Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally

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Abstract

As the title suggests, this paper argues that evidence of intoxication should be inadmissible for all offences, including murder. Such an argument is justified on public policy grounds, and by the proposition that principles of criminal law relating to voluntariness and intention should be secondary to the morally correct position that a person who is voluntarily intoxicated is criminally responsible for any conduct he or she causes whilst in such a condition. As an alternative to such an 'absolutist' position, this paper contends that it is appropriate to place a legal burden on the defence where intoxication is raised to rebut the presumption that the intoxicated person foresaw or intended the natural and probable consequences of his or her conduct. The analysis is conducted through the relevant intoxication provisions in the *Criminal Code 1995* (Cth) and the *Criminal Code 1983* (NT). The argument is made that these two Codes have the weakest and least effective version of the *Majewski* principle of all Australian jurisdictions such that the relevant basic intent provisions make the prohibition virtually meaningless. Revised provisions dealing with intoxication have been proposed for s 43AS *Criminal Code 1983* (NT). The overriding objective of these redrafted provisions is to strengthen the reach of s 43AS, and to make these provisions the strongest and most effective version of the *Majewski* principle in Australia.

I INTRODUCTION

> He that kills a man when he is drunk shall be hanged when he is sober.[1]

This paper will critically examine the role of intoxication (a term which for present purposes encompasses alcohol and drugs) in determining criminal liability in Australia. It is possible to divide Australian jurisdictions into two groups for the purpose of classifying the treatment of evidence of intoxication: those that follow *The Queen v O'Connor*[2] and those that adhere to *DPP v Majewski*.[3] In

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1 Rosalind Fergusson, *The Penguin Dictionary of Proverbs* (Penguin, 1983) 51.

2 (1980) 146 CLR 64. Victoria and South Australia follow the *O'Connor* principle.

O'Connor, the High Court decided by a majority of four to three that evidence of intoxication was part of the totality of the evidence in determining whether the Crown had proved beyond reasonable doubt that the defendant had acted voluntarily and intentionally. By contrast, in *Majewski*, the House of Lords held that offences should be divided into specific and basic intent,[4] with evidence of intoxication only being relevant to an offence of specific intent.[5] This decision was rooted in a public policy principle that if a person voluntarily consumes alcohol then it is justifiable to hold that person criminally responsible for any injury caused whilst intoxicated. As will be discussed in the body of the paper, considerable criticism has been directed at the arbitrariness and difficulties in dividing offences between specific and basic intent.

This paper will avoid problems surrounding such a distinction by contending for the radical proposition that evidence of voluntary intoxication should be excluded from a determination of voluntariness and intention for all offences, including murder.[6] Section 43AF(5) *Criminal Code 1983* (NT) states that 'evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary'.[7] The focus of this paper is to advocate a similar absolute exclusion for self-induced intoxication and intention, or, in the alternative, to take the position that the defence must discharge a legal burden on the balance of probabilities that the defendant did not foresee or intend the natural and probable consequences of his or her

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3 [1977] AC 443 (House of Lords). See *Criminal Code 1899* (Qld) s 28(3); *Criminal Code 1902* (WA) s 28(3); *Criminal Code 1924* (Tas) s 17(2); *Criminal Code 2002* (ACT) s 31; *Criminal Code 1995* (Cth) s 8.2; *Criminal Code 1983* (NT) s 43AS; *Crimes Act 1900* (NSW) s 428C. For the import of such a distinction see G.F. Orchard, 'Criminal Responsibility and Intoxication – The Australian Rejection of *Majewski*' (1980) *New Zealand Law Journal* 532, 533: 'Where an offence requires a specific intent the accused is entitled to acquittal if he lacked the required intent, even though this resulted from the effects of voluntary intoxication.'

4 An offence of basic intent is one where the defendant intends to commit the proscribed conduct such as to strike the victim in a case of common assault. For an offence of specific intent some further intention is required such as not only intending to strike the victim but also intending to cause the victim serious harm in a case of causing serious harm.

5 *Ja v Goldsmith* [2004] ACTSC 15 (2 September 2004) [15] (Crispin J). Crispin J was construing s 31 *Criminal Code 2002* (ACT) in relation to grievous bodily harm and concluded that 'this provision does not apply to an allegation of a specific intent such as an intent to cause grievous bodily harm [and] hence, the appellant's state of intoxication had to be taken into account'.

6 'In early Anglo-Saxon law, no concession was made in practice to an intoxicated accused.' S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters, 2005) 242, citing R U Singh, 'History of the Defence of Drunkenness in English Criminal Law' (1933) 49 *Law Quarterly Review* 528, 529.

7 See also *Criminal Code 1995* (Cth) s 4.2(6); *Criminal Code 2002* (ACT) s 15(5); *Crimes Act 1900* (NSW) s 428G(1).

conduct because this is peculiarly within the knowledge of the defendant.

Chief Justice Barwick in *O'Connor* asked the question whether 'intoxicated violence' was sufficient to warrant a departure from established common law principles.[8] This paper unequivocally answers that question in the affirmative, and supports the view of the minority in *O'Connor* that a defendant who chooses to become intoxicated is morally accountable for any offences committed while in that state.[9] However, it is here further argued that there is no reason of public policy to distinguish between offences of specific and basic intent, and that evidence of intoxication should be inadmissible in all criminal trials.

The justification for extending the *Majewski* approach to all offences is grounded in the very significant statistical relationship between alcohol consumption and homicide in Australia. In a recent study, Dearden and Payne concluded that 47 per cent of all homicides recorded between 1 July 2000 and 30 June 2006 were classified as alcohol related.[10] Furthermore, estimates suggest that in 2004-05, the total costs attributable to alcohol-related crime in Australia was $1.7 billion with the social cost relating to alcohol-related violence (excluding the costs to the criminal justice system) calculated to be $187 million, while the costs associated with the loss of life due to alcohol-related violent crime amounted to $124 million.[11]

A suitable public information campaign prior to the introduction of legislation banishing evidence of intoxication would ensure that potential intoxicated defendants would not be able to claim ignorance of a change in the law. Such a campaign would reinforce the positive duty on any state to take appropriate steps to safeguard the lives of those within its jurisdiction and a duty to put in place 'effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.[12]

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8 (1980) 146 CLR 64, 86.

9 *The Queen v O'Connor* (1980) 146 CLR 64, 94 (Gibbs J), 109-110 (Mason J), 136 (Wilson J).

10 Jack Dearden and Jason Payne, 'Alcohol and Homicide in Australia' (*Trends and Issues in Crime and Criminal Justice,* No 372, Australian Institute of Criminology, 2009) 5.

11 Anthony Morgan and Amanda McAtamney, 'Key Issues in Alcohol-Related Violence' (*Research in Practice Summary Paper,* No 04, Australian Institute of Criminology, 2009) 1.

12 *Osman v United Kingdom* (1998) App No 23452/94 [115], cited in the Law Commission of England and Wales, 'Intoxication and Criminal Liability', Law Com No 314 (2009) 3.67.

In the event that such a position is considered too extreme, this paper contends that as a second best solution, for the purpose of reversing the onus of proof in relation to evidence of intoxication, it is appropriate to adopt the rebuttable presumption that every person intends the natural and probable consequences of his or her acts. In *Director of Public Prosecutions v Smith*,[13] the House of Lords adopted the objective test of the reasonable person as opposed to the subjective test of the defendant's intention. The objective test in *Smith* was rejected by the High Court in *Parker v The Queen*.[14]

Where a subjective test is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. However, this is 'somewhat artificial as an accused, in many cases, will deny that he or she possessed the necessary state of mind necessary to commit the offence'.[15] Barwick CJ in *Pemble v R* pointed out that the jury will normally have to infer the accused's state of mind from what the accused has actually done and the surrounding circumstances.

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind… that conclusion [as to the accused's state of mind] could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.[16]

Applying the above comments on inference in relation to a subjective test as to the accused's actual state of mind, it is here argued that if the defence introduces intoxication as evidence as to why the defendant did not have the requisite state of mind then the defence must overcome an objective test that every person intends the natural and probable consequences of his or her acts. Thus, the 'artificiality' of the subjective test where the jury is required to infer the defendant's state of mind, is replaced, when intoxication is raised, by a clearer objective test as to what a reasonable sober person might have intended or foreseen. In this way, the double-edged sword that evidence of intoxication currently represents would become singularly single-edged.

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13 *Director of Public Prosecutions v Smith* [1961] AC 290 (House of Lords) ('*Smith*').

14 (1963) 111 CLR 610, 632 (Dixon CJ).

15 Jonathan Clough and Carmel Mulhern, *Criminal Law* (Butterworths, 2004) 17.

16 *Pemble v R* (1971) 124 CLR 107, 120-121 (Barwick CJ). See also *R v Clare* (1993) 72 A Crim R 357, 369; and *R v Cutter* (1997) 94 A Crim R 152, 156-157, 164-166.

For the purpose of analysis, the approach taken in this paper is to examine the *Criminal Code 1983* (NT) which recently adopted Chapter 2 of the *Criminal Code 1995* (Cth) as a new Part IIAA.[17] In particular, attention will be focused on s 43AS Intoxication – offences involving basic intent, which is closely modelled on s 8.2 *Criminal Code 1995* (Cth). Essentially, both of these Codes have opted for the *Majewski* model of distinguishing between offences of specific and basic intent. However, the Commonwealth Criminal Code's Guide to Practitioners states that 'specific intent has no counterpart in Chapter 2 and basic intent is given a restricted definition' such that *Majewski* is 'of little or no use in determining the application of the *Code* provisions'.[18]

Section 43AS(1) *Criminal Code 1983* (NT) states that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. However, s 43AS(1) is qualified by a note that states that 'a fault element of intention in relation to a result or circumstance is not a fault element of basic intent', and by subsections which allow self-induced intoxication to be taken into consideration in determining whether the conduct was accidental (s 43AS(2)) or whether the person had a mistaken belief about facts (s 43AS(3)). As Odgers has pointed out, the prohibition on the use of evidence of voluntary intoxication has no application in determining whether a fault element existed in relation to 'a physical element of circumstance or a physical element of result; an ulterior (or specific) intention; or knowledge, recklessness or negligence'.[19] It will be contended that the note and the two exceptions have the effect of making the prohibition in s 43 AS(1) virtually meaningless.

This paper will address the vexed question of intoxication and criminal responsibility at three levels. Firstly, it is proposed to extend the *Majewski* model to cover all offences. Secondly, in the alternative, it is argued that where intoxication evidence is raised, the rebuttable presumption relating to foresight and intention of the natural and probable consequences of actions should be introduced. Thirdly, a revised s 43AS is proposed containing the general rule that where recklessness is the fault element evidence of intoxication is inadmissible, such that it has a more wide-reaching effect on offences of basic intent. The proposed s 43AS will in turn be supplemented by a subsection giving a short list of offences of specific intent in order to avoid confusion as to which offences are covered by the prohibition.[20]

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17 *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT).

18 Ian Leader-Elliott for the Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code – A Guide for Practitioners* (2002) 145.

19 Stephen Odgers, *Principles of Federal Criminal Law*, (2007) 70.

20 See for example *Crimes Act* 1900 (NSW), s 428B.

II BACKGROUND

> Looking at this great social defect of drunkenness, Australians are not content to drink, or even to get drunk – they never drop the cup until delirium-tremens overtakes them.[21]

The architect of the *Criminal Code 1983* (NT), Mr Sturgess, in his preface to the Criminal Code discussed the treatment of intoxication. Having referred to the Northern Territory government's policy that a defence based upon voluntary intoxication was to be regarded as an excuse of little merit, Mr Sturgess continued:

> In giving effect to this policy the following matters have been provided for: involuntary intoxication has been given a strict definition (section 1); until the contrary is proved it is to be presumed that intoxication was voluntary and, unless it was involuntary, that the accused person foresaw the natural and probable consequences of his conduct and intended them (section 7); that voluntary intoxication is only relevant in relation to penalty when doing a dangerous act is charged and, in most cases, will increase the penalty (section 154).[22]

As it transpired, part of this policy fell foul of the Federal Government and s 7 proved to be the first section of the newly minted *Criminal Code 1983* (NT) to be amended.[23] As originally worded, s 7 did not contain the word 'evidentially' and established a legal presumption ('until the contrary is proved') that, in any case where 'intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence', the accused 'foresaw the natural and probable consequences of his conduct and intended them'. In response to a question as to whether the onus of proof had been reversed under s 7, Mr Sturgess replied as follows at a seminar on the Criminal Code held shortly after the Code had been passed by the Northern Territory in October 1983: 'No, you are talking about an inference here. An inference may be drawn in the circumstances that you intended what you actually did, and Lionel Murphy says that is the law – it always was the law – you are presumed to have intended what you did.'[24]

The above reference was to Murphy J's judgment in *O'Connor v The Queen*:

> Perhaps no harm will be done if the (rebuttable) presumption continues to be used, even if it is described as a process of inference. It is important in cases where there is evidence of intoxication that the tribunal understand

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21 Frank Fowler, *Southern Lights and Shadows* (Sampson Low, 1859), 47-48.

22 D G Sturgess, Preface to the Criminal Code, 12 August 1983, 8.

23 *Criminal Code Amendment Act 1984* (NT).

24 Comments by D G Sturgess, Criminal Code Seminar Transcript, October 1983, Darwin, 119.

> that, consistently with the presumption of innocence, an inference is available to it that a person intends the natural and probable consequences of his actions. In the absence of other evidence, this is the only reasonable inference open to them in most criminal cases.[25]

This presumption of foreseeing the natural and probable consequences of conduct was criticised shortly after the *Criminal Code 1983* (NT) had been passed in November 1983 by the then Prime Minister as placing an 'insuperable burden on a defendant' and as a breach of Article 14 (the presumption of innocence) of the 1966 *International Covenant on Civil and Political Rights* scheduled to the *Human Rights Commission Act 1981* (Cth).[26] The fledgling Northern Territory Government immediately accepted the Prime Minister's criticism under the threat of s 122 of the Federal Constitution.[27]

The effect of the amendment was to change the presumption from a legal burden to an evidential one, such that the defendant must adduce evidence of intoxication but the burden of proving intention or recklessness remains on the prosecution.[28] This interpretation of the amended s 7(1)(b) was confirmed by the Supreme Court of the Northern Territory in *Charlie v The Queen* where two judges of the Court of Appeal spoke of s 7(1)(b) establishing an evidential burden only.[29]

Nevertheless, Bronitt and McSherry consider s 7(1)(b) to be 'somewhat different to the other jurisdictions in that it does not expressly state that intoxication may negate the fault element of a crime' and that its wording 'seems to suggest that self-induced intoxication will be irrelevant to the question of intention'.[30] Ironically, because the new Part IIAA (effectively Chapter 2 of the

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25 (1980) 146 CLR 64, 116.

26 Letter dated 17 November 1983 written by the Prime Minister, the Honourable Robert Hawke to the Chief Minister of the Northern Territory cited in Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication*, Report Number 53 (1999) 49.

27 Section 122 of the Federal Constitution is entitled 'Government of territories' which gives the Federal Parliament the power to make laws for the government of any territory. Action under the *Northern Territory (Self-Government) Act 1978* (Cth) s 9 was proposed. See (1984) 9 Commonwealth Record 472, recording the agreement between the Commonwealth and Northern Territory Attorney-General for amendments to the Code, cited in Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No 31 (1986) [439].

28 *Criminal Code Amendment Act 1984* (NT), s 7(1)(b): 'unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct.'

29 (1998) 7 NTLR 152, 157 (Martin CJ), 170-171 (Angel J).

30 Bronitt and McSherry, above n 6, 249.

Criminal Code (Cth)) only applies to a narrow band of offences in Part VI which covers offences against the person,[31] s 7(1)(b) remains the relevant section dealing with intoxication for all other offences including causing serious harm and causing harm. This paper contends that even the amended s 7(1)(b) is more effective than its equivalent section, s 43AS, in Part IIAA, notwithstanding the partial adoption of the *Majewski* principles because the omission from the reach of s 43AS of a fault element of intention for a physical element of a result or circumstance, and the accident and mistake of fact exceptions, severely limit the effect of s 43AS in excluding evidence of intoxication for offences of basic intent.

III DECONSTRUCTING INTOXICATION IN PART IIAA CRIMINAL CODE (NT)

> At other times he was so overwhelmed by a desire for strong drink that not even the spirits in his instruments were safe in his presence.[32]

A *Voluntariness*

The incorporation of Chapter 2 of the *Criminal Code 1995* (Cth) as Part IIAA of the *Criminal Code 1983* (NT) brought two sections into play for the purposes of the treatment of evidence of intoxication. The first is s 43AF which deals with voluntariness (s 4.2 in the *Criminal Code 1995* (Cth)), and the second is s 43 AS which covers intoxication. Section 43AF(1) states that conduct can only be a physical element[33] if it is voluntary, and s 43AF(2) explains that conduct is only voluntary if it is the product of the will of the person whose conduct it is. By way of clarification, examples of conduct which is not voluntary are given such as a spasm, convulsion or other unwilled bodily movement; an act performed during sleep or unconsciousness; and an act performed during impaired consciousness depriving the person of the will to act. These two subsections set out well settled legal territory on voluntariness and specifically import automatism into the *Criminal Code 1983* (NT).

For present purposes, it is s 43AF(5) which moves to centre stage. Section 43AF(5) states that evidence of self-induced intoxication

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31 Part IIAA applies to all offences listed in Schedule 1.

32 Manning Clark, *A History of Australia* (Melbourne University Press, vol 4, 1978) 145 of John McDouall Stewart.

33 Under s 43AC which deals with establishing guilt of offences a person must not be found guilty of committing an offence unless the existence of the physical elements of the offence and for each physical element one of the fault elements (where required) for the physical element is proved.

cannot be considered in determining whether conduct is voluntary. Section 43AD(1) defines conduct as an act, an omission to perform an act or a state of affairs, while 43AE sets out that a physical element of an offence may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct, happens. Thus, clearly, the effect of s 43AF(5) above is to exclude evidence of self-induced intoxication from the physical element of an offence (or the *actus reus*). As Odgers has pointed out:

> If the only evidence tending to suggest that a person's conduct was not the product of the person's will is evidence the person was intoxicated, and the intoxication was self-induced, such evidence must be disregarded by the tribunal of fact. If it must be disregarded then, presumably, the inference of voluntariness will be drawn.[34]

It is illuminating to consider the ramifications of s 43AF(5) in the context of the well known passage from Barwick CJ's judgment in *The Queen v O'Connor*:

> But the state of intoxication may, though perhaps only rarely, divorce the will from the movements of the body so that they are truly involuntary. Or, again, and perhaps more frequently, the state of intoxication, whilst not being so complete as to preclude the exercise of the will, is sufficient to prevent the formation of an intent to do the physical act involved in the crime charged.[35]

If one conceives of these two states of intoxication on a scale of 0 to 10, where 0 is stone cold sober and 10 is paralytic, then 7.5 could represent a person being sufficiently intoxicated to prevent the formation of an intent to do the physical act which goes to the fault element or *mens rea*. Then again, 9 could represent a person who is so intoxicated that the will has been divorced from the movements of the body which goes to the physical element or *actus reus*. It is this second or super intoxicated state that s 43 AF(5) has knocked out from the evidential equation. However, for crimes of specific intent the *O'Connor* principle of intoxication being part of the totality of the evidence is alive and well for the first intoxicated state relating to the fault element of intention.

The mechanics of evidence of intoxication being excluded for voluntariness and included for intention under Part IIAA can be illustrated for the specific intent offence of murder.

Section 156 Murder

(1) A person is guilty of the crime of murder if:
  (a) the person engages in conduct; and

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34 See above n 19, 27.

35 (1980) 146 CLR 64, 72.

(b) that conduct causes the death of another person; and
(c) the person intends to cause the death of, or serious harm to, that or any other person by that conduct.

The elements of s 156(1) can be broken down as follows:

1. The person engages in conduct
   - Physical element – Conduct
   - Fault element – Intention (s 43AM(1)[36] default fault element)
2. That element causes the death of another person
   - Physical element – Result
   - Fault element – Intention to cause the death of, or serious harm to, that or any other person by the conduct.

Consequently, it can be seen that s 43AF(5) means that evidence of intoxication cannot be considered for the physical element of conduct as per s 156(1)(a) above where the person engages in conduct. The requirement of voluntariness applies only to conduct. By contrast, evidence of intoxication is able to be considered as to whether the person intended the result of that conduct as per s 156(1)(c) above.

A recent Northern Territory example of the consideration of evidence of intoxication in a murder trial under Part IIAA occurred in *The Queen v Billy King*[37] In this case, the defendant stabbed the victim nine times with a 23 centimetre knife with the final fatal wound being between the breasts while she was prone on the Katherine Terrace median strip in broad daylight in view of a number of witnesses. The defendant had also stabbed a bystander who had tried to intervene. This was a case of a virtual certainty that after eight previous attempts the final ninth stab wound directed between the breasts would prove fatal.

The only issue at the trial was the defendant's intention as he was heavily intoxicated at the time of the killing. The jury returned a verdict of manslaughter as presumably they were not satisfied beyond reasonable doubt that the defendant intended either to kill the deceased or cause her serious (grievous) harm. This verdict was available because the *O'Connor* principle is the law in all jurisdictions in Australia for crimes of specific intent such as murder, and

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[36] S 43AM(1) states: 'If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.' By contrast, s 43AM(2) states: 'If a law that creates an offence does not provide a fault element for a physical element that consists only of a result or circumstance, recklessness is the fault element for the physical element.' There is a note for s 43AM(2) which states: 'Under section 43AK(4), recklessness can be established by proving intention, knowledge or recklessness.'

[37] *The Queen v Billy King*, (Unreported, Supreme Court of the Northern Territory, Angel ACJ, 4 July 2008).

presumably the jury's verdict represents an exception to evidence presented to the Parliament of Victoria Law Reform Committee 'that the *O'Connor* argument is not very often used and, when it is argued, it is very rarely accepted'.[38]

Proponents of the *O'Connor* principle argue that the exclusion of evidence of self-induced intoxication means that the defendant's ability to act voluntarily and intentionally would be evaluated hypothetically and would be based on a legal fiction. A former Victorian Director of Public Prosecutions has expressed the view that allowing evidence of voluntary intoxication to be taken into account can actually assist the Crown:

> From our perspective, we are quite happy to live with the intoxication as a fact that the jury can take into account along with all the other facts because we find that, as a matter of reality, intoxication is two-edged. Once it is raised it also raises very clearly the fact that it reduces a person's inhibitions. It makes people less likely to have the same self-control that they might when sober; and it might explain to a jury why someone might do something that otherwise would be quite out of character.[39]

By contrast, this paper disputes the above view that evidence of intoxication may be counter-productive for the defence, instead contending that the outcome in *The Queen v Billy King* is unsatisfactory and that public policy mandates that either *Majewski* apply to all offences or such a defendant is properly required to discharge a legal burden on the balance of probabilities that he or she did not foresee or intend the natural and probable consequences of his or her conduct. In effect, the latter is a call to restore the equivalent language of the repealed s 7 Intoxication, *Criminal Code 1983* (NT). Support for this proposition can be found in Canada where the 'Canadian Supreme Court has often found that a persuasive burden of proof can be held constitutional as a demonstrably justified reasonable limit under section 1,[40] as the Court has decided for defences of

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38 Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication*, Report Number 53 (1999) 107.

39 Ibid, 110, citing a submission from Mr G Flatman, QC, the then Victorian Director of Public Prosecutions. See also Leader-Elliott, above n 18, 135: 'The potential benefits to the prosecution from attempts to base a defence or denial of liability on evidence of intoxication are frequently remarked.' See, for example: *Ainsworth* (1994) 76 A Crim R 127, 138-139 (Gleeson CJ).'

40 Section 1 reads: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982* (Canada), being Schedule B to the *Canada Act 1982* (UK) c.11, s 1.

mental disorder, extreme intoxication and, very recently,[41] sane automatism'.[42]

B *The Absolutist Approach*

It is important to clarify the crux of the argument of this paper. This is a call for an 'absolutist' approach which would never permit a defendant to rely on voluntary intoxication to avoid criminal liability where the defendant's intoxicated understanding of the circumstances would always be replaced by the view the defendant would have taken if he or she had been sober. The Law Commission of England and Wales levelled the following criticism at such an 'absolutist' approach:

> An 'absolutist' approach of this kind, which would focus solely on D's conduct and its effects, but would disregard D's state of mind where affected by voluntary intoxication, might contribute in some small way to the reduction of the social evil of drink or drug-fuelled violent crime and reassure the public. However, it could result in D being convicted of offences such as murder when D's culpability came nowhere close to the requirements for legal liability. To permit such a degree of mismatch between the level of culpability and the level of the offence committed would be wrong.[43]

The Law Commission gave as an example a defendant genuinely believing that he was stabbing a mannequin when actually stabbing a friend, and that the 'absolutist' position would attribute to the defendant a non-existent intention to kill or seriously harm another person. The Law Commission suggested that such an 'absolutist' approach would 'equate the moral culpability associated with self-induced intoxication to the moral culpability required for any crime, even murder' and concluded that 'such a disproportion between culpability and the extent of liability cannot be introduced into the criminal law'.[44]

Support for the 'absolutist' position can be found in various submissions to the Parliament of Victoria Law Reform Committee, including one from the Queensland Director of Public Prosecutions,[45] and an example of this view was expressed by Mr Ray Pinkerton that 'people know what alcohol does and if they become self-intoxicated, then they should have to answer fully for every crime

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41 See *The Queen v Stone* [1999] 2 S.C.R. 290.

42 Don Stuart, 'Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective' (2000) 4(13) *Buffalo Criminal Law Review* 40.

43 The Law Commission of England and Wales, *Intoxication and Criminal Liability*, Law Com No 314 (2009) 1.56.

44 Ibid, 1.57.

45 See Parliament of Victoria Law Reform Committee, above n 38, 104, citing inter alia Mr R Miller, QC, the then Director of Public Prosecutions (Qld).

or misdemeanour that they commit'.[46] Historically, this has been the law as exampled by the sixteenth century case of *Reniger v Feogossa*[47] which in turn draws on the ethics of Aristotle[48] and moral responsibility. Coke states that: 'As for the drunkard who is voluntarius daemon, he hath no privilege thereby, but what he hurt or ill soever he doeth, his drunkenness doth aggravate it'.[49] Implicit in the 'absolutist' approach advocated in this paper is that, for the purpose of defining the relationship between alcoholism and criminal liability, alcoholism should not be treated as a disease but as a habit and therefore relevant only to sentencing rather than to criminal defences.[50]

Significantly, the background to the above Parliament of Victoria Inquiry was the case of Noa Nadruku who punched two women in the face but was acquitted by Magistrate Madden on the grounds that 'the degree of intoxication is so overwhelming to the extent that the defendant, in my view, did not know what he did and did not form any intent as to what he was doing'.[51] A Committee of the Legislative Assembly for the Australian Capital Territory noted that 'the ACT magistrate's decision attracted widespread community outrage, both in the ACT and nationally' prompting calls for legislative reform 'to prevent a defendant being able to rely on the "defence" of excessive intoxication to avoid criminal responsibility'.[52]

Further evidence of public disquiet can be found in the public furore surrounding acquittals for killings that have resulted from so called 'one-punch' assaults and that for example have bedevilled s 23(1)(b) of the *Criminal Code 1899* (Qld) which states that a person is not criminally responsible for an event that occurs by accident.[53] The Queensland Law Reform Commission recently reported on the

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46 Ibid.

47 *Reniger v Feogossa* (1551) 1 Plowden 19, 31. 'If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory: but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.'

48 *The Ethics of Aristotle; The Nicomachean Ethics* (Thompson, 1976) 383.

49 E Coke, *Institutes of the Laws of England* (Book 1, 1628) 247.

50 For a discussion of this issue see Julia Tolmie, 'Alcoholism and Criminal Liability' (2001) 64(5) *Modern Law Review* 688.

51 *S.C. Small v Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, CC97/01904 (22 October 1997) 11; See Parliament of Victoria Law Reform Committee, above n 38, 4-5.

52 Standing Committee on Justice and Community Safety, Legislative Assembly for the Australian Capital Territory, *The Crimes (Amendment) Bill No 4 1998*, Report No 10, (May 2000) 1.3.

53 The equivalent section in the *Criminal Code 1902* (WA) is s 23B(2).

excuse of accident,[54] which followed an audit[55] of the defences to homicide used in murder and manslaughter in Queensland in the previous five years and public outrage over several high profile cases in which the defendants were acquitted or convicted of lesser charges.

The main difficulty with the alternative subjective approach (to the 'absolutist' position), which treats the defendant's actual state of mind at the time of the alleged offence as the sole determinant of guilt, is that such an approach treats as irrelevant what the defendant's state of mind would have been had the defendant been sober. Thus, a strictly subjective approach to intoxication and criminal responsibility would, as the Law Commission acknowledged, 'have the effect of providing the defendant with a complete answer to any serious offence requiring proof of a culpable state of mind'.[56] This then led the Law Commission to observe that the 'absolutist' approach and the purely subjective approach were equally unattractive resulting in English law adopting an intermediate position based on the definitional requirements of the offence.[57]

This paper contends that given the Law Commission of England and Wales accepted that 'there is a compelling argument for imposing criminal liability' to the extent reflected by the culpability associated with knowingly and voluntarily becoming intoxicated which the Law Commission stated was 'morally justifiable in principle, and warranted by the desirability of ensuring public safety and deterring harmful conduct',[58] it is unfortunate the Law Commission was unable to shed its *Majewski* driven view of the interaction between intoxication and criminal responsibility. It is here argued that Lord Denning pointed the correct way forward in *Attorney-General of Northern Ireland v Gallagher*:[59]

> I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out

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54 Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008).

55 Department of Justice and Attorney-General, Queensland Government, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (2007).

56 See Law Commission of England and Wales, above n 43, 1.53.

57 Ibid, 1.58. Andrew Ashworth appears to agree with this position. 'Murder and wounding with intent are crimes of specific intent, and there is no great loss of social defence in allowing intoxication to negative the intent required for those crimes when the amplitude of the basic intent offences of manslaughter and unlawful wounding lies beneath them – ensuring D's conviction and liability for sentence.' Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2006) 212.

58 Ibid, 1.55.

59 [1963] AC 349, 382-383.

> his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill … I would agree, of course, that if before the killing he had discarded his intention to kill or reversed it—and then got drunk—it would be a different matter.

The difficulty with the 'Dutch courage' scenario is that only the defendant would ever know whether he or she had formed a prior intention to kill or had then discarded such an intention and woken up from a drunken stupor to find the intended victim dead anyway. Nevertheless, some jurisdictions specifically exclude evidence of intoxication if the person 'had resolved before becoming intoxicated to do the relevant conduct or became intoxicated in order to strengthen his or her resolve to do the relevant conduct'.[60] However, Lord Denning was trying to address the important issue of the knowledge from past experience that people have of the effect of alcohol (or drugs) on their own behaviour. The *Majewski* public policy perspective is that getting intoxicated is reckless and therefore a person should be held criminally responsible for any crime committed whilst intoxicated where recklessness is the requisite fault element.

The reasoning in *Majewski* was that no wrong is done to a person in holding him or her criminally responsible for any injuries inflicted upon others whilst intoxicated precisely because the act of intoxication supplies the evidence of *mens rea*, at least for crimes of basic intent. However, the better view is that because a person voluntarily becomes potentially dangerous through the ingestion of alcohol or drugs in wanton disregard of public safety, this voluntary act becomes the moral equivalent of possessing the fault element of recklessness as regards other people's safety.

One of the main criticisms of the *Majewski* approach is the problem of distinguishing between offences of specific and basic intent.[61] This is reinforced where a defendant is charged with offences of both specific and basic intent and intoxication is an issue, thereby requiring the judge to give different directions to the jury on the relevance of intoxication which may be confusing and submerge the jury in technical legal rules.[62] A further criticism is that for offences of basic

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60 *Crimes Act 1900* (NSW) s 428C(2); See also *Criminal Code 1899* (Qld) s 28(2); *Criminal Code 1913* (WA) s 28(2). Such prior resolution amounts to constructive *mens rea*. This is a sound policy position and is preferable to the argument supporting admission of evidence of intoxication on the grounds it may be counter-productive to the defence if the jury accepts the intoxicated defendant's inhibitions and self-control were thereby reduced.

61 See for example *The Queen v O'Connor* (1980) 146 CLR 64, 81 (Barwick CJ): 'With great respect to those who have favoured this classification of crimes, it is to my mind not only inappropriate but it obscures more than it reveals.'

62 See Parliament of Victoria Law Reform Committee, above n 38, 80.

intent the jury is forced to consider how a defendant would have acted had he or she been sober, a task that has been described as 'impossible and artificial'.[63] The attack on the 'fiction' that the defendant was sober is exemplified by the following submission to the Parliament of Victoria Law Reform Committee:

> [T]he voluntariness of any act would be assessed on the fictional basis that the accused was sober, and hence it would be presumed that the accused acted voluntarily, and further it would be presumed that the accused was sober for the purpose of determining fault in relation to crimes of basic intent but not for crimes of specific intent.[64]

Whilst this paper acknowledges the technical force of such a criticism, as discussed earlier, s 43AF(5) *Criminal Code 1983* (NT) avoids any 'fiction' as to the voluntariness of any act by preventing evidence of self-induced intoxication being considered. The preferred position in this paper is to overcome the 'fiction' of sobriety regarding the fault element for crimes of basic intent by contending that evidence of intoxication should be inadmissible for any offence. Nevertheless, if intoxication evidence is to be admitted for specified offences, this paper addresses the 'fiction' of the sober defendant by substituting an objective test of the sober reasonable person. The test becomes what the ordinary responsible sober person would in all the circumstances have considered to be the natural and probable outcome.

C *Majewski Writ Small*

The rule in *Majewski* is that if the Crown can prove the defendant committed the external element of an offence with a fault element of recklessness whilst intoxicated, liability can be sheeted home despite the defendant's lack of appreciation of the relevant risk, provided the Crown can prove that the defendant would have appreciated that risk if he or she had been sober. In effect, the rule in *Majewski* allows the Crown to pursue an alternative objective basis to establish liability by qualifying the normal subjective approach for offences requiring no more than recklessness as the fault element. Consistent with the presumption of innocence, if it is reasonably possible that the defendant would have been unaware of the relevant risk even if sober or that a sober person might have made the same mistake, then the defendant is not liable for the offence. However, as mentioned earlier, *Majewski* is of limited use in determining the intoxication provisions of the *Criminal Code 1995* (Cth) as the *Guide for Practitioners* makes clear:

> The physical elements of an offence are conduct, circumstances or results. The *Code* provisions on intoxication require a distinction to be drawn

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63 Ibid, 81, citing a submission from the Victorian Criminal Bar Association.

64 Ibid, citing a submission from the Attorney-General's Department, South Australia.

> between conduct elements of an offence and circumstantial or result elements.[65] When evidence of intoxication would have a rational bearing on proof of intention, knowledge, recklessness, negligence or any other fault element relating to an incriminating *circumstance* or *result* of conduct, the court must give consideration to that evidence.[66]

Leader-Elliott has identified in a table in a recent article that for the physical element of conduct, the fault element is intention; for the physical element of circumstance, the fault element is knowledge; and for the physical element of result, the fault element is recklessness or negligence, or others as specified.[67] This paper contends that recklessness should be the dividing line for a general rule regarding the admissibility of self-induced intoxication evidence, which would limit such evidence to proof of intention or knowledge.

The *Guide for Practitioners* continues with a discussion that intoxication can lend credibility to a defendant's denial of intention, knowledge or recklessness because drunks are poorly co-ordinated, display bad judgment and make mistakes. Therefore, the argument runs, '[d]epending on the circumstances, these decrements in performance can displace the usual inference that anyone of normal intelligence must have known what they were doing or must have intended the consequences of their actions: s 9.1(2)'.

Section 9.1(2) *Criminal Code 1995* (Cth)[68] deals with mistake or ignorance of fact for fault elements other than negligence and allows the jury to consider whether the mistake was reasonable in the circumstances.[69] Odgers states that s 9.1(2) is 'superfluous' as the jury, in determining whether the defendant entertained a mistaken belief about some fact that negated a fault element, 'would inevitably consider the reasonableness of making such a mistake'[70] under the circumstances. Odgers goes on to make the following pertinent observation as regards the nature of the test.

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65 See the note to *Criminal Code 1995* (Cth) s 8(2) and the note to *Criminal Code 1983* (NT) s 43AS(1).

66 See Leader-Elliott, above n 18, 145 (original emphasis). The *Guide for Practitioners* at 149 makes the point that a defendant who claims that the act causing harm was a mere stumble can equally well deny that there was any intention to cause harm. 'The same conclusion follows for all offences which require proof of fault with respect to a result. If the act causing the result was not intentional, the result is not intentional either.'

67 Ian Leader-Elliott, 'The Australian *Criminal Code*: Time for Some Changes' (2009) 37(2) *Federal Law Review* 205, 212-213.

68 See also *Criminal Code 1983* (NT) s 43AW(2).

69 *Criminal Code 1995* (Cth) s 9.1(2) states: 'In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.'

70 See Odgers, above n 19, 78.

> What this provision does *not* do is replace a subjective test with an objective one. While the reasonableness of the mistake is relevant in deciding whether the defendant might have made it, the ultimate issue is whether the defendant might have made it, not whether the mistake was a reasonable one.[71]

On the question of proof, Odgers points out that while there is an evidential burden on a defendant who relies on mistake of fact, this is of 'no practical significance because there is no evidential burden on the defendant who argues that the prosecution has failed to prove an element of the offence'.[72] The prosecution must prove every element of an offence and there is no evidential burden on a defendant who argues mistake of fact prevents a fault element being proven.

This paper takes issue with the present legislation as it is contended that if the defence is going to argue intoxication displaced the inference that a normal person intended the consequences of his or her actions, then the 'superfluous' s 9.1(2) above needs to go further than simply allowing the jury to consider the reasonableness of the mistake as regards negating a fault element from the subjective perspective of the defendant. The test should become objective by requiring consideration of whether the mistake was a reasonable one and not whether the defendant might have made the mistake.

The above contention derives some support from the position taken by the Law Commission of England and Wales who recommended that:

> [A] defendant should not be able to rely on mistake of fact arising from self-induced intoxication in support of a defence to which the defendant's state of mind is relevant, regardless of the nature of the fault alleged. The defendant's mistaken belief should be taken into account only if the defendant would have held the same belief if the defendant had not been intoxicated.[73]

The Law Commission has adopted a subjective test of the defendant's belief rather than the preferred objective test of a sober reasonable defendant, but at least requires the mistaken belief to be assessed from the perspective of a sober defendant. The Law Commission used the example of self-defence not being available if the mistake the defendant made as to the circumstances was caused by intoxication citing Lord Lane CJ for the Court of Appeal in *O'Grady*[74] as authority:

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71 Ibid (original emphasis).

72 Ibid.

73 See Law Commission of England and Wales, above n 43, 3.53.

74 *O'Grady* [1987] QB 995.

> [W]here 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 [of self 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,[75] the question of mistake can and ought to be considered separately from the question of intent.[76]

The use of a sober defendant, albeit subjective and fictional, is a considerable improvement on the present intoxication provisions in the Commonwealth and Northern Territory Criminal Codes where the standard of a reasonable person who is not intoxicated only emerges where intoxication may be relevant to defences such as self-defence and the defence of sudden or extraordinary emergency, which is discussed in a later section of this paper.

Such a critical view of the present legislation becomes more apparent when the content of s 8.2(4) *Criminal Code 1995* (Cth) is considered.[77] Section 8.2(4) operates as an exception to evidence of self-induced intoxication being excluded in determining whether a fault element of basic intent existed, and allows such evidence to be taken into consideration in deciding whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed. As Odgers notes while this exception only applies if the person has given consideration as to the existence of the facts, 'it is a limitation of little practical significance' because '[i]f a person has a belief about facts, he or she has invariably considered, to some extent, whether or not the facts exist'.[78]

The *Guide for Practitioners* states that s 8.2(4) 'has no bearing on proof of basic intent' as the provision applies 'only to the defence of reasonable mistake of fact in offences which impose strict liability'.[79] The mistake has to be reasonable by virtue of s 8.2(5)(b) which uses the words 'honestly and reasonably believed'. The *Guide for Practitioners* comments that the prosecution can 'rely on evidence of the defendant's intoxication to defeat the defence … by proving the mistake to have been unreasonable'.[80] This paper contends that if intoxication is being used to support a defence of reasonable mistake

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75 See for example *Criminal Code 1983* (NT) s 316(1).

76 *O'Grady* [1987] QB 995, 999.

77 See also *Criminal Code 1983* (NT) s 43AS(3).

78 See Odgers, above n 19, 72.

79 See Leader-Elliott, above n 18, 153.

80 Ibid.

of fact, then, even for an offence of strict liability, the defendant's mistaken belief should be taken account only if a reasonable sober person would have held the same belief (or at a minimum only if the defendant would have held the same belief if the defendant had not been intoxicated).

Furthermore, s 8.2(4) needs to be considered in tandem with the 'sister' exception of accident in s 8.2(3)[81] which allows evidence of self-induced intoxication to be taken into consideration in determining whether conduct was accidental. The *Guide for Practitioners* observes a claim that conduct was accidental 'is no more than a denial that the conduct was intended'.[82] There is therefore a distinction between a denial of intention based on mistake (not permitted) and a denial of intention based on accident (permitted), albeit a 'fine'[83] distinction. The *Guide for Practitioners* optimistically opines that the accident exception to the rule excluding reliance on evidence of intoxication 'is likely to be narrowly construed'.[84] Rather, the author respectfully agrees with Odgers who concluded that the exceptions in ss 8.2(3) and (4) 'to a large extent remove the prohibition created by the rule'.[85]

Odgers reinforces the weakness of the prohibition by noting that because the prohibition is restricted to whether the defendant intended to engage in particular conduct (s 8.2(2)), 'it follows that evidence of self-induced intoxication … may be considered in determining whether a fault element of intention existed in relation to a physical element of circumstance or a physical element of result'.[86] In *R v Collins*,[87] Weinberg J was considering the equivalent section, s 31(1) *Criminal Code 2002* (ACT), in relation to manslaughter which his Honour stated had three physical elements: an act or omission; causing death; that is unlawful. Justice Weinberg noted that the first element constituted conduct, the second the result of conduct, and the third as a circumstance in which conduct, or a result of conduct, happens. His Honour concluded that 's 31(1) would appear to apply to the fault element for the acts or omissions, but not to any fault elements of the other two physical elements'.[88]

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81 See also *Criminal Code 1983* (NT) s 43AS(2).

82 See Leader-Elliott, above n 18, 151.

83 Ibid.

84 Ibid.

85 See Odgers, above n 19, 70-71.

86 Ibid 71.

87 *R v Collins* [2004] ACTSC 108 (18 June 2004) (Weinberg J).

88 Ibid [83]-[84].

D *General Rule of 'Recklessness' Governing the Admissibility of Intoxication Evidence*

This then begs the question as to the nature of the general rule governing the admissibility of intoxication evidence. A very useful starting point is the recommendation of the Law Commission of England and Wales which argued there should be a general rule that:

> (1) if the defendant is charged with having committed an offence as a perpetrator;
>
> (2) the fault element of the offence is not an integral fault element (for example, because it merely requires proof of recklessness); and
>
> (3) the defendant was voluntarily intoxicated at the material time.
>
> Then, in determining whether or not the defendant is liable for the offence, the defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication.[89]

The Law Commission adopted recklessness (both subjective recklessness and objective '*Caldwell*'[90] recklessness) as the touchstone for disregarding the effects of self-induced intoxication.[91] The Law Commission identified the following integral fault elements as exceptions to the above general rule and therefore should always have to be proved: intention as to a consequence (but not intention as to conduct); knowledge as to something (but not knowledge as to a risk which falls within the scope of subjective recklessness); belief as to something (this is a belief amounting to a certainty or near-certainty); fraud; and dishonesty.[92]

If the sufficiency of proof of the fault element of recklessness was to become the sole criterion for the admissibility or otherwise of evidence of self induced intoxication, then this would bring s 43AK Recklessness of the *Criminal Code 1983* (NT) fully into play. Section 43AK uses the term awareness of a substantial risk that a result will happen or that the circumstance will exist, and that having regard to the circumstances known to the person, it is unjustifiable to take the risk. Applying the above integral fault elements as exceptions to the general rule of

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89 See Law Commission of England and Wales, above n 43, 3.35.

90 Following *Caldwell* [1982] AC 341, the defendant is *Caldwell* reckless if the defendant is subjectively reckless or if the defendant does not foresee the relevant risk but a reasonable person would have foreseen it.

91 See also United States *Model Penal Code*, Proposed Official Draft, American Law Institute (1962) s 2.08(2): 'When recklessness establishes an element of an offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.'

92 See Law Commission of England and Wales, above n 43, 3.46.

recklessness, because knowledge as to a risk is deemed to fall within the scope of subjective recklessness, evidence of self-induced intoxication would be completely precluded for manslaughter (an offence of basic intent) under s 160 *Criminal Code 1983* (NT) as recklessness or negligence are alternative faults elements.

This paper takes such an argument one step further. The leading case on reckless murder at common law in Australia is *R v Crabbe*[93] where the test is whether the accused knew that death was a probable as opposed to possible consequence of his or her conduct. Clearly, a 'substantial risk' in s 43AK is equivalent to the test applied for reckless murder at common law. It follows that as reckless murder would therefore be open to the exclusion of intoxication evidence if recklessness was the sole criterion of the admissibility of self-induced intoxication, there is little point in preserving the specific intent versus basic intent division.

Alternatively, if intoxication evidence is to be allowed, where the defence raises intoxication evidence, this paper advocates the replacement of a subjective test with an objective test for criminal responsibility as was held by the House of Lords in *DPP v Smith*[94] until replaced by statute.[95] In *Smith*, a policeman tried to prevent the defendant from driving off with stolen goods by jumping on the bonnet of the car. The defendant not only drove away at speed but also succeeded in dislodging the police officer by zigzagging. The policeman fell into the path of an oncoming vehicle and was killed. The trial judge directed the jury on the basis of whether a reasonable man would have contemplated that grievous bodily harm was likely to result to the police officer. The Court of Appeal quashed the murder conviction and substituted a manslaughter conviction in applying a subjective test.[96] The Director of Public Prosecutions appealed to the House of Lords who reinstated the murder conviction in holding that the trial judge had not misdirected the jury and that an objective test was applicable.

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93 *R v Crabbe* (1985) 156 CLR 464.

94 [1961] AC 290.

95 *Criminal Justice Act 1967* (UK), s 8 provides that the court: '(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.' The decision in *DPP v Smith* was treated as wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576.

96 The test put forward by Byrne J stated: 'While that is an inference [a person intends the natural consequences of his or her acts] which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yea if on all the facts of a particular case it is not the correct inference, then it should not be drawn.' *Director of Public Prosecutions v Smith* [1961] AC 290, 300.

Viscount Kilmuir LC gave the sole speech:

> The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[97]

If the facts in *Smith* were to be applied to the Northern Territory, then the Crown would have to prove beyond reasonable doubt all the elements of s 156 above, and s 156(1)(c) in particular which is a subjective test. However, if an intoxicated driver is introduced into the factual scenario and the defence seeks to rely on intoxication as the reason why the defendant did not form the necessary intention to cause the death of or serious harm to the victim, then this paper contends that it is appropriate to go beyond an evidential onus with the low bar of 'a reasonable possibility',[98] and to place a legal burden on the defendant to prove on the balance of probabilities that he or she did not foresee or intend the natural and probable consequences of his or her conduct. This does not place an 'insuperable burden on a defendant'[99] and is consistent with Murphy J's reference to a rebuttable presumption in *O'Connor v The Queen*.[100]

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97 *Director of Public Prosecutions v Smith* [1961] AC 290, 327, concurred in by Lord Goddard, Lord Tucker, Lord Denning and Lord Parker of Waddington. The decision in *Smith* harked back to *R v Meade* [1909] 1 KB 895.

98 See *Criminal Code 1983* (NT) s 43BT Evidential burden of proof.

99 See Robert Hawke cited in Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication,* above n 26.

100 (1980) 146 CLR 64, 116. The rebuttable presumption does not change the role of intoxication from an excuse that seeks to negative intent to a situation where intent is removed from the jury altogether. The jury is not directed that public policy grounds override any doubts they may have concerning the intoxicated defendant's intention. Rather, the jury is told it must consider whether the defence has satisfied them on the balance of probabilities that the defendant when sober did not intend the natural and probable consequences of his or her conduct. Such a direction is consistent with Murphy J's observation in *O'Connor* that 'in the absence of other evidence, this is the only reasonable inference open to them in most criminal cases'.

More realistically, in the Northern Territory, the Crown would prosecute a *Smith* case under s 174F for driving a motor vehicle causing death or serious harm which under s 174F(4) is an offence of strict liability[101] and which carries a maximum term of imprisonment of 10 years under s 174F(1). For present purposes it is of interest that one of the physical elements of the offence is driving dangerously, which in turn has three alternative definitions one of which is being under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. Thus, not only is this serious offence one of strict liability but also intoxication per se is sufficient to trigger a physical element.

However, as one academic author has pointed out there have been suggestions that 'voluntary intoxication will never support a defence to an offence of strict liability or negligence, for in such a case no *mens rea*, intention of foresight need be proved'.[102] Orchard argues that this statement must be qualified as 'on the majority view in *O'Connor* voluntary intoxication should excuse *any* offence if it led to the relevant conduct being "involuntary", because voluntary conduct is essential for criminal responsibility even when strict liability is imposed'.[103] As has been previously discussed, this point is met by s 43AF(5) *Criminal Code 1983* (NT) which prevents evidence of self-induced intoxication being considered in determining whether conduct was voluntary. Therefore, if a serious offence such as s 174F above can be legislated to be an offence of strict liability and s 43AF(5) disposes of voluntariness as an issue, then this begs the question as to whether it is such a big stretch to declare evidence of intoxication inadmissible for all offences that contain a fault element?

Indeed, one could turn around the arguments of the proponents of *O'Connor* who suggest that evidence of self-induced intoxication is rarely accepted by the jury, by contending that if the jury rarely believes the defendant is there any reason for stopping at recklessness as the touchstone for basic intent and not taking the 'absolutist' position?

Given that in an adversarial legal system trial by jury is widely portrayed as a bastion against arbitrary exercise of power by the state, the significance of comments, warnings and directions to the jury should not be underestimated.[104] 'While doubts are often expressed

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[101] Under s 43AN strict liability is defined as where there are no fault elements for any of the physical elements and the defence of mistake of fact under s 43AX is available.

[102] Orchard, 'Criminal Responsibility and Intoxication – The Australian Rejection of *Majewski*', above n 3, citing C R Williams, *An Annual Survey of Law* (1976) 88.

[103] Ibid, 537 (original emphasis).

[104] See for example, Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) [18.4].

about whether juries understand and heed judicial directions, the law operates on the assumption that they do.'[105] The Australian Law Reform Commission noted that studies showed that juror comprehension varied according to the subject matter of the direction,[106] and that '[d]irections regarding subject matter which is new, difficult or counter-intuitive to jurors' commonsense are less likely to be effective than directions regarding subject matter with which jurors are generally familiar'.[107]

Although jurors are generally familiar with the effects of intoxication, 'a number of studies have shown that directions to disregard inadmissible evidence or to limit the use of evidence are less likely to be effective than other types of directions, and can in fact be counter-productive'.[108] This finding is significant where jurors are required to distinguish between the admissibility of evidence of intoxication for different offences where alternative verdicts are available such as murder (specific intent) and manslaughter (basic intent), or different charges within the same sequence of events such as serious harm (specific intent) and assault (basic intent). Furthermore, empirical research has confirmed the finding 'that jurors have difficulties understanding and following judicial directions'.[109] This paper contends such practical considerations are persuasive reasons for adopting the 'absolutist' position.

IV RECONSTRUCTING INTOXICATION IN PART IIAA CRIMINAL CODE (NT)

> The intoxication of anger, like that of the grape, shows us to others, but hides us from ourselves.[110]

In keeping with the three levels on which this paper has addressed the important question of intoxication and criminal responsibility, the relevant sections of Part IIAA *Criminal Code 1983* (NT) are here rewritten to reflect each level, starting with the preferred position that

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[105] Ibid [18.8], citing *R v Glennon* (1992) 173 CLR 592.

[106] Ibid [18.10], citing J Tanford, 'The Law and Psychology of Jury Instruction' (1990) 69 *Nebraska Law Review* 71, 79.

[107] Ibid [18.10] 79-80.

[108] Ibid [18.12] 86-87; J Lieberman and J Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677, 703.

[109] Ibid [18.14], citing New Zealand Law Commission, *Juries in Criminal Trials*, Preliminary Paper 37 Vol 2 (1999); W Young, Y Tinsley and N Cameron, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) 24 *Criminal Law Journal* 89, 100.

[110] John Dryden.

evidence of intoxication be inadmissible for any offence. The simplest and most clear cut approach to achieve this objective would be to rewrite s 43AS as follows:

> **Section 43AS Intoxication**
>
> Evidence of self-induced intoxication cannot be considered in determining whether a fault element *of specific intent or* of basic intent existed. (Words in italics added and the rest of s 43AS deleted.)

In the alternative, the second level of analysis has considered the admissibility of evidence of intoxication from the perspective of changing the onus of proof from an evidentiary burden to a legal burden on the defence. Currently, s 43BV *Criminal Code 1983* (NT) deals with the legal burden of proof on the defence, and relevantly states that a legal burden on the defence is only imposed if the law expressly specifies the burden is a legal burden, or requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved. Adopting the latter presumption, a new subsection would be inserted into s 43AS, which is labelled s 43AS(6) in the proposed complete revision of s 43AS given below.

> **Subsection 43AS(6)**
>
> Where evidence of self-induced intoxication is admitted under one of the specified fault elements operating as an exception to the general rule that a defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication, the intoxicated person is presumed to have foreseen or intended the natural and probable consequences of his or her conduct unless the contrary is proved.

Consistent with the proposed new subsection 43AS(6) above and with the objective test of a reasonable sober person for the purpose of mistaken belief of fact for an offence of strict liability identified earlier in this paper, a new section would be added to s 43AX Mistake of fact – strict liability,[111] which is similar in form to s 43AU(3)[112] which deals with the relevance of intoxication to defences such as the defence of sudden or extraordinary emergency.

> **Section 43AX(3)**
>
> If any part of an excuse of mistaken belief as to the existence of facts is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

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111 See also *Criminal Code 1995* (Cth) s 9.2.

112 See also *Criminal Code 1995* (Cth) s 8.4(2).

The third level of analysis, which is not mutually exclusive with a legal burden of proof on the defence in the proposed new subsection for s 43AS above, is to rectify the restricted definition of basic intent in Part IIAA, and to specify the fault elements that operate as exceptions to the general rule that, where the fault element of recklessness satisfies the fault element for an offence, evidence of self-induced intoxication cannot be considered. Presently, s 43AS *Criminal Code 1983* (NT) reads as follows:

> **43AS Intoxication** – offences involving basic intent
>
> (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.[113]
>
> *Note for subsection (1)*
>
> *A fault element of intention in relation to a result or circumstance is not a fault element of basic intent.*
>
> (2) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
>
> (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
>
> (4) A person may be regarded as having considered whether or not facts existed if:
>
> (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
>
> (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

This paper has contended that the note for subsection (1) above and the two exceptions of accident and mistake of fact in subsections (2) and (3) respectively, have the effect of leaving the prohibition in s 43AS(1) with very little work to do. The proposed revision of s 43AS below takes as its starting point the language of the general rule advocated by the Law Commission of England and Wales suitably adjusted for the nomenclature of Part IIAA *Criminal Code 1983* (NT). The list of specific intent offences in the proposed s 43AS(5) below is restricted to three offences because at present Part IIAA only applies to a narrow band of offences against the person listed in Schedule 1 of the *Criminal Code 1983* (NT). The proposed new subsection 43AS(6) above dealing with a legal onus of proof on the defence is incorporated into the completely revised s 43AS below.

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[113] Section 43AS follows s 8.2 *Criminal Code 1995* (Cth) but omits s 8.2(2) which states: 'A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.'

43AS Intoxication – offences involving basic intent

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed, and the person is to be treated as having been aware of anything which the person would then have been aware but for the intoxication.

(2) A fault element of basic intent is defined as not being a fault element of specific intent in subsection (3), such as a fault element that requires proof of recklessness.

(3) For the purposes of this section, a fault element of specific intent means an intention as to a result or circumstance (but not intention as to conduct)[114] or knowledge as to something (but not knowledge as to a risk which falls within the scope of recklessness as defined in s 43AK of this *Code*) [115]

(4) However, evidence of self-induced intoxication cannot be considered in determining whether a fault element of intoxication or knowledge existed if the person had resolved before becoming intoxicated to do the relevant conduct, or became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

(5) The only offences in Schedule 1 to which subsection (3) applies are:

(a) Section 156 Murder

(b) Section 162 Assisting and encouraging suicide

(c) Section 176A Drink or food spiking.

(6) Where evidence of self-induced intoxication is admitted under one of the specified fault elements operating as an exception to the general rule that a defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication, the intoxicated person is presumed to have foreseen or intended the natural and probable consequences of his or her conduct unless the contrary is proved.

Note for subsection (6)

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[114] This follows the language of s AI Intention where a person has intention in relation to conduct if the person means to engage in that conduct; a person has intention in relation to a result if the person means to bring it about or is aware it will happen in the ordinary course of events; and a person has intention in relation to a circumstance if the person believes that it exists or will exist. Thus, using the example of shoplifting, an offence requiring proof of ulterior intention, 'the shoplifter cannot rely on evidence of intoxication to support a denial of intention to appropriate the publication [but] that evidence *can* be considered, however, when the court comes to consider whether the publication was appropriated with intent to deprive permanently'. See Leader-Elliott, above n 18, 149-151 (original emphasis).

[115] Section AJ Knowledge states: 'A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.'

> *The presumption of foresight or intention of the natural and probable consequences of conduct applies only where evidence of intoxication is admitted and does not apply to any other defences.*

It is possible to illustrate the operation of the proposed s 43AS above by looking at two offences that are in Schedule 1 but are not listed as offences of specific intent in the proposed s 43AS(5) above. The first is s 192 Sexual intercourse without consent, and the second is s 240A Causing bushfires. Both of these offences specify the fault element of recklessness. Therefore, given the proposed s 43AS(3) above precludes evidence of intoxication being considered for a physical element where proof of recklessness is sufficient to satisfy the fault element, evidence of self-induced intoxication is inadmissible for both of these serious offences.

V CONCLUSION

> Australians are not a nation of Snobs like the English, or of extravagant boasters like the Americans, or of reckless profligates like the French; they are simply a nation of Drunkards.[116]

This paper has reviewed the law relating to the admissibility of evidence of self-induced intoxication in the *Criminal Code 1995* (Cth) and the *Criminal Code 1983* (NT) and found it wanting. The attack on these two Codes has been made from two perspectives. The first is general and applies to a greater or lesser degree to all Australian jurisdictions: namely, that there is good reason of public policy to prevent the admissibility of evidence of self-induced intoxication for all offences, or, in the alternative, to place a legal burden on the defence to rebut the presumption that the intoxicated person foresaw or intended the natural and probable consequences of his or her conduct. The second is particular: namely, that these two Codes have the weakest and least effective version of the *Majewski* principle of all Australian jurisdictions such that the relevant basic intent provisions make the prohibition virtually meaningless.

Consistent with these two perspectives, legislative change has been proposed which, at its highest, is the inverse of *O'Connor* such that evidence of intoxication is never part of the totality of the evidence. Such an approach avoids the difficulties associated with the division of offences into specific and basic intent by arguing that the *Majewski* measuring rod of recklessness should be extended to intention. This position is justified on public policy grounds that place primary importance on public safety, supported by evidence of a very significant statistical relationship between alcohol consumption and homicide in Australia. In effect, under this policy position, society is saying to every individual: 'If you choose to get drunk then you must face the full consequences of all your actions.' The clash between

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[116] Marcus Clarke, *Humbug* (15 September 1869).

principles of criminal liability and public policy has been neatly summed up one commentator who has observed that 'the issue presents a choice of whether the magnitude of an offence should be measured from the objective perspective of the community or the subjective perspective of the offender'.[117] This paper endorses the objective perspective.

As an alternative to the preferred 'absolutist' position, a reversal in the onus of proof has been proposed where evidence of intoxication is led. It has here been contended that such a legal burden does not place an insuperable burden on the defendant, being on the balance of probabilities, and finds support in Canadian jurisprudence within the *Canadian Charter of Rights and Freedoms*.

Finally, and not mutually exclusive with a legal onus, revised provisions dealing with intoxication have been proposed for s 43AS *Criminal Code 1983* (NT). The overriding objective of these redrafted provisions is to strengthen the reach of s 43AS, and to make these provisions the strongest and most effective version of the *Majewski* principle in Australia.

It is to be hoped that the present shibboleth surrounding the reluctance of legislators to extend the *Majewski* principle to all offences, or to reverse the onus of proof where evidence of intoxication is led, will be revisited. The principle of criminal law that a person is not guilty unless the person acted voluntarily and intentionally should give way to the morally correct position that a person who is voluntarily intoxicated is criminally responsible for any conduct he or she causes whilst in such a condition.

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[117] M Keiter, 'Just say no excuse: the rise and fall of the Intoxication Defence' (1997) 87 *Journal of Criminal Law and Criminology* 482. See Parliament of Victoria Law Reform Committee, above n 38, 6.