

## Drug Abuse as a Defence

*Anthony J Bellanto QC graduated in Law from Sydney University. He was called to the Bar in 1967 and practised in all areas of the law. In 1975, he was appointed Crown Counsel and later Senior Crown Counsel in Hong Kong. He returned to Australia in 1978 and was commissioned as a Crown Prosecutor for six years. He returned to private practice in 1984 and took silk in July 1988. His principal area of practice is criminal law – trial advocacy and appeals. He was also the advisory editor of Sentencing Law New South Wales, published by LexisNexis in 2003.*

### Introduction

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”<sup>i</sup> Lewis Carroll didn’t have in mind our topic tonight, but ‘Drug Abuse as a Defence’ attracts meaning according to how it is expressed:

‘Drug abuse as a defence!’

‘Drug abuse as a defence?’

‘Drug abuse as a defence.’

Legislation and case law use ‘intoxication’ to reflect the state of a person affected by a drug, including the most used and abused mood/mind altering drug - alcohol. I will adopt this approach.

### Is Intoxication a Defence?

The question arises then: is intoxication a defence to a criminal charge? Intoxication is not a defence in itself. However, it might negate the elements of a crime if it causes a condition inconsistent with criminal responsibility. Most individuals have the capacity to make rational choices in performing or refraining from performing acts. A person will be considered to be criminally responsible for a criminal act which he or she has performed voluntarily and intentionally and where the individual understood the significance of the act.

Intoxication impairs the capacity to perceive and interpret reality and to coordinate actions to intended objectives. Where the prosecution must prove that the accused was aware of the risk or intended consequence, these incapacities can have an obvious bearing on criminal responsibility. Generally, there are two broad elements necessary to be proved in order to find guilt – a guilty act (*actus reus*) and a guilty mind (*mens rea*) or, applying the term used in the Commonwealth Code ‘fault’. *Mens rea* is not a general condition of the mind, but a variety of states of mind including intent, knowledge and recklessness. The legal requirements as to precisely which state of mind, that needs to be proved by the prosecution, varies from offence to offence.

### Defences Generally

The law provides for certain defences and partial defences to charged criminal conduct. These require some general review so that intoxication, when raised, can be considered in terms of the *mental* element required for a particular offence and the *act or conduct* giving rise thereto. Defences in criminal law comprise three categories – (i) mental state defences (mental impairment, automatism and intoxication<sup>ii</sup>); (ii) partial defences;<sup>iii</sup> and (iii) self-help defences.<sup>iv</sup>

## **Intoxication**

Intoxication is relevant to these three categories depending on two important questions (i) was it self-induced? (ii) is the crime charged one of specific intent or basic intent?

Self-induced intoxication is not to be considered in determining whether conduct is voluntary.<sup>v</sup> One of the basic principles of the criminal law is that an accused can be criminally responsible only if he or she performed the criminal act voluntarily in the sense that it was willed. Unwilled conduct may give rise to the defence of automatism;<sup>vi</sup> however self-induced intoxication is irrelevant to this issue.

In practice, evidence of intoxication is most commonly used to negate the fault element of a crime rather than as grounds for involuntary conduct.<sup>vii</sup> For reasons of public policy, the law of Australia<sup>viii</sup> and of New South Wales<sup>ix</sup> has followed the English approach of dividing crimes into those where intoxication may be taken into account and those where evidence of intoxication is irrelevant.

### **General and Specific Intent**

This leads to a consideration of two broad categories of offences. Those requiring a *general* (or basic) intent, and those that require a *specific* intent. The response by the UK courts to self-induced intoxication was to distinguish between these two broad groups of offences and to deny a defence for offences requiring a general intent. The High Court of Australia in *O'Connor*<sup>x</sup> rejected this approach on the grounds that it was analytically suspect. It has, however, been revived in legislation.<sup>xi</sup>

Leading up to 1995, there had been a number of highly controversial cases where persons accused of murder had either been acquitted or had been given sentences perceived by the media to be manifestly inadequate. In these cases, the accused had raised the issue of self-induced intoxication, either by way of intoxicating liquor or drugs.

The matter came to a head in *Paxman*.<sup>xii</sup> ‘Intoxication’ was not raised as a defence – but in mitigation of penalty. The accused fired a rifle into the air, killing a six-year-old boy. During sentencing, he admitted consuming a carton of beer prior to arriving at the house and that he was *drunk*. He was sentenced to six years, with a non-parole period of 3 years – resulting in media outrage: “Drunken child killer gets 6 years”.

### **Legislative Change**

The response from the NSW Government was to enact substantial changes to the law on intoxication by introducing [Part 11A](#) to the *Crimes Act*. In the second reading speech, the Minister for Police Mr Whalan said:

*The present law in New South Wales is that a person charged with a criminal offence, including murder, might be acquitted altogether if there is evidence that the accused was so intoxicated at the time of committing the act that there was a reasonable doubt whether the accused had acted intentionally or voluntarily.*

*This reflects the common law as stated by the High Court in The Queen v O'Connor 1981 146 CLR 64. It reflects the principle that a person should not be held criminally responsible for an act in the absence of proof that the accused acted voluntarily and with the required mental element for an offence. This is also the law in the other common law jurisdictions of Victoria, South Australia and the Australian Capital Territory.*

By contrast, in the case of [Regina v Majewski](#) 1977 AC 443, the House of Lords in England held that evidence of self-induced intoxication may be considered in relation to offences of specific intent only, and cannot be considered in relation to offences of basic intent. The Majewski approach reflects generally the position in the code jurisdictions, as well as Canada and the United States of America.

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.

The effect of Majewski is that a person who kills another while in a state of gross intoxication may be found not guilty of murder but might still be guilty of manslaughter. For the purpose of determining guilt on a manslaughter charge, the accused's intoxication would not be able to be taken into account. The effect of O'Connor, on the other hand, is that intoxication may be considered in relation to both offences such that a person might be acquitted outright.

In 1994 the Standing Committee of Attorneys-General endorsed the Majewski approach in preference to the O'Connor approach for incorporation in the model criminal code. Majewski has consequently been adopted by the Commonwealth in the [Criminal Code Act 1995](#), which codifies chapter 2 of the model criminal code on the general principles of criminal responsibility.

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](#).

Under the proposal, intoxication will mean intoxication whether by means of alcohol or drugs. 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. The proposed section 428B lists examples of offences in the Crimes Act which are offences of specific intent for which evidence of intoxication may be taken into account. Murder is listed as an offence of specific intent. In conformity with Majewski, intoxication will not be able to be taken into account on a charge of manslaughter.*

*Some of the specific intent offences are very serious offences, for example, assault with intent to have sexual intercourse. It should be noted, of course, that although evidence of intoxication can be taken into account on such an offence, such evidence will not be able to be considered in relation to a basic offence of assault.*

Following the introduction of the legislation, a table was inserted in the *Crimes Act 1900 (NSW)* setting out some 88 offences which come under the category of specific intent offences.

**TABLE**

(a) an offence under the following provisions of this Act:

19A	Murder
27	Acts done to the person with intent to murder
28	Acts done to property with intent to murder
29	Certain other attempts to murder
30	Attempts to murder by other means
33	Wounding etc, with intent to do bodily harm or resist arrest
33A	Discharging loaded arms with intent
33B	Use of weapon to resist arrest etc
36	Causing a grievous bodily disease
37	Attempts to choke etc (garrotting)
38	Using chloroform etc to commit an offence
41	Administering poison etc with intent to injure or annoy
41A	Poisoning etc of water supply
47	Using etc explosive substance or corrosive fluid etc
48	Placing gunpowder near a building etc
49	Setting trap etc
55	Possessing etc gunpowder etc with intent to injure the person
61K	Assault with intent to have sexual intercourse
82	Administering drugs etc to herself by woman with child
83	Administering drugs etc to woman with intent
86	Kidnapping
87	Child abduction

**TABLE**

99	Demanding money with intent to steal
100A	Blackmail by threat to publish etc
101	Threatening letters
102	Accusing or threatening to accuse of crime to extort money etc
103	Causing a person by violence or threats to execute deeds etc
110	Breaking, entering and assaulting with intent to murder etc
111	Entering dwelling-house
113	Breaking etc into any house etc with intent to commit serious indictable offence
114 (a) (c) (d)	Being armed etc with intent to commit offence
158	Destruction, falsification of accounts etc by clerk or servant
172	Trustees fraudulently disposing of property
174	Directors etc omitting certain entries
175	Director etc wilfully destroying etc books of company etc
176	Director or officer publishing fraudulent statements
178BB	Obtaining money etc by false or misleading statements
179	False pretences etc
180	Causing payment etc by false pretences etc
181	False pretence of title
184	Fraudulent personation
185	Inducing persons by fraud to execute instruments
190	Receiving etc cattle unlawfully killed, or carcass etc
196	Maliciously destroying or damaging property with intent to injure a person
198	Maliciously destroying or damaging property with the intention of endangering life
199	Threatening to destroy or damage property
200	Possession, custody or control of an article with intent to destroy or damage property
202 (c)	Interfering or damaging etc bed or bank of river with intent of obstructing etc navigation
205	Prejudicing the safe operation of an aircraft or vessel
210 (b)	Acting with intention of destroying etc aids to navigation
211	Criminal acts relating to railways
249C	Misleading documents or statements used or made by agents
249D	Corrupt inducements for advice

**TABLE**

298	Demanding property on forged instruments
300	Making or using false instruments
301	Making or using copies of false instruments
302	Custody of false instruments etc
302A	Making or possession of implements for making false instruments
309 (2)	Unlawful access to data in computer [Repealed]
314	False accusations etc
315	Hindering investigation etc
317	Tampering etc with evidence
318	Making or using false official instrument to pervert the course of justice
319	General offence of perverting the course of justice
321 (1)	Corruption of witnesses and jurors
322	Threatening or intimidating judges, witnesses, jurors etc
323	Influencing witnesses and jurors
328	Perjury with intent to procure conviction or acquittal
333 (2)	Subornation of perjury
(b) an offence under the following provisions of this Act to the extent that an element of the offence requires a person to intend to cause the specific result necessary for the offence:	
57	(assault on persons preserving wreck)
58	(assault with intent to commit serious indictable offence on certain officers)
66B	(assaulting with intent to have sexual intercourse with child under 10)
66D	(assaulting with intent to have sexual intercourse with child between 10 and 16)
78I	(assault with intent to have homosexual intercourse with male under 10)
78L	(assault with intent to have homosexual intercourse with male between 10 and 18)
78O	(assault with intent to have homosexual intercourse with pupil etc)
91	(taking child with intent to steal)
94	(assault with intent to rob person)
95	(assault with intent to rob in circumstances of aggravation)
96	(assault with intent to rob with wounding)
97	(assault with intent to rob with arms)

**TABLE**

98	(assault with intent to rob)
109	(entering with intent, or stealing etc in dwelling-house and breaking out)
126	(killing with intent to steal)
139	(destroys, damages, breaks with intent to steal)
140	(destroys, damages, breaks with intent to steal)
197	(dishonestly destroying or damaging property with a view to gain)
204	(destruction of, or damage to, an aircraft or vessel with intent)
	(c) any other offence by or under any law (including the common law) prescribed by the regulations.

**Commonwealth Criminal Code**

The Commonwealth Criminal Code in Division 8 addresses intoxication. However, most criminal offences involving intoxication fall under State law. The main offences within the Code are those occurring on aircraft.

With respect to the Commonwealth legislation dealing with intoxication, there is no list of offences requiring proof of specific intent. Otherwise, the legislation is of similar import to the New South Wales amendments. It is not proposed to discuss the Code further in view of the extremely limited facts situations that would arise. Accordingly the paper will address cases under the New South Wales amendments.

**The Crimes Act (NSW) Part 11A**

This Act deals specifically with situations involving the commission of criminal offences where intoxication is a factor. Part 11A makes provision for five situations viz:

- Offences involving a specific intent –Section 428C
- Offences *not involving a specific intent* – (basic intent) – Section 428D
- Intoxication *in relation to murder and manslaughter* – Section 428E
- Intoxication *in relation to the reasonable person test* – Section 428F
- Intoxication and the *actus reus* of an offence. – Section 428G

**Self –induced intoxication**

This is defined to mean any intoxication, except intoxication that:

- is involuntary, or
- results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or
- results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner, a person authorised under the *Nurses and Midwives Act 1991* to practise as a nurse practitioner or a midwife practitioner, or dentist, or of a drug for which no prescription is required administered for the purpose, and in accordance with the dosage level recommended, in the manufacturer's instructions

The effect of this legislation is that, in respect of offences involving a *specific intent*, evidence that a person was intoxicated at the time of the commission of the offence can be taken into account in determining whether or not he or she had the necessary

intent to commit the particular offence. However, the evidence cannot be taken into account in two situations –

(a) where the person had resolved before becoming intoxicated to do the relevant act or

(b) the person became intoxicated in order to strengthen his or her resolve to. (Section 428C)<sup>xiii</sup>

### **Intoxication and *actus reus***

In relation to intoxication and the *actus reus* of the offence, evidence of self-induced intoxication cannot be taken into account in determining whether or not the relevant conduct was voluntary. However, a person is not criminally responsible for an offence if the relevant conduct resulted from intoxication which was not self-induced.

(Section 428G)

### **Self-induced intoxication**

Looking at the case law as a whole, evidence of self-induced intoxication is not raised very often because it is extremely difficult to establish that an accused was so intoxicated that he or she was unable to form any intent. Whilst legislation can be seen as an attempt to achieve a fair compromise between principles of criminal responsibility and public policy issues, it is not without criticism. Part 11A does not, for example, clearly address how the concept of recklessness is to be dealt with. It would appear that, where an offence can be committed recklessly or intentionally, evidence of self-induced intoxication can only be raised to negate the specific intent and not the reckless aspect of the offence. Moreover 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, an accused is imputed with an intention which he or she does not, in fact, possess.

### **Substantial Impairment**

The law concerning diminished responsibility was amended in 1997. This reflects a recommendation made by the New South Wales Law Reform Commission. Under the new section 23A, a defendant may rely on the defence of substantial impairment only if that defendant's capacity to understand events, or to judge right and wrong, were substantially impaired because of an abnormality of mind arising from an underlying condition. 'Underlying condition' is defined as a pre-existing mental or physiological condition and does not include a condition of a transitory kind. Evidence of self-induced intoxication must be disregarded for the purpose of determining whether or not the defendant was suffering from substantial impairment.<sup>xiv</sup> A criticism of these changes is that they appear to deny the application of the defence to a person who suffers a mental disorder after consuming a spiked drink, or unknowingly takes a drug, because such a condition would be transitory and not pre-existing.

### **Self-Defence**

Intoxication can be relevant to self-defence and I refer to s428F above. The *Crimes Act 1900* (New South Wales) provides for self-defence in the following terms:

*418 Self-defence – when available*

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if the person *believes* the conduct is necessary:

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

*419 Self-defence – onus of proof*

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

**R v Katarzynski**

In *R v Katarzynski* [2002] NSWSC 613; (2002) 9 Crim LN 54 [1445], the question before the jury was whether or not there was a reasonable possibility that the accused believed his conduct, in firing a handgun three times towards the deceased, was necessary to defend himself, and whether such conduct was a reasonable response in the circumstances as he perceived them. It was held that the first question is determined from a completely *subjective* point of view, considering all the personal characteristics of the accused at the time he carried out the conduct.

The second question is determined by an entirely *objective* assessment of the proportionality of the accused's response to the situation the accused believed he faced. The Crown would negative self-defence if it proved beyond reasonable doubt either: (a) that the accused did not genuinely believe that it was necessary to act as he or she did in his own defence; or (b) that what the accused did was not a reasonable response to the danger, as he perceived it to be. Intoxication is relevant to the first question to be determined by the jury, that is whether or not it is reasonably possible that the accused believed it was necessary to do what was done in self-defence, but not to the second question, being whether the response was reasonable.

The Court observed that Section 418(2) is concerned, not with the state of mind of a reasonable person, but with the reasonableness of the conduct of the accused having regard to *his or her* state of mind.

**Provocation**

As to provocation, s23 *Crimes Act* 1900 (NSW) provides:

*s23 Trial for murder—provocation*

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

Intoxication of the accused is relevant only to the question of whether or not the accused *did lose control*. See *R v Croft* (1981) 1 NSWLR 126.

### **Evidentiary Onus**

In order to displace the presumption of mental capacity, the defence would normally be required to give sufficient evidence from which it might reasonably be inferred that an act was involuntary, or that the accused lacked the necessary fault element to commit the offence. Evidence of the accused himself might not be sufficient, unless it is supported by medical evidence which points to the cause of the mental incapacity.

The mere fact that an accused had consumed alcohol or drugs, or was 'drunk' does not necessarily provide a basis for the case to go to the jury on intoxication. It is up to the trial judge to decide whether or not there is sufficient evidence of intoxication to enable an accused to rely upon it, so that it might raise a reasonable doubt in the prosecution case.

The fact that intoxication is a disinhibitor, changes a personality, weakens self-control or reduces awareness, does not necessarily mean a person's will is reduced or nullified. Furthermore, a lack of recollection does not necessarily mean that the act involved was not voluntary.

Experience has shown that the intoxication defence is rarely successful unless there is strong evidence of a scientific or medical nature bearing on the accused's capacity to form the requisite intent and/or to foresee the consequences of his or her actions.

In many cases, intoxication can assist the prosecution. It may invite an inference of intention or motive from the very fact the accused was intoxicated. It may also explain the accused's behaviour. Murphy J in *O'Connor* said, "The inferences to be drawn from intoxication are not all one way: evidence of intoxication may result in absence of proof beyond a reasonable doubt of the requisite fault element, or in a more ready acceptance that the fault element exists on the supposition that intoxication reduces inhibitions".

### **Sentencing for Offences Concerning Drugs and Alcohol**

Should an offender who, whilst under the influence of a drug, commits a crime, have his sentence reduced or increased on the basis that his intoxication was a mitigating or aggravating factor respectively? How should the sentencing court deal with an offender who mixes alcohol with that person's prescription drugs? What about a drug addict who engages in the sale of drugs to feed his or her habit?

The following cases reveal the extensive consideration the Courts have given to these types of questions.

#### **R v Thomas**

In *R v Thomas* [2004] NSWCCA 291, Thomas had pleaded guilty to a crime involving specific intent namely maliciously inflicting grievous bodily harm with intent. The offence occurred on New Year's Day 2002, following a New Year's Eve party at which a lot of intoxicating liquor had been consumed. Howie J said at 7:

*The applicant relied upon his level of intoxication as a mitigating factor so far as both the head sentence and the non parole period were concerned.*

*The law rarely regards voluntary intoxication by alcohol as a mitigating factor when sentencing for serious criminal offences. Even more rarely, if at all, does it take into account, by way of mitigation, that the offender was intoxicated by reason of his or her voluntary consumption of illegal drugs.*

*In the present case there is much to support the proposition, in my view, that the applicant's voluntary use of alcohol and drugs on the evening prior to the offence was an **aggravating** feature in the light of his criminal record and the apparent connection between his use of alcohol and the drugs and his violence."*

#### **R v Sotheren**

In *R v Sotheren* [2001] NSWCCA 425, Southern pleaded guilty to six offences involving the assault and robbery of six different victims committed over a 24-hour period. One of the victims died three days after the attack. All the other victims, including a taxi driver, suffered severe injuries. During the relevant period, the respondent had injected himself with a considerable quantity of amphetamines. He had an extended prior criminal history, including crimes of violence. He pleaded guilty to one count of manslaughter: s24 of the *Crimes Act 1900* (NSW); two counts of aggravated robbery (inflicting grievous bodily harm): s96 of the *Crimes Act*; and three counts of aggravated robbery (maliciously inflicting actual bodily harm): s95 of the *Crimes Act*.

For the manslaughter, he was sentenced to 5 years imprisonment with a non-parole period of 2 years and 6 months. The Crown appealed on the grounds that the sentence was manifestly inadequate. Beazley JA, (Wood CJ at CL and Carruthers AJ agreeing) said at page 5:

*It is apparent from lengthy discussions of this issue in the authorities that the question of serious drug addiction can be relevant in a number of ways.*

### **Coleman**

In *Coleman* (1990) 47 A Crim R 306, Hunt J said at 327:

*Only one matter of general principle was debated, and that was the extent to which the appellant was entitled to have his intoxication at the time of this offence taken into account in mitigation. The **degree of deliberation** shown by an offender is usually a matter to be taken into account; such **intoxication would therefore be relevant in determining the degree of deliberation involved in the offender's breach of the law. In some circumstances, it may aggravate the crime because of the recklessness with which the offender became intoxicated; in other circumstances, it may mitigate the crime because the offender has by reason of that intoxication acted out of character.** (I have not intended by those examples to limit the extent to which intoxication may be taken into account: see, generally, *Sewell and Walsh* 1981) 29 SASR 12 at 14-15 ... Where the reason for the offender's intoxication is a self-administered drug rather than alcohol, the cases suggest that that fact may well be more likely to aggravate than to mitigate.*

### **The Court of Criminal Appeal in *Fletcher-Jones***

That passage was considered by the Court of Criminal Appeal in *Fletcher-Jones* (1994) 75 A Crim R 381 at 387. McInerney J, (Hunt CJ at CL and Bruce J agreeing), commented that the accused in that case had been an habitual drinker, but had ceased to drink for a period of about 6 months immediately prior to the offence. In those circumstances, the Court considered that the matter should be treated neutrally. His Honour went on however and stated:

*It has been pointed out by this Court on many occasions that whilst being affected by alcohol may explain why an offence occurred, it is not a licence to commit crimes ...*

*In R v Valentini (1989) 46 A Crim R 23 it was said that **drug addiction was not to be considered as a factor for the reduction of an appropriate sentence, although it would usually serve to provide an explanation for the commission of the offences.** See also R v Ellis (1993) 68 A Crim R 449.*

*The question of drug addiction in relation to sentencing was also considered in the guideline judgment of R v Henry. For the purposes of the guideline judgment, the offences under consideration were s 97 offences: robbery, being armed with an offensive weapon: which carries a maximum penalty of penal servitude for 20 years.*

[addiction may]

(i) **impact upon the prospects of recidivism/rehabilitation**, in which respect it may on occasions prove to be a two-edged sword: eg, *R v Lewis* (Court of Criminal Appeal, 1 July 1992, unreported);

(ii) [addiction that] **was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example, where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness or surgery** (cf *R v Hodge* (Court of Criminal Appeal, 2 November 1993, unreported) and *R v Talbot*); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment of choice was incomplete;

[addiction may]

(iii) **justify special consideration in the case of offenders judged to be at the 'crossroad'**: *R v Osenkowski* (1982) 30 SASR 212; 5 A Crim R 394."

His Honour concluded:

*To go further, and to accept the fact of drug addiction as a mitigating factor generally, would not be justified in principle. Moreover, it would involve an exercise in irresponsibility on the part of the Court, if it were understood as a message that committing the crime of armed robbery to feed a drug habit is less deserving of censure than would otherwise be the case.*

*Simpson J at 413 endorsed this approach.*

### **R v Wright**

In *R v Wright* (1997) 93 A Crim R, Wright was charged with armed robbery. He suffered from a psychiatric illness and was under medication. He deliberately failed to take his medication and had become intoxicated by drugs which brought on a psychotic state during which he heard voices telling him to commit an armed robbery.

Hunt CJ at CL concluded at 52:

*But even taking the history at its face value, two things become clear. First, although the respondent may have been encouraged by the voices which he heard to commit armed robbery, he very well knew what he was doing and that what he was doing was gravely wrong. Secondly, the respondent quite deliberately had left home and his pills behind him and either deliberately or recklessly become intoxicated by drugs, thereby bringing on the psychotic state which the doctors had diagnosed. He had been addicted to drugs for many years.*

*Rather than mitigation, this conduct was really a matter of aggravation, but it is unnecessary to determine whether it was. It certainly was not a matter in mitigation.*

*The Judge was, in my view, in error in treating psychotic state and the intoxication at the time of the offence as a matter which did go to mitigation. The circumstances of this crime, together with the respondent's criminal history, also demonstrated that, by his recklessness in bringing on these psychotic episodes, he is a continuing danger to the community, a matter*

*which would in any event reduce – if not eradicate – the mitigation which would otherwise be given for.*

*It is clear therefore that those who commit crimes of violence whilst in a state of self-induced intoxication from drugs will not be able to rely on that fact as a matter of mitigation. In extreme cases, that fact could well be a matter of aggravation that will increase the sentence.*

*It is therefore clear that those persons who commit serious crimes of violence whilst in a self-induced state of intoxication from the ingestion of drugs will not have that fact treated as a mitigating factor which would reduce the sentence. In extreme cases, that fact may well be treated as a aggravating factor which may increase the sentence.*

### **R v Duncan & Perre**

*R v Duncan & Perre* [2004] NSWCCA 431. The Appellants, Duncan and Perre, were convicted on 24 March on counts of maliciously inflicting grievous bodily harm with intent (s33 *Crimes Act* 1900 (NSW)) and affray (s93C *Crimes Act*) and were sentenced on 19 August 2003. A fight had erupted between two groups, giving rise to the victim being attacked by a number of assailants with poles, a machete and a wheel brace. This resulted in a permanent disability. The appellants received sentences of 16 years with a non-parole period of 12 years for the s33 offence and concurrent fixed terms of 2 years for the s93C offences.

In the case of *Perre*, one of his grounds of appeal was that the sentencing judge did not take into account his intoxication by consumption of alcohol.

Wood CJ at CL (Adams J and Hislop J agreeing) said at paragraph 203:

*Whilst it is correct that alcohol may tend to mitigate the culpability of an offender where it causes him to act out of character, or where it affects the deliberateness of his act (R v Gordon (1994) 71 A Crim R 417), the evidence in the circumstances outlined in this case fell well short of this mark. At most, this was a case of reduced inhibitions, without any suggestion of any decrease in the Appellant's awareness of what he was doing. Alcohol is not a licence to commit crime: R v Fletcher-Jones (1994) 75 A Crim R 381 at 387 per McTierney and it was obviously to that principle that His Honour was referring when he noted that intoxication is no excuse or mitigation.*

### **Drug Dealer Addicted to Narcotics**

If the offender is addicted to the narcotic then the appropriate sentence should be mitigated to take into account that subjective fact: *R v Foster and D'Anna* (1992) 59 A Crim R 14; BC9201245; *R v Tulloh* (CCA(NSW), 16 September 1993, unreported, BC9302114).

In *R v Selim* BC9801861; [1998] NSWSC 165 Studdert J (Smart and Hidden JJ agreeing) said at 5:

*Since his Honour had found that there was a link between the applicant's addiction and her participation in this crime, that was a circumstance which, on the authorities, entitled the applicant to have her criminality regarded as on a lower level than had she been committing the offence purely for monetary gain: see R v Tulloh (CCA(NSW), 16 September 1993, unreported, BC9302114) , and in particular the*

*judgment of Hunt CJ at CL. See also R v Bernath [1997] 1 VR 271; BC9602463, and in particular the judgment of Callaway JA at 275–6. To what extent a penalty otherwise appropriate should be adjusted if the offender commits the offence to feed an addiction calls for close assessment of all the relevant circumstances.*

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<sup>i</sup> Through the Looking Glass, Lewis Carroll, Chapter 6.

<sup>ii</sup> Mental impairment includes: a disease of the mind, mental illness, intellectual disability, dementia and personality disorders and delirium tremens. The defence is required to rebut the presumption that the accused is of sound mind – ie did not know the nature and quality of the act or did not know that it was wrong.

<sup>iii</sup> Referred to as ‘partial’ because they can reduce murder to manslaughter. They do not negate the fault element of the crime of murder or nullify the physical act. These defences are provocation, diminished responsibility and infanticide.

<sup>iv</sup> Self defence, duress and necessity (eg medical treatment).

<sup>v</sup> Criminal Code – Part 11A, *Crimes Act* 1900 (NSW), s428G.

<sup>vi</sup> Impaired consciousness, spasm, convulsion.

<sup>vii</sup> *Principles of Criminal Law*, 2<sup>nd</sup> Ed. Bronitt and McSherry, p247 – There are difficulties getting a jury to accept that an accused could carry out quite complicated conduct, yet claim that it was unwilling due to intoxication. Fault element includes, intention, knowledge and recklessness.

<sup>viii</sup> Commonwealth Criminal Code, s4.2(7).

<sup>ix</sup> *Crimes Act* 1900 (NSW), Part 11A.

<sup>x</sup> (1981) 146 CLR 64.

<sup>xi</sup> Commonwealth Criminal Code, Division 8; *Crimes Act* 1900 (NSW), Part 11A.

<sup>xii</sup> Unreported, New South Wales District Court, 21/6/95.

<sup>xiii</sup> Alcohol and some other drugs can be disinhibitors. Lord Denning in *AG (Northern Ireland) v Gallagher* [1963] AC 349 at 379 and 382 used the expression ‘Dutch courage’. This has offensive overtones; however, it has much older origins dating back to the 17<sup>th</sup> Century when the English and Dutch were rivals in international commerce. The Dutch became a real challenge, thus causing disrespectful references. The specific use of the term ‘Dutch courage’ may be associated with the Royal Navy’s practice of issuing rum rations, especially before battle. (Bonnitt and McSherry, p 252)

<sup>xiv</sup> *Criminal Liability for Actions Performed in a State of Self-Induced Intoxication* - Chapter Three, Criminal Liability and Self-Induced Intoxication, Victorian Law Reform Committee.