine belief in facts which would have rendered D's conduct lawful will provide an excuse. However, the approach in *Albert* v *Lavin* may still be taken where authority does not dictate otherwise. In that case, the defining conditions of lawfulness

65 See further Dingwall, n 2 above, 111–117.
66 See n 16 above.
67 See G. Orchard, 'Surviving without *Majewski* – a view from down under' [1993] CrimLR 426; L. Skene, 'Drunkenness and Acquittals' (1983) 57 *Law Institute Journal* 318; G. Smith, 'Footnote to *O'Connor's* case' (1981) 5 *Criminal Law Journal* 270.
68 See *R* v *Graham* [1982] 1 All ER 801; *R* v *Howe* [1987] AC 417; *R* v *Hasan* [2005] UKHL 22 at [23].
69 *R* v *Letenock* (1917) 12 Cr.App.R. 221.

> may be treated as matters of defence: something distinct from the definitional elements of the offence itself. If that analysis is employed, a court may require, as in *Graham*, that mistakes must be based on reasonable grounds to afford a defence . . . English law lacks any theory of exculpation to guide decision-making on the range and application of the defence of mistake.[70]

The Court of Appeal refused leave to appeal to the House of Lords. It was acknowledged that the point of law was important but felt that this was not a suitable case for appeal.[71] This is regrettable for *Hatton* remains a deeply unsatisfactory case. Cases where an intoxicated individual makes a genuine mistake about the need for self-defence are to be treated in a different manner from most cases involving an intoxicated defendant. Although the Court held that they were bound by *O'Grady,* which stated that 'the question of mistake can and ought to be considered separately from the question of intent',[72] nowhere in either judgment is it explained why this is acceptable as a matter of principle. It is respectfully suggested that this central premise is flawed and that further consideration of the issue is warranted.

70 Simester and Sullivan, n 9 above, 551.
71 [2005] EWCA Crim 2951 at [32].
72 [1987] QB 995, 999.

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