HOW LIABLE IS A DRUNK?

By His Honour Judge L. S. Lazarus

Delivered at a Meeting of the Medico-Legal Society held on 20th August, 1977 at 8.30 pm at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, Dr. J. J. Billings.

I face the problem which has confronted many speakers in this forum—do I talk directly to the subject? In which case I shall probably be misleading, unintelligible—and boring. Or do I talk around the subject? In which case I shall be effusive, uninformative—and boring. Or do I sedulously avoid the subject altogether and talk about something else? In which case I shall be unscrupulous, irrelevant—and boring.

I have decided to do a little of each. However, so that you will know which one of these courses I am following at any given time, I should tell you what I understand the subject to mean. I do not take it to refer to the civil liability of a drunk either in respect of, or despite, his inebriation. I do not take it to refer to his criminal liability arising from his condition, as when he drinks and becomes disorderly, or when he attempts to combine his alcoholic intake with the navigation of some vessel or other means of transportation.

I take the subject to be how far, if at all, does drunkenness provide a defence in law to charges alleging criminal offences?

We in this State are particularly fortunate in having enshrined in our case law a concise and lucid statement which I think is unchallengeable. In *The Queen v. Keogh* in 1964 the late Mr. Justice Monahan said this, and I quote:

> "The extent to which the law can permit drunkenness to be advanced as a defence is an extraordinarily difficult problem."

This has not deterred the House of Lords from recently giving a short and clearcut answer to it, in terms which leave one wondering what on earth the difficulty was thought to be. One might also wonder in passing why their Lordships thought such a simple statement of the self-evident to require justification in speeches running to twenty-nine pages of smallish print, especially as they were doing no more than affirm what the Court of Criminal Appeal had already decided.

It may be of some help to look at why it is the lawyers see a legal problem to arise. I suspect that most people untutored in the law

think of a crime as an act, someone doing something which society stigmatizes as a crime, supposedly because of its tendency to undermine or impair the fabric of society. However, for too many centuries to worry counting them, our system of criminal jurisprudence has insisted that the act alone is not a crime and that it does not become one unless done with a certain intention or state of mind. That has become for the law as immutable as a law of nature, like saying that every fruit must have juice or it's not a fruit. Of course the mental element in one crime is not the same as that in another, any more than lemon juice is the same as pineapple juice. But (and for the purists I leave aside altogether those statutory offences of absolute prohibition) the Crown does not prove any crime unless it proves both the act proscribed and the relevant state of mind, often called the guilty mind, or, in another tongue, *mens rea*.

And even when one is looking at the act itself (before you come to look at the state of mind) the law has not regarded something as a person's act, unless it was the product of the will, unless the mind accompanied it. And so it has not been regarded as an assault to kick a medical practitioner when he is testing your knee jerk—unless at any rate you do it with the other foot. And the law has not confined the involuntary act to the reflex action, spasm or convulsion, but has extended it to the rather different case of the person who is not conscious of what he is doing, for example, the person who is concussed, comatosed or sleepwalking. At least in this extended sense the concept has been assigned the uncomfortable title of "non-insane automatism".

An example of a willed or voluntary kick, where the guilty intent is nevertheless absent, is when the footballer means to kick the football but accidentally kicks an opposing player—that is not an assault because he did not intend to kick anyone. The cynical may of course note how rarely they kick one of their own team, but that is getting a little far from the subject.

Both in the case of involuntariness (or absence of will) and in the case of absence of intent, we are dealing with the functioning or non-functioning of the mind. Of course the law also has its own method of dealing with the malfunction of the mind. It presumes everyone to be sane, but allows them the privilege of proving that they are not, although it requires to be established something which is not insanity but rather what the law says insanity is. If insanity is established, it results in a peculiar form of acquittal which leaves one's name, like one's mind, under a cloud but otherwise unstained and permits the executive arm of the State the free disposition of the mind's earthly host.

Now with this body of principle in mind, any person with a

reasoning faculty could deal with cases where there is evidence of drunkenness at the time of the alleged crime and could do so in four propositions:

First, that if the drunkenness had given rise to disease of the mind productive of a defect of reasoning so that the accused did not know what he was doing or that what he was doing was wrong, the proper verdict would be not guilty on the ground of insanity.

Secondly, if the intoxication did not amount to disease of the mind, but nevertheless rendered the accused unconscious of what he was doing to such an extent that it could no longer be said that his mind accompanied his act, he should be acquitted altogether on the principle of involuntariness or, if you like, non-insane automatism.

Thirdly, if the drunkenness merely went so far that the accused did not form the necessary intent he would be acquitted altogether, because half the offence, namely the mental element, was not proved.

Lastly, if the drink imbibed had none of these effects, but merely inflamed the passions or loosened the inhibitions, it would offer no defence at all, passion and lack of inhibition not being accepted generally as excusing an act otherwise criminal.

Strangely enough, whilst I make no confident assertion on the subject, this may well be the law in the State of Victoria. I think it is.

The ruling of Mr. Justice Crockett in the Supreme Court in the case of *Haywood* in 1971 seems to me, although His Honour did not have to deal with all these propositions, to go far to saying that these general propositions would constitute the law. And our Full Court has quite recently strongly supported the like view.

This would in turn simply mean that in applying any legal principle regarding a state of mind, the fact that the state of mind was brought about or contributed to by the voluntary intake of alcohol is interesting but irrelevant.

These propositions were as I apprehend thought, although by no means universally thought, to be generally embodied in the opinion of Lord Chancellor Birkenhead in *Beard's case* in 1920 although some parts of what was there said have been much affected by subsequent changes in or clarifications of the law as to the burden of proof in criminal cases and as to the validity of the old presumption that a man is taken to intend the natural consequences of his acts. And in any event the Lord Chancellor's pronouncements in that case often appeared to have a little each way, and certainly left ambiguities and doubts for the future.

The Lord Chancellor's approach was historical, showing how a long series of decisions throughout the nineteenth century had mitigated the severity of the old common law.

As illustrating the harshness of the old common law we may give ear to a voice from the Year of Our Lord 1551 in the case of *Reniger v. Feogossa*:

> "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 in as much as that ignorance was occasioned by his own act and folly, he shall not be privileged thereby."

One is tempted to indulge an anachronistic fancy and to envisage the television commercial for the favourite brew of the day being followed by the announcer intoning the words—"Legal authorities warn that drinking is a health hazard."

And as late as 1870 in the U.S.A. a Michigan Court gave voice to similar thoughts in a colourful passage with heavy overtones of moral philosophy:

> "He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason—to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will thus set free, as for the acts done by its prompting."

It is a far cry from this approach to the simple statement of Sir Robert Monahan in the case to which I earlier referred when he said:

> "Speaking for myself I hold firmly to the view that a state of automatism even that which has been brought about by drunkenness, precludes the forming of the guilty intent which is the fundamental concept in criminal wrong-doing."

For more than half a century after *Beard's* case, in relation to the defence of drunkenness, the House of Lords did nothing in particular, and did it very well.

On the 19th February, 1973, my son Robert celebrated his twentieth birthday. By the long arm of coincidence, on that very evening, 12,000 miles away another Robert was celebrating at the Bull Public House in Basildon, U.K. He got into a spot of trouble at the pub, nothing very serious, but there were the usual few charges of assault occasioning actual bodily harm and assault on a police constable in the execution of his duty. He got a bond from His Honour Judge Petre, but because he failed to adhere to its conditions, he ended up with a sentence of six months in the "peter." His name was Robert Stefan Majewski.

The subsequent proceedings provide amusing reading, well summed up by Sir William Gilbert in the passage commencing:

"Taken from the County Jail
By a set of curious chances;
Liberated then on bail,
On my own recognizances . . . "

Majewski gave notice of appeal, but as Lord Justice Lawton was to say "From this moment the appellate machinery began to go wrong." Majewski's case came before the Court of Criminal Appeal three times. The first time, as the folk-song says: "There must have been a mix-up" because no one turned up to appear for either side. The Court of Appeal had a look at the case and, finding no point worth considering, dismissed the appeal as frivolous and vexatious. On their second bite at the cherry, counsel for Majewski advanced a series of propositions which are very much those which I have suggested express what the law is. The Court of Appeal then called on learned senior counsel for the Crown, who said in effect that he so entirely agreed with what had been argued on the other side that he saw no point in presenting any contrary argument. The Court of Appeal did not much care for this and decided that the race ought to be rerun with different jockeys for the prosecution. They rode the race a lot better, having the doubtless advantage of a stiff breeze in their favour. And so, sure enough, the Court of Appeal dismissed the appeal and affirmed the conviction, although they were kind enough to tell Bob Majewski that he need not bother going back to gaol to complete his sentence. But they by no means thought that the matter was frivolous, because they then made what many would think, although with the aid of hindsight, was their worst mistake and gave leave to appeal to the House of Lords.

In approaching the decision of that august body, and its effect on the law, I am reminded of a funny thing which happened at dinner the other night. We all sat down as usual in the kitchen and something then came over me. For some unaccountable reason I said to my younger daughter—"Fiona, say Grace." Caught completely off her guard and unrehearsed she said simply—"May the Lord make us truly thankful for what we are about to ravish." And so to the House of Lords in Majewski's case.

Now there is one fact I have not told you, that Majewski's binge was not confined to alcohol, he had a mixed intake of alcohol and drugs.

Early in his judgment the Lord Chancellor quoted Lord Justice Lawton in the Court of Appeal as saying:

"The facts are commonplace—indeed so commonplace that their very nature reveals how serious from a social and public stand-

point the consequences would be if men could behave as the appellant did and then claim that they were not guilty of any offence."

The Lord Chancellor went on:

"Self-induced alcoholic intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause has added a new dimension to the old problem with which the courts have had to deal in their endeavour to maintain order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law."

And there can be little doubt, on reading the various speeches—and only two of the seven Lords were good enough to spare the reader the separate expression of their views—that the question that the House was facing up to was the enormously difficult one of attempting to strike a balance between, on the one hand, the development of a logical and harmonious set of legal principles and ideal justice to the individual accused and, on the other hand, the necessity for what writers have called adequate social defence.

This of course comes very near the heart of what is undoubtedly an important socio-legal problem, although the degree of its gravity at any time and place must be very difficult to assess.

The immediate question is what is wrong with the Majewski solution? I am not asserting positively that the answer given is necessarily wrong in law. The unattractive aspect of it is that it may be seen as interrupting the smooth and progressive development of legal principles and as saying that the point of interruption is the end result. It is a bit like saying that the conclusion of one of those slow motion cricket replays is the end of play, with the batsman looking behind him in anguish, the bowler in a process of levitation, the ball in the air midway between the stumps and the keeper and the umpire not immutable but as yet unmoved. Whether or not the law had yet reached the position where drunkenness of any degree was at least relevant whenever any state of mind was in question, it was undoubtedly well on its way there and its journey almost completed. I think general opinion would have been that it should have been allowed to go on to this conclusion. The satisfactoriness or otherwise of the resulting legal position, viewed in its social context, could then have been surveyed to see whether reform of the law was required and, if it was, what direction that reform could best assume.

Well, where was the law, according to the House of Lords, when the slow motion picture was stopped? I suppose one could say that

drinks were on the field; the aging *mens rea* was badly out of focus; the young player, Automatism, was being spoken to rather crossly by the umpires; insanity seemed to be everywhere like Derek Randall; nobody seemed to be paying much attention to Voluntariness who had taken several valuable wickets in Australia; whilst in the centre of the picture, by some trick of the camera, Intent, who had played such a great innings for England, appeared to have split into two so as to look like two quite different players on the field together.

The House of Lords called one image of intent "specific", and the other fellow "basic". They then said that when you had a crime requiring a specific intent, intoxication could be taken into account in considering whether it was proved; but where you had an offence requiring merely a basic intent, intoxication was irrelevant.

Then, to make sure there were no loopholes, they appear to say also that in every case where intoxication is not relevant to intent it is not relevant to voluntariness either. This is perhaps the nearest any court of law has gone to setting aside the laws of nature. Up until then medical science had been under the established impression that if a man was truly unconscious, then he was unconscious no matter what the angle from which he was viewed.

But the main source of difficulty is how the ordinary mortal distinguishes a specific from a general intent. Here unfortunately the House appears to speak in tongues. With trepidation I venture the interpretation that for a specific intent the definition of the crime must require some intention over and beyond the intent to do the act involved in the offence; for a basic intent it need only require an intent to do the act.

But to say that this test is difficult to apply would be an understatement. Murder in its simplest form would seem to involve a basic intent, a killing with intent to kill, but it is said to require a specific intent, as indeed it has always been thought to require. And so with the fairly serious crime of causing grievous bodily harm with intent to do grievous bodily harm. This looks very like a basic intent as above defined, but the House of Lords says it is specific, as the law has uniformly treated it.

And other very odd things start to happen. The intent in rape is said to be basic, by which of course I don't mean simply earthy, but non-specific. But assault with intent to rape, a lesser alternative to rape, is obviously a specific intent; whilst the still more lowly alternative of indecent assault is classified as basic. Thus, on many charges of rape the trial judge would have to tell the jury that they must first consider rape and for that purpose completely ignore as irrelevant the proved fact that the accused was blind drunk and did not

know what he was doing; but if they were not satisfied as to rape, then consider assault with intent to rape, for which purpose the state of intoxication is highly relevant and perhaps decisive; but if again they were not satisfied as to that offence, then to go on to consider indecent assault and to do so as if the man was completely sober. Whatever else the jury might think by that stage they must begin to wonder whether the directions were proceeding from one who was as sober as a judge!

The real trouble is that there appears no easily definable way to distinguish a specific from a basic intent in a definitive fashion so that the House of Lords has a fairly free hand to put each offence where it would like it to go.

One is reminded of Big Julie in "Guys and Dolls" who, when losing heavily at conventional craps, produces his equalizer and plays with imaginary dice, exclaiming with delight as they notionally come to rest—"Hah! a five and a six—I win."

The greater misfortune is that along the way various members of the House do miscellaneous violences to what have been considered to be corner-stones of the criminal law and introduce concepts which are or have become foreign to it.

Alongside positive intention the law had come to recognize recklessness as one expression of the required intent in very many crimes. But recklessness in this sense almost invariably means doing the act with foresight of the consequences, and so reckless in the sense of heedless, whether or not those consequences follow.

The Lord Chancellor in *Majewski's* case says that self-induced intoxication "is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases . . . The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness."

This sort of exposition does dreadful violence to recklessness as understood in the law and would undoubtedly fail a law student without a backward glance. It amounts to the reintroduction in a flagrant form of what was happily a dying and unregretted phenomenon, the legal fiction. It is recognized that in all crimes the Crown must prove against the accused the act and its voluntary character and the necessary intent or other guilty state of mind. But in crimes of basic intent (whatever they may be) if the accused be drunk, the law conclusively presumes the voluntariness and the intent and the Crown only has to establish in the literal sense that the accused did the act. However disguised, this is not equal justice. "It is one law for the sober and one law for the drunk."

It is comforting that at least a number of their Lordships recognized that the result of their decision was illogical. But, as the lawyers among you will immediately anticipate, the stock answer was given. As an example Lord Salmon says:

> "The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England, which is founded on commonsense and experience rather than strict logic."

It may be suggested however that the House has done more than offend the strict logician. It has cast the law in a mould which does violence to legal principle and many will find a much more edifying view of the common law embodied in a well known speech of the late Sir Owen Dixon when he said: "The common law, in most things, brought principle to the solution of the difficulties which facts present."

If the law in this State is what I have suggested it is, it represents a reasonably coherent and sound body of principle. The most charitable mind could not say this of the state of the law as left by *Majewski's* case. The more uncharitable would see it as a state of chaos.

But whatever might be thought by the community of the idea inherent in *Majewski* that the consumption of drink or drugs or both can be ascribed as fault and categorized as a guilty mind, the decision is capable of having repercussions of which I think few would approve.

For instance, is it fault in a relevant sense for the diabetic to take a little too much insulin and so produce a state of hypoglycaemia under the influence of which he might become irrational? If he then commits an offence of basic intent, is he to be denied the defences of automatism, involuntariness and absence of intent?

Ah! I hear you say. He goes too far. He has opened up a credibility gap. This is a flight of fancy.

It is not. With the help of a little alcohol, these were the very facts in the case of a gentleman named Quick decided by the Court of Criminal Appeal in England in 1973. The trial judge had ruled that automatism was not open, it was insanity or nothing. The accused, preferring the possibility of Wormwood Scrubs to the certainty of Broadmoor promptly changed his plea from not guilty to guilty. The Court of Criminal Appeal quashed the conviction, holding it was not an insanity case and that automatism was fairly open. But the Court said this:

> "Had the defence of automatism been left to the jury, a number of questions of fact would have had to be answered. If he was in a

confused mental condition, was it due to a hypoglycaemic episode or to too much alcohol? If the former, to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If Yes, why did he not use the antidote of eating a lump of sugar as he had been advised to do? On the evidence which was before the jury Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his acts."

This case was referred to in passing but without disapproval in Majewski.

Is guilt of a criminal offence going to depend on the size or number of a man's meals? Are juries going to enquire into why a man failed to eat a lump of sugar, and so no doubt into the point of time at which he should have eaten the lump, and then into the state of his mind at the time he omitted to consume it? Is his guilt going to depend on the extent and quality of the doctor's instructions to his patient?

The medical profession would join the lawyers in saying, "Let us hope not." There are of course other problems. Cases like *Quick's* case, and there are a number, show the shadowiness of the line separating insanity from non-insane automatism. The law looks with some disfavour on automatism mainly, although not exclusively, because unlike insanity it results in a complete acquittal and sometimes, of course, acquittal of a person who may be quite a danger to society.

There is irrationality in the consequences of the distinction. Who can justify, except as a matter of the merest legalism, that where a disease is not classed as a disease of the mind the Crown has to prove that, notwithstanding his disablement, the accused had the necessary degree of will and intent and if it fails the man goes at large; whereas if the disease is characterized as one of the mind, the accused has the burden of proof and even if he satisfies it he is subject to restraint of indefinite duration?

In America I understand the law has at least moved to the rational position of placing on the Crown the ultimate burden of disproving insanity.

The problems are manifold and difficult. *Majewski's* case was doubtless not very much concerned with the peccadilloes of Mr. Majewski but, was, in reality, much more concerned with the situation which arose in *Lipman's* case, an earlier and controversial decision of the English Court of Criminal Appeal which did not go to the House of Lords. That was the case of the killing of a woman by a man who, with his victim, was far away on a trip induced by the consumption of LSD, giving rise to hallucinations and the delusion that he was wrestling with serpents. Lord Edmund-Davies in *Majewski's* case said:

"The undeviating application of logic leads inexorably to the conclusion that a man behaving even as Lipman unquestionably did must be completely discharged from all criminal liability for the dreadful consequences of his conduct."

Majewski's case has so far been regarded, as I understand the position, as not being the law of Victoria and I should imagine that it will not become part of our law. I cannot speak of the other States, many of which have criminal codes which already deal with these topics in one way or another.

I would be surprised if the decision affects the law of New Zealand where a strong body of well-reasoned opinion is to the contrary effect.

I should think it will be followed in Canada, where the law was already shaping if not shaped in the like direction. And in the United States of America I believe a Majewski-like position generally prevails.

Majewski's case is of course the law of England.

But, in varying degree, their Lordships recognized that the best and final solution has not been reached and most clearly in the speech of Lord Edmund-Davies the outcome is regarded as no more than the best compromise solution until the Parliament enacts a better one.

In truth the problems are universal and the solutions difficult to find. The objectives appear to be to liberate those who are both innocent and harmless, to punish the truly guilty, to treat the disordered, and to place the innocent but incurably dangerous in a place of security.

Many solutions have been suggested, among them to create a separate punishable offence of dangerous intoxication; and another which advocates the introduction of a verdict of not guilty on the ground of intoxication, with provision for remedial orders. Every writer who has put forward a suggestion, has been able to point to the short-comings of alternative suggestions. They are all in fact attended by drawbacks and difficulties. One common and recurrent difficulty is to find a community ready to sponsor as many institutions as the community's problems call for.

The time must at least be approaching for a thorough-going investigation by a law reform agency with adequate medical and other specialist representation and advice to attempt to find a truly satisfactory solution. For myself I have an unbounded admiration for the jury system, but I believe it has its limitations, and I do not believe that it is really suited to the investigation and disposition of cases of mental disorder and other forms of disease, aberration and abnormality. I make bold to suggest, with all the modesty at my command, that the solution may be found in leaving the law much as it is in Vic-

toria, subject to reform of the law as to insanity possibly to widen its scope and certainly to reverse the onus of proof. Thus would be decided the question of criminal guilt or innocence. The protection of the community against those who are dangerous but not guilty and the provision of treatment for those who need it, whether they be dangerous or not, might best be dealt with outside the criminal law, whether by judicial order made on appropriate application and evidence, or by some non-judicial authority, or some combination of the two.

The problem is there, but its proportions may easily be exaggerated. Juries simply do not acquit every person who claims to have had a few too many or to have had a strange blackout at the crucial time. Juries do not readily find that people who have the dexterity to rob a bank, or the strength and persistence to rape a woman are in a state of powerless unconsciousness. Most of the cases in the law reports are not cases where juries have acquitted, or were remotely likely to have acquitted. They are cases of actual or alleged misdirection in law. There is a great deal to be said for keeping the law straightforward, simple and rational, so that a judge can easily direct a jury in terms which the jury will understand and respect. A great deal of what remains may safely be left to the good sense of the jury.

Come what may, Robert Majewski with his few months "in the cooler" won everlasting notoriety at a smaller price than many who have given their names to leading or misleading cases in the criminal law.

If his case has awakened people to a more intense search for social protection consistent with justice, it was probably a valuable night out at the Bull Public House in Basildon.

And now it is time for me to ask you—how liable is a drunk?