

E – BRIEF



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Intoxication and the Criminal Law

by Gareth Griffith

1 Reform proposal

On 15 October 2008 it was reported that, in response to 'the soaring incidence of alcohol-related violence across Sydney', State Cabinet is considering changes to the liquor laws and also to the criminal law of intoxication. Specifically, all pubs, clubs and bottle shops would have to close at 2 am. The report also said the changes would

remove intoxication as a defence or a mitigating factor in crime – particularly assaults. Instead, drunkenness would become an 'aggravating factor' in sentencing...

A Cabinet minute is quoted as saying:

It is incongruous that the criminal law still regards intoxication as a factor that can lessen culpability for violent anti-social behavior.¹

2 Intoxication and the criminal law

Intoxication can impact on the criminal law in a number of ways. These include:

2.1 Public drunkenness:

Public drunkenness is no longer an offence in itself in NSW. However, under s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* a person who appears to be seriously affected by alcohol or other drugs in a public place may be

detained by police if they are behaving in a disorderly manner, are likely to cause injury to themselves or someone else, or are in need of physical protection.

Further, under s 73 of the *Liquor Act 2007* it is an offence for a licensee to permit intoxication on licensed premises, or for a licensee or an employee to sell or supply alcohol to an intoxicated person.

2.2 Dangerous driving under the influence

Intoxication can be an element of the offence of dangerous driving, specifically where a person is found guilty of the crimes of 'dangerous driving occasioning death' or of 'dangerous driving occasioning grievous bodily harm' and is 'under the influence of intoxicating liquor or of a drug' (s 52A(1)(a) and s 52A(3)(a)) of the *Crimes Act 1900*.

It is also the case that a defined level of intoxication can be an aggravating factor, specifically in relation to the offences of 'aggravated dangerous driving occasioning death' and 'aggravated dangerous driving occasioning grievous bodily harm' (ss 52A(2) and (4) read with s 52A(7) of the *Crimes Act 1900*). In *R v Jurisic* (1998) 45 NSWLR 209 a guideline judgment was handed down for the sentencing of offences of dangerous

driving. Aggravating factors were said to include 'Degree of intoxication or of substance abuse'.

The offences of dangerous driving are ones of strict liability, which means that the prosecution is not required to prove any *mens rea* (a guilty mind or criminal intention).

2.3 Knowledge about consent in sexual assault offences

In 2007, s 61HA was inserted into the *Crimes Act 1900* for the purpose of defining what is meant by 'consent' in sexual assault offences. In determining the issue of knowledge about consent, the judge or jury (as the case may be) is directed *not* to have regard to the self-induced intoxication of the accused. In the relevant Second Reading speech it was said:

The reference to the exclusion of self-induced intoxication as a relevant circumstance simply replicates the current provisions in Division 11A of the *Crimes Act 1900* in relation to intoxication. It serves as an important reminder that self-induced intoxication cannot be taken into account in relation to the *mens rea* for these sexual assault offences.²

It is also the case that self-induced intoxication is to be disregarded for the purpose of the defence of substantial impairment by abnormality of mind (s 23A(3), *Crimes Act 1900*).

3 Intoxication as a mitigating or aggravating factor in sentencing

The relevance of intoxication for the determination of the guilt or non-guilt of a person is set out under Part 11A of the *Crimes Act 1900*. This is discussed below. Distinct from that is the potential relevance of intoxication for sentencing purposes. Under s 21A of the *Crimes (Sentencing Procedure)*

Act 1999 various aggravating and mitigating factors to be taken into account are listed. However, these are not exhaustive of all the factors that may be taken into account by the Court, with s 21A(1)(c) permitting account to be taken of 'any other objective or subjective factor that affects the relative seriousness of the offence'. The point to make is that, even where intoxication is deemed inadmissible by Part 11A, it may still be relevant at the sentencing stage, either as a mitigating or aggravating factor, on an objective or subjective basis. For example, the *Sentencing Bench Book* [10.480] states:

The degree of deliberation manifested by the offender is usually a matter to be taken into account in the sentencing process. Intoxication at the time of the offence is often a relevant consideration in determining the degree of deliberation involved. It may, for example, aggravate the crime because of the recklessness with which the offender became intoxicated and proceeded to carry out the crime; or it may mitigate the crime because the offender has, by reason of that intoxication, acted out of character: *R v Coleman* (1990) 47 A Crim R 306 at 327 per Hunt J; *R v Jerrard* (1991) 56 A Crim R 297 per Finlay J at 301–302.

4 Intoxication as a 'defence'

Strictly speaking, in terms of the determination of guilt or non-guilt, intoxication is not in fact a 'defence' in criminal proceedings. Rather, it is 'a factual matter which bears upon the existence or non-existence of an ingredient of the offence'.³ Intoxication may negate the elements of a crime if it causes a condition inconsistent with criminal responsibility. That is, at common law evidence of intoxication may be used by the defence to support a claim that:

- the criminal conduct was performed involuntarily; or
- the conduct was not intended or the accused did not have the requisite *mens rea* for the offence.⁴

4.1 Voluntariness and intention

At common law, therefore, evidence of intoxication may be used by the defence to establish that the person did not act voluntarily, thus negating the *actus reus* of the offence. Evidence of intoxication can also be used for the purpose of negating *mens rea*.

The *actus reus* refers to the act (either a positive act or an omission to act) as defined by the offence, that is required to attract criminal liability. The defendant's act or conduct must be voluntary (that is, the product of the will or the conscious mind) for criminal liability to be inferred. The question raised by intoxication (self-induced or otherwise) is whether the criminal act was performed in a state of impaired consciousness and therefore could not be defined as voluntary.

A second element of a criminal responsibility is the *mens rea* (the guilty mind) of the accused.⁵ The *mens rea* of most serious crimes is generally expressed as an intention to bring about the requisite *actus reus* of the offence. Without the requisite intention, it is argued, the accused cannot be guilty of a criminal offence. The question is whether a state of intoxication can be said to prevent the formation of the required intent.

4.2 The public policy debate

Complex issues arise, of a technical nature relating to the criminal law and of public policy. In terms of the public policy debate, the views of Parliaments and the public generally may be in marked contrast to those of the courts, law reform bodies and the like. The

broad public view is that offenders should not be acquitted of violent and other crimes simply because they acted when in a state of self-induced intoxication. On the other side, those more concerned with the purity of legal principles have tended to argue in the opposite direction, taking the view that letting the occasional defendant escape the criminal net is a 'small price for keeping away any alternative which will be complex, confusing and unjust to others'.⁶

4.3 Two cases, two approaches

In the leading Australian High Court case of *R v O'Connor* (1980) 29 ALR 449 Barwick CJ reviewed the arguments on both sides of the debate and asked whether a departure from common law principles was justified to protect society from what he called 'intoxicated violence'. His answer, which was in the majority, was that such a departure was not justified. The rationale for the admission of intoxication evidence was explained by Barwick CJ in the following terms:

Now there can be little doubt that as of this time an accused in a state of intoxication which has rendered his acts involuntary or precluded the formation of relevant intent...could not be guilty of any common law offence. What his body had done, he had not done, or what he had done had not been done with intent to do it.⁷

Barwick CJ concluded:

It seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do.⁸

In *O'Connor* therefore the High Court upheld the principles of the common

law by deciding that evidence of self-induced intoxication (either by alcohol or drugs, or both) is relevant in relation to any criminal offence to determine whether a defendant acted voluntarily or intentionally.

In arriving at this conclusion, the High Court rejected the alternative approach taken by the House of Lords in *Reg v Majewski* [1977] AC 443. *Majewski* was a case concerned with charges of assault occasioning actual bodily harm, and assault on a police officer in the execution of his duty. The House of Lords was unanimous in concluding that even though the defendant was intoxicated he could be convicted of the assault. A distinction was made between crimes of basic and specific intent and it was decided that self-induced intoxication is only relevant to the proof of a crime of specific intent. The decision in *Majewski*'s case was based on principles of public policy, notably: (1) that the law should provide protection against unprovoked violent conduct of intoxicated offenders; and (2) that it is morally just to hold intoxicated offenders responsible for criminal conduct, given that they freely chose to become intoxicated.

4.4 Basic intent and specific intent

The distinction between crimes of basic and specific intent is a difficult one. In summary, in offences of basic intent the only relevant intent is to do the physical act which is required as part of the *actus reus*, whereas in offences of specific intent an intention to cause a specific result is an element. In the Second Reading speech for the *Criminal Legislation Further Amendment Act of 1995* the distinction was explained as follows:

An offence of basic intent is an offence which simply requires an intention to perform some act - such as striking a person - rather than

one requiring an intention to bring about some consequences, such as striking a person with intent to cause grievous bodily harm. An offence of specific intent is thus one involving an additional purposive element, that is, a specific purpose or an intention to achieve a particular result. Murder is such an offence. It requires proof that the accused acted with an intention to kill or inflict grievous bodily harm. By contrast, an offence of basic intent requires proof only that the accused intended to commit the act proscribed. Manslaughter is such an offence. It requires proof only that the accused committed an unlawful or dangerous act.⁹

An example of an offence of basic intent is the offence of common assault under s 61 of the *Crimes Act 1900*.

4.5 Intoxication and criminal responsibility in NSW

In NSW the law relating to self-induced intoxication was changed by the *Criminal Legislation Further Amendment Act of 1995*. Basically, reform was away from the common law position reflected in *O'Connor* and towards that found in *Majewski*. It was explained in the relevant Second Reading speech that:

The preference for the *Majewski* approach is based on important public policy considerations. The Standing Committee of Attorneys-General, in particular, took the view that to excuse otherwise criminal conduct in relation to simple offences of basic intent - such as assault - because the accused is intoxicated to such an extent, is totally unacceptable at a time when alcohol and drug abuse are such significant social problems. The standing committee considered that if a person voluntarily takes the risk of getting intoxicated then he or she should be responsible for his or her

actions. This Government agrees with and strongly supports this approach. The proposed amendments therefore essentially reflect the approach taken in *Majewski*, as well as that taken by the Commonwealth Criminal Code Act 1995, which enacts the principles of the model criminal code.¹⁰

4.6 Part 11A of the Crimes Act 1900

New Part 11A was inserted into the [Crimes Act 1900](#) which applies to all offences committed since 16 August 1996.

Under this codified scheme, the common law relating to intoxication and criminal responsibility is abolished (s 428H). Adopted is the basic/specific intention distinction, as is a distinction between self-inflicted intoxication and intoxication that is not self-induced (involuntary intoxication). 'Self-induced intoxication' is defined as any form of intoxication except that which is: (a) involuntary; (b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or (c) results from the appropriate administration of a prescription or non-prescription drug (s 428A). The relevant Second Reading speech explained:

The intoxication must be self-induced. Clearly it would be unfair for intoxication to be disregarded where a person becomes intoxicated due to fraud, reasonable mistake, duress or force. For example, it would be unfair not to allow evidence of intoxication to be considered where a person may unknowingly have had his or her drinks spiked.¹¹

By s 428G(1), which is headed 'Intoxication and the *actus reus* of an offence', evidence of self-induced intoxication cannot be taken into

account in determining whether the accused acted voluntarily. This applies for all categories of offences, of basic and specific intent. Involuntary intoxication, on the other hand, can be taken into account for this purpose (s 428G(2)).

By s 428D, evidence of self-induced intoxication cannot be taken into account in determining whether the accused had the *mens rea* for an offence of basic intent. Again, this exclusionary rule does not apply to involuntary intoxication.

An offence of specific intent is defined in s 428B(1) as an 'offence of which an intention to cause a specific result is an element'.¹² By s 428C the relevance and admissibility of self-induced intoxication is restricted to the *mens rea* for offences of specific intent. Self-induced intoxication may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent. However, exceptions apply if the person (a) had resolved before becoming intoxicated to do the relevant conduct, or (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

Section 428B(2) sets out in table form non-exhaustive examples of the offences of specific intent found in the *Crimes Act 1900*. These include: murder (s 19A); wounding or grievous bodily harm with intent (s 33); assault with intent to have sexual intercourse (s 61K); and entering dwelling house (s 111). A second table sets out those provisions where an element of the offence requires a person to intend to cause the specific result necessary for the offence. One example is the offence of 'assault with intent to rob person' (s 94). By s 428B(c) there is also a regulation making power to

include as an offence of specific intent, 'any other offence by or under any law (including the common law) prescribed by the regulations'.

By s 428E special provision is made for murder and manslaughter. If evidence of intoxication at the time of the relevant conduct results in a person being acquitted of murder, then, in the case of self-induced intoxication, evidence of that intoxication cannot be taken into account in determining whether the accused had the requisite *mens rea* for manslaughter. In the case of intoxication that was not self-induced, evidence of that intoxication may be taken into account in determining whether the person had the requisite *mens rea* for manslaughter

Section 428F is headed 'Intoxication in relation to the reasonable adult test'. It provides that where, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the state of mind of the accused with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the accused and that of a reasonable person who is not intoxicated. The *Criminal Trial Courts Bench Book* comments:

This provision would be relevant when the court was dealing, for example, with a charge of manslaughter by an unlawful and dangerous act or manslaughter by criminal negligence.¹³

4.7 Part 11A applied

An example of the application of Part 11A in a case of self-induced intoxication and specific intent is [R v Makisi \[2004\] NSWCCA 333](#)

A more recent example is [Bellchambers v R \[2008\] NSWCCA 235](#)

4.8 Comments on Part 11A

The Victorian Parliament's Law Reform Committee, which reported in 1999 in support of retaining the common law position on intoxication, made a number of critical observations in relation to Part 11A of the NSW *Crimes Act 1900*. These included:¹⁴

- The evidence taken by the Committee is that evidence of self-induced intoxication is not raised very often because it is extremely difficult to establish that a defendant was so intoxicated that he or she was unable to form any intent.
- Part 11A is based on the ability to distinguish between offences of specific and basic intent. While examples of offences of specific intent are provided, the list is not exhaustive leaving the courts with the responsibility of determining the nature of offences not included in the legislation. This is not an easy task because the distinction between offences of basic and specific intent is artificial, unclear and arbitrary. There is also the criticism that where an offence of basic intent is involved, a defendant is imputed with an intention which he or she does not in fact possess.

5 Suggested reforms

As noted, it is reported that the Government intends to 'remove intoxication as a defence or a mitigating factor in crime – particularly assaults'. Instead, drunkenness would become an 'aggravating factor' in sentencing'. Note that neither common

assault (s 61) nor the offence of assault occasioning actual bodily harm (s 59) are offences of specific intent. Evidence of self-induced intoxication is not admissible therefore in these cases for the determination of a person's guilt or non-guilt. As explained, self-induced intoxication may still be relevant in such cases, as a mitigating or aggravating factor, for sentencing purposes. Presumably, it is to this issue that the suggested reform looks. Self-induced intoxication could, for example, be included as an aggravating factor under s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999*. Alternatively, it could be made an aggravating factor for specific assault offences under the *Crimes Act 1900*.

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¹ S Benson, 'Cabinet closing in on liquor laws', *The Daily Telegraph*, 15 October 2008, p 9.

² [NSWPD, 7 November 2007, p 3584](#)

³ NSW Judicial Commission, *Criminal Trial Courts Bench Book*, [3.260].

⁴ Evidence of intoxication may also substantiate a claim of self-defence.

⁵ Note that issues of mens rea do not arise in respect to statutory offences of strict liability.

⁶ Matthew Goode quoted in B McSherry and B Naylor, *Australian Criminal Laws: Critical Perspectives*, Oxford University Press 2004, pp 529-530.

⁷ (1980) 29 ALR 449 at 455.

⁸ Ibid at 465-466.

⁹ [NSWPD, 6 December 1995, pp 4278-4281](#)

¹⁰ Ibid

¹¹ Ibid.

¹² This appears to have been borrowed from the judgment of Gibbs J in *O'Connor* (1980) 146 CLR 64 at 91, where his Honour observed that 'a crime of special intent is a crime of which an intention to cause a particular result is an ingredient'. (Emphasis added): *R v Grant* (2002) 55 NSWLR 80 at para 44.

¹³ NSW Judicial Commission, *Criminal Trial Courts Bench Book*, [3.260].

¹⁴ Parliament of Victoria, Law Reform Committee, [Criminal Liability for Self-Induced Intoxication](#), 1999, p 53 - The common law position, as expressed in *O'Connor*, continues to apply in Victoria.