# CRIMINAL RESPONSIBILITY OF THE DRUG ADDICT—MAINLINE FOR IMMUNITY?

By the HONOURABLE MR. JUSTICE CROCKETT

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As long ago now as November, 1970 in the Criminal Court at Melbourne I was trying a youth charged with murder. The prisoner's name was Haywood. The case had proceeded in as tranquil and unexceptional manner to the close of the evidence as could be expected in a murder trial. At that point the calm (at least mine) was shattered by the making of a submission by the learned Prosecutor for the Queen that the state of the evidence required that I should direct the jury that it was not open to them to acquit the accused, the only possible verdict being either guilty of murder or guilty of manslaughter. Such a submission was completely unanticipated by me, not only because of its novelty (I had always thought that a jury had a constitutional right to acquit any accused and could not be directed as a matter of law to convict), but also because it rested on a, then, recent authority of the English Court of Appeal,[1] the existence of which was (due, of course, entirely to my own default) completely unknown to me. Well, the matter had to be examined and a ruling given.[2] But, that having been done, I am not yet, it seems, free of its repercussions because, as you can see, I find myself here tonight almost four years later called upon virtually to justify that decision.

When the legal secretary of your Society called upon me and asked me to undertake that justification (of course, that word or any remotely like it was not used by him) he left me with the impression (though, despite the selection by him of the title of this paper. I could be completely in error) that, because the ruling that was made was such that the accused would not, and the Crown could not, appeal thus denying a conventional apellate

[1] *R. v. Lipman* (1970), 1 Q.B. 152.
[2] *R. v. Haywood* (1971), V.R. 755.

tribunal the opportunity to pass judgment on the matter, it was nevertheless thought the ruling should not be allowed to escape further examination. Now, the question that was dealt with involved a determination of the ingredients of a crime (clearly a subject encompassed by the law) and arose by reason of the effects of drug taking (a matter within the parameters of medical science). So naturally it was suggested what better body to undertake that examination than your Society?

The essence of the ruling was this: In respect of both murder and manslaughter the Crown must show that the act causing death was a conscious, voluntary and deliberate act of the accused. That meant that the jury were directed that if they were not satisfied that the act of the accused in discharging a rifle was voluntary the proper verdict would be one of acquittal. The way in which the question arose for consideration and the context in which that ruling was given may be explained no better, I think, than by recapitulating the introductory paragraphs of the reported ruling. They are to be found in these terms:

"The Crown case is that the accused, who was at the relevant time some fifteen years of age, had entered the home of an absent householder, and after filling his pockets with articles of value found a rifle and ammunition. He then tested his marksmanship within the various rooms of the house. Following this, he fired a number of shots from inside the house but to reach beyond it. One of these shots, so the Crown case is, struck a woman mortally wounding her.

"The evidence discloses that prior to these events taking place the accused had met a young woman of some seventeen years of age, who had in her possession a number of valium tablets which had been legitimately prescribed for her by her medical practitioner. It seems that she and other young persons of a like age had been making a habit of taking more than the prescribed dose of these tablets as some form of experimentation with the drug in question. The reason for this seems to stem from an observation which one of the witnesses made to the effect that taking the tablets 'made you feel beaut.' Apparently the knowledge that this experimentation with such effects had taken place led to the accused's making a request of the girl in question for some tablets to be made available to him. She gave him a quantity of tablets. There is a dispute as to the number of tablets which were made available to him, but it is undoubted that he did in fact get some tablets and immediately consumed them.

At some time that appears to be approximately a half hour after such consumption the accused left the house where he had swallowed the tablets and made his way to the home which he robbed, which was only three or four doors away in the same street. There is also evidence that after the completion of the thefts the accused found a decanter with some whisky in it in the home in which he then was and consumed some quantity of whisky—the amount so consumed is difficult to estimate, but it is possible for the jury to take the view that it was not an insignificant quantity. There is evidence to the effect that the consumption of alcohol can have an adverse effect upon a person who has previously within a short period consumed the drug valium.

"In these circumstances the defence have called two psychiatrists to give evidence to the effect that the acts, including the firing of the homicidal shot, performed by the accused person after a space of approximately a half hour after first taking the valium tablets were acts that were, or might have been, performed in a state of automatism, that is to say that they were involuntarily performed and it could not be said of them, or it might not be the fact, that the mind of the accused went with those acts. The case for the defence, therefore, is that the act in question which caused death was not a voluntary act, and thus not one for which the accused should stand culpable.

"In these circumstances a submission has been made, principally on the authority of *R. v. Lipman* (1970) 1 Q.B.152 that even were the jury to accept the proposition that at the material time the accused, being subject to the influence of the drug, or the drug and the alcohol, was unable to perform a voluntary act, or at all events, if they had not been satisfied beyond a reasonable doubt that such was not the case, nevertheless, since the condition was due to self-induction of the drug in question, it would not, therefore, be open to the jury to do other than consider the alternatives of murder or manslaughter. *Lipman's* case is a decision of the Court of Appeal in the Criminal Division, and it deals with an appeal by an applicant who had been convicted of manslaughter following upon the death of a woman who had died from asphyxia as a result of some eight inches of sheet having been crammed into her mouth. Apparently the appellant in that case was responsible for this assault. What he did was done whilst in the course of a hallucinatory experience induced by an intake of the drug L.S.D. It was his contention that in doing what he did he had acted in an automatistic manner under the

influence of the drug and devoid of any intention to harm the deceased woman. The Court of Appeal disposed of the application for leave to appeal by stating that, 'When the killing results from an unlawful act of the accused no specific intent has to be proved to convict of manslaughter, and self-induced intoxication is accordingly no defence'."

Now, when considering the social consequences of any forensic solution reached in relation to the problem posed in the circumstances revealed in the passage just cited it must, of course, be borne in mind that the forms of manslaughter recognized by the law are many and varied. Nor is there any thread of common principle referable to such offences. Indeed, it is a "rag-bag" rather than rubric given the one name and into rather than under which the common law has placed all those homicides that, not being justified or excusable, are culpable but fall short of murder. Manslaughter has been classified as voluntary or involuntary. The former covers cases where, but for a special circumstance, the killing would be murder; e.g. reduction of murder to manslaughter because of the existence of provocation or excessive force having been used in the course of the exercise of self-defence. The case presently being discussed has nothing to do with this class of manslaughter.

Involuntary manslaughter includes every other form of homicide culpable at common law. Let me refer to three such forms of manslaughter—chosen because there is or may be, I believe, a link between them and the sociological problem (if there is such a problem) created by the decision in *Haywood*'s case. I exemplify each classification by facts (sometimes very commonly occurring) that have in the past been the basis of prosecutions in this State.

1. *Death caused by gross negligence,* e.g. a parent with a legal duty to care for its young child withholding from it the means of subsistence; or an adult with a duty to care for or supervise a toddler allowing it to enter a deep swimming pool thus permitting it to be drowned; or a man cleaning a firearm he knows to be loaded in close proximity to a group of children so that unintentional discharge kills a child. In these cases the law as to intent is explicit and has been for at least the past thirty-seven years. It must be shown that the accused acted recklessly in the sense that he realized that he was creating an appreciable risk of really serious bodily harm or

injury to another but nevertheless chose to run the risk.[3]

2. *Death caused by intentional infliction of bodily harm.* It is manslaughter if the commission of the offence of battery results in death and the application of force was made, not with the intention of killing or inflicting serious bodily harm (murder), but with the intention of inflicting some physical injury that is not of a mere trivial or negligible character; e.g. a typical domestic, street or hotel brawl when a punch is delivered to the head that causes an unexpected fatal brain lesion or a fall so that the head strikes some object with the same effect. A mere push or jostle resulting in a fall and striking of the head with fatal results would not be within the ambit of this doctrine.[4]
3. *Death caused by an unlawful and dangerous act.* The unlawful act must be a breach of the criminal law. It may be minor and need not of itself involve violence. The act is dangerous if, tested objectively, there would be a realization that the act was exposing another to an appreciable risk of really serious injury;[5] e.g. death in a motor car accident caused by furious driving during which some provision of the traffic code is breached. Although it is true that most motor car accident manslaughter charges are also presented in reliance upon the gross negligence doctrine. In this connection it is worth noting that, in conformity with the aphorism that no community gets a standard of justice better or worse than it deserves or wants, juries in the past, with odd exceptions, simply have not convicted accused motorists of the crime of manslaughter. In the lay mind the crime of manslaughter connotes a degree of moral obloquy greater than it is thought should be attributed to a motor car offence no matter how gross the consequences. Moreover, as most jurors are motorists, presumably the thought is ever present that the predicament of the accused may one day be theirs. So the Parliament of this State recently created a statutory offence to deal with such cases. It is a kind of intermediate homicide. Its description is causing death by culpable driving.[6] It may be incidentally remarked that the only other homicide on the Victorian criminal calendar

[3] *Andrews v. Director of Public Prosecutions* (1937), A.C. 576.

[4] *Mamote-Kulang v. R.* (1964), 111 C.L.R. 62; *R. v. Holzer* (1968), V.R. 481.

[5] *R. v. Lamb* (1967), 2 Q.B. 981; *R. v. Holzer (supra)*; but *cf. R. v. Church* (1966), 1 Q.B. 59.

[6] Crimes Act 1958, S. 318.

(suicide no longer being a crime) is the other statutorily created offence of infanticide. This is the killing by a mother of her newly born child. Although such an offence ordinarily is the result of a deliberate act it is thought that the perpetrator in doing what she does has, or may have, her normal rationality disturbed by psysiological or psychological factors connected either with the act of child birth or subsequent lactation. Hence the creation of a specific offence less than murder that has been statutorily made equatable with the common law crime of manslaughter.[7]

Of course, most, if not all, fact situations that lend themselves to presentation of the Crown case in reliance upon any one of the three doctrines I have postulated will be able also to be brought within one or both of the other doctrines. How a jury is to be directed on the relevant law by the judge must largely depend upon the way the Crown has chosen to put the case against the accused.

Well, what has all this to do with the drug-induced actions of a taker of human life? This much I think. Once it is acknowledged that a prerequisite to criminal culpability is the performance of a conscious, voluntary and deliberate act and that induction of a drug may prevent an act causing death from possessing such characteristics the question is immediately asked, "Is not the law deficient when a taker of drugs for pleasure may escape punishment for the anti-social results of his drug induced actions and ought not that deficiency be corrected?" I venture to suggest that the answer clearly is there is no such deficiency as may be supposed.

In the first place the best known and widely used drug of all, alcohol, has been with us for a long time. The criminal law has, admittedly after a somewhat lengthy and tortuous period of development, finally accommodated (at least as I understand it to be administered in the State of Victoria) to the results of alcohol abuse. It can scarcely be correct that the recent discovery and/or widespread use of other narcotics for non-therapeutic purposes that have an intoxicant effect upon the user should demand any fundamental recasting of legal principle. The fact is that the case of a drug intake so massive—be it of alcohol or any other toxic substance—as to destroy the capacity of the taker to perform a conscious, voluntary and deliberate act will, statistically speak-

[7] Crimes Act 1958, S. 6.

ing, be rare indeed. The more so when such a person commits an act that leads to his being charged with an offence.

What is needed is faith in the commonsense of juries, not a tinkering with the fundamental principles of the criminal law. The criminal jury as an organ of justice has been developed over a period of about nine hundred years and has come to be widely used in a great part of the western world. It must be a reasonably reliable instrument for the administration of the law for it to have sustained such universal and long-standing acceptance. Of course, this is not to say that juries will not set their own standards and reflect them by verdicts which legalism will condemn as perverse. Legal history is enshrined with such examples. But, history has also shown that what at the time was thought to be apparent perversity has, with the enlightenment that the passage of time has brought, proven to be no more than the application of compassion and a community sense of justice at a time when those qualities were called for but the obsolescence and absolutism of the law had rendered them unavailable. Who is to say that such juries were wrong? Indeed, it is that very capacity for introducing to the "legalism" of the law a sensible and beneficial amelioration which is one of the qualities that has made the criminal jury the object of such admiration that it is. Perhaps the refusal of juries to convict motorists of manslaughter is yet another manifestation of this phenomenon. But juries on the other hand are neither maudlin nor stupid. Countless attempts to employ alcoholic intoxication (which, after all, to a greater or lesser degree does play a part in a very large number of criminal offences) as an exculpatory device have been made. Their success is occasional only and then usually in crimes either of a minor character or where the results of the accused's actions have been negligible. Similarly there are no grounds for thinking that juries will allow a defence of mind destruction by voluntary drug induction as an easy passport to acquittal. Quite the contrary. The contemporary community climate and incessant public education on the evils of non-prescribed self-induction of the dangerous (hard) drugs mean that no cross-section community representation expressed by jury verdict will be likely to reflect a soft or irresponsible attitude towards those causing harm whilst under the influence of drugs taken for pleasure.

The jury in *Haywood*'s case found the accused guilty of manslaughter. Regrettably the report does not record this fact. If it had I rather suspect that I should never have been called upon

to prepare this paper. For what it is worth, my own opinion is that the verdict was entirely correct. It necessarily involved the total rejection of the evidence of the two medical witnesses called on behalf of the defence. That evidence to my mind was palpably untenable. There is a great difference between diminished responsibility or lessened capacity to form a specific intent or the production of amnesia due to intoxication on the one hand and on the other the reduction of the actions of a drug affected individual to the level of the unconscious so that what he does is automatistic or the equivalent of somnambulistic.

Haywood's intake of whisky and valium no doubt made him act irresponsibly in a social sense—perhaps gravely so. I daresay it disabled him from forming a specific intention to kill or cause grievous bodily harm, or, at least it meant that he did not have such intent when he fired the fatal shot. But he certainly knew that the rifle was a firearm. He knew what ammunition was. He could identify it for the purpose of loading the rifle. He must have known that pulling the trigger discharged the rifle. He did all this in a prolonged exercise of marksmanship using objects that had obviously been selected as targets. It had, in my opinion, to be nonsense to suggest the act of firing the rifle was not conscious, voluntary and deliberate.

If the drugs had worked such a destruction of his reason that he thought, for example, that the rifle was a snake and the trigger its tongue that had to be plucked out to avoid some ophidian attack then death from discharge of the rifle caused by grasping the trigger for such a purpose would truly be the result of an involuntary or unconscious act. Haywood's defence never really came within measurable distance of a true negation of a general intent, as distinct from a specific intent. But Lipman's did. The fact was, assuming his account to be creditable, that the woman's death caused by him was the result of an action in a hallucinatory state when he believed he had descended into the centre of the earth and was fighting off an attack of snakes. For my part I do not understand how death caused in such circumstances can amount to manslaughter by the intentional infliction of bodily harm or, for that matter, an unlawful and dangerous act if the unlawful act is the battery.

No one has ever suggested (indeed, it has always been the typical textbook example of an exculpatory non-deliberate act) that a killing by a sleepwalker was a criminal act. Can there be any rational distinction between an unconscious act the product

of automatism and that the result of a paroxysm of somnolentia? It may be said, yes, if the state if self-induced. Apart from the fact that any such claimed distinction offends principle it is probably one that does not bear examination. Take the case of the insomniac who takes a drug to induce sleep. Without it sleep will escape him. During the drug-induced sleep he inflicts a mortal injury upon another whilst in a state of somnambulism. Would the authority of *Lipman's* case compel infliction of a conviction of manslaughter? If not, why not? Even if the fact of self-induction renders such cases on some supposed moral ground distinguishable from those where the actor cannot "help" his actions, e.g. sleepwalker, epileptic etc., the crime must surely be, ex hypothesi, not that which involves or requires the possession of a general intent, but the voluntary consumption of the narcotic that so devastatingly affects the consumer.

A rationale that it might seem could be adopted and which may be thought to provide the only really intellectually satisfactory answer to this type of problem is to say that a death caused by an act whilst the mind of the actor is so disturbed by self-induction of a drug as to render the act unconscious is one performed during a period of temporary insanity. The law relating to insanity may be simply enough stated even though from time to time its application in particular cases proves difficult. For the defence to succeed the accused must show that due to a defect of reason caused by a disease of the mind he either (a) did not know the nature and quality of his act, or (b) if he did know this, did not know that what he was doing was wrong. Clearly enough the nature and quality of the act may well be able to be shown not to have been understood by an accused whose reason has been transitorily dethroned by drug consumption. The difficulty arises with regard to whether any such defect of reason can properly be said to be the result of a "disease of the mind". I must own to a disposition to think that the defence of insanity should be open in such cases.

It is true that the expression "disease of the mind" is not a term of art in medical science and the ability to strip the phrase of the elusiveness of its meaning is not aided by the different and sometimes contradictory nomenclature adopted by psychiatrists. But my understanding (which, if in error, will no doubt be corrected by at least some of those present tonight) is that there is ample medical support for the proposition that delusions produced by "hard" drugs are manifestations of a temporary

psychosis and that certainly some psychiatrists assert that such a psychosis is properly describable as a disease of the mind.

Certainly there are some older legal authorities[8] where views are expressed of such width as to allow a temporary malfunction of the mind regardless of the nature or cause of the derangement to be embraced by the expression "disease of the mind". However, it is true that the defence of insanity has always been a relatively unpopular one, one reason being that its success may often be expected to produce a pyrrhic victory only. But, unless and until the highest appellate courts should rule otherwise the weight of modern judicial opinion would now seem to deny an accused person the right to set up a defence of insanity in circumstances of temporary degeneration or affliction of the brain caused by external factors. In 1958 the Court of Appeal in New Zealand[9] dealt with an accused convicted of warehouse breaking and theft who had put forward a defence of automatism arising from epilepsy. The President of the Court said,[10] "Automatism, that is action without conscious volition, may or may not be due to or associated with 'disease of the mind'—a term which defies precise definition and which can comprehend mental derangement in the widest sense whether due to some condition of the brain itself and so to have its origin within the brain, or whether due to the effect upon the brain of something outside the brain, e.g. arteriosclerosis. The adverse effect upon the mind of some happening, e.g. a blow, hypnotism, absorption of a narcotic, or extreme intoxication all producing an effect more or less transitory, cannot fairly be regarded as amounting to or producing 'disease of the mind'." Nevertheless, in that very case it was pointed out that in each particular case what was the correct view was a matter to be determined in accordance with the medical evidence.

Then in 1959, Sholl J. of the Supreme Court of Victoria,[11] when dealing with a defence of post-traumatic automatism, observed that "the term 'disease' in the M'Naughten formula is not used, I think, with reference to a temporarily inefficient working of the mind due only to such outside agencies as alcoholism or drugs or applied violence producing trauma."

Finally, the Court of Appeal[12] dealt with this very matter only

8 e.g. *R. v. Porter* (1933), 55 C.L.R. 182, at 188-9; *R. v. Kemp* (1957), 1 Q.B. 399.

9 *R. v. Cottle* (1958), N.Z.L.R. 999.

10 Gresson, P. at 1011.

11 *R. v. Carter* (1959), V.R. 105.

12 *R. v. Quick* (1973), 1 Q.B. 910.

last year and in a decision from which the House of Lords refused leave to appeal definitively determined what must be taken to be the present law of England. The court was there examining a trial judge's ruling that the defence raised was one of insanity with a consequential removal of the issue of automatism from the consideration of the jury. The appellant maintained that the assault of which he had been accused was committed by him unconsciously whilst he was suffering from hypoglycaemia induced by a combination of abstinence from food and consumption of alcohol following on an intake of insulin prescribed for his diabetic condition.

The Court of Appeal expressed the view that in cases of this nature judges should "follow in a common sense way their sense of fairness". The court opined that it was just such that the New Zealand Court of Appeal and Sholl J. had done in the two cases to which I have made reference. Its own opinion delivered in terms of some forcefulness I think merits quotation. It is to be found in this passage:[13] "In our judgment no help can be obtained by speculating (because that is what we would have to do) as to what the judges who answered the House of Lords' questions in 1843"—(this being a reference to M'Naughten's case in which the answers given became the rules that have since served in the common law as the authoritative definition of legal insanity)—"means by disease of the mind, still less what Sir Matthew Hale meant in the second half of the 17th century. A quick backward look at the state of medicine in 1843 will suffice to show how unreal it would be to apply the concepts of that age to the present time. Dr. Simpson had not yet started his experiments with chloroform, the future Lord Lister was only 16 and laudanum was used and prescribed like aspirins are today. Our task has been to decide what the law means now by the words 'disease of the mind'. In our judgment the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self-induced incapacity will not excuse (see *R. v. Lipman*), nor will one which could have been reasonably foreseen as a result of either doing, or

[13] At 922.

omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin. From time to time difficult border-line cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal is likely to give the correct result, viz., can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?"

It may parenthetically be noted that the unquestioning acceptance in this passage of the correctness of *Lipman*'s case confirms what doubtless needs no confirmation, namely, that my own puny blow delivered in *Haywood*'s case in favour of the contrary view would not be considered worth citation in an English court (as the report of the case shows it was not) even if, as I suppose is most unlikely, it has ever been heard of in that country.

However, in relation to the issue of what is a "disease of the mind" all these categorical judicial statements seem rather arbitrary to me. No doubt unconsciousness due to a sudden illness entailing as no doubt it does a malfunctioning of the mental processes of the sufferer is not to be equated with a "disease of the mind". One can readily agree that the law should not give the words "defect of reason from disease of the mind" a meaning which would be regarded with incredulity outside a court. Of course, the concussed footballer who plays on without consciousness of his actions and in doing so assaults the umpire, or the dentist's patient who in reaction to and whilst under the effect of the anaesthetic kicks the nurse is not and so should not be legally regarded as insane. But I am not so sure about a temporary hallucinatory state created by the absorption of a powerful drug. It does not seem to me that it would stretch the credulity of anyone—be he lawyer or layman—to regard as temporarily insane a person rendered so stupid by drink that (and I refer to actual cases with which the law has had to deal[14]), being a nurse, she put the baby behind a large fire, taking it for a log of wood, or, he thought his friend who was lying in bed was a theatrical dummy placed there and stabbed him to death. Moreover, the view I have expressed appears to be consistent with and supported by the opinion expressed by Lord Denning in 1961[15]

14 The facts are quoted by, and the case citations to which may be found in the judgment of, Lord Denning in *Attorney-General for Northern Ireland v. Gallagher* (1963), A.C. 349 at 381.

15 *Attorney-General for Northern Ireland v. Gallagher (supra)*, at 381.

in the course of a judgment given as a member of the House of Lords that if a man by drinking brings on a distinct disease of the mind such as delirium tremens, so that he is temporarily insane within the M'Naughten Rules, that is to say that at the time he does not know what he is doing or that it is wrong, then he has a defence on the ground of insanity. The matter really I believe is one for medical evidence. If that is so it is difficult to accept as valid the categorical judicial pronouncements that a drug-induced temporary malfunction of the mind cannot in any circumstances be said to be due to disease.

In any event it must be conceded that an insanity defence is in many ways an unsatisfactory legal device. There is a certain inconclusiveness about it. The burden of proof shifts with its advancement—a rule which Smith J. was once minded to tell a jury had been described by some as disgraceful.[16] Above all, its success is met with an indeterminate and sometimes uncommonly long incarceration. My experience has been that it is the resort of the desperate. Plainly the social problem of drug-induced supposed criminality has to be met by a more resourceful employment of the genius of the common law. The principles of that law, moreover, are remarkably supple. They rarely, if ever, need to be done the violence as I think was done them in Lipman's case in order to achieve an acceptable social assessment.

In the first place in many cases the homicidal act can be presented as one that is the product of gross negligence—the recklessness being a realization that in taking the drugs that he did the accused was creating an appreciable risk of really serious bodily injury to another or others but nevertheless he chose to run that risk. Indeed, this was one way the case was presented against Lipman and I think it not without significance that all the commentators who have dealt with *Lipman's* case, whilst having been universally critical of the Court of Criminal Appeal's treatment of the matter, have been as one in agreeing that the actual verdict was justified on the gross negligence principle. However, it is clear that attempts to accommodate this doctrine to drug-induced acts will often create considerable difficulty. One legal commentator has suggested that the case against Haywood could have been left to the jury on this basis. But this clearly was not possible on the evidence. Haywood had never taken valium before. Assuredly he had never taken it in conjunction with alcohol.

[16] *R. v. Letis*, 1967, unreported.

Whilst he may well have been found to have been reckless in his indiscriminate and extravagant consumption of both valium and alcohol at about the same time, plainly he possessed no realization that in doing so he was creating an appreciable risk of bodily injury to others. This often will be the problem in such cases—even one would think, with the experienced drug user.

However, there is another way in which the common law principles can be accommodated to allow the provision of a judgment that most would regard as a justifiable social assessment of the actions of one who takes drugs for his own pleasure but who produces harm under their influence. That is by resort to the unlawful dangerous act doctrine. As I have already pointed out, the test of the act being dangerous is objective. It is the realization in that regard that would be entertained by a reasonable man placed in the same circumstances as the accused. On the other hand the Crown must establish an intention to commit the unlawful act. Moreover, that act must be dangerous in the relevant sense. But why cannot that act simply be the taking of the drug and not the assault or battery? It is unlawful, if not to take, at least to possess many dangerous drugs.[17] The act of possession and certainly of consumption must surely be voluntary. All possessors are not users—they may be "pushers". But presumably each consumption must be preceded by and, indeed, amount to the unlawful act of possession by the person who intends in fact to take the drug. The difficulty is that it remains to be established beyond reasonable doubt that a reasonable man in the accused's position would have realized that such consumption involved exposure of others to an appreciable risk of really serious injury. In the present climate of community alarm concerning the injurious results (not only to the user) especially of "hard" drugs, I venture to think that juries would be quick to find such an element established to their satisfaction if there was evidence placed before them upon which they could act.

Now, my final point is this. If resort to the existing rules of law which I have endeavoured to explain should prove unequal to the task of sheeting home to drug-crazed killers a responsibility that it is thought should justly be theirs (which has not been, and I do not believe for a moment will be shown to be, the case) the answer cannot be to jettison a fundamental principle of the criminal law that constructive manslaughter requires at least

[17] Poisons Act, 1962, Parts II and III.

proof that the act that caused—directly or indirectly—the death of the victim was intentional or knowingly done. The solution must be to tighten the law concerning drug consumption and, if necessary, upgrade the penalties attaching to such consumption to a scale calibrated by reference to harm flowing from the particular act of drug abuse. Such a solution is abhorred by criminologists as being "anti-medical". The drug addict is simply "sick" (so for that matter in one sense are most men who stand in the dock). I quote the editorial opinion of the Australian and New Zealand Society of Criminologists (Volume 5 of the Journal (1972) at p. 134) where it is said:

> His (the then Minister for Customs and Excise, Mr. Chipp) earlier enthusiastic acceptance of the "legalistic approach" (punishment) has agreeably given way to something closer to the medical model. While this change is welcomed, one cannot help but wonder why it is that it requires a remarkably brief (and thus superficial) overseas trip to change his views. Does his earlier backing of the efficacy of the criminal law to deal with the drug dependent indicate the attitude of his official advisers, or does it represent the attitude of a Minister who takes little heed of the advice proffered? Finally, whichever is the right answer, why do ministers come out with their sometimes uninformed opinions in such aggressively assertive tones and terms?
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> Again, we applaud Mr. Chipp's recognition of the family as a major aetiological factor in drug dependence, and much other antisociality. But there will always be the drug dependent and the alcoholic, so that we must make adequate provision for those who become "ill"—those who need care and treatment rather than punishment through custody, even though some vaguely therapeutic endeavours be married into the custodial system. However, we must emphasise that we are at one with the Minister when the argument involves the professional commercial pusher—then the criminal law is most properly invoked.

Of course, every reasonable step should be taken to cure sick people including drug addicts. If pending the cure grave danger to innocent members of society from the depredations of the "patient" exists then the "patient" must be incarcerated until the cure is effective. I venture to think that most laymen would consider semantic debate upon whether that incarceration be termed custody or hospitalization—it is all institutional. However, I agree that the question of what is to be done with those who,

being devoid of self-control, may by intoxicant abuse indulge in actions which, whilst injurious to others, are not acts for which the actor is legally unanswerable, is a subject on which more than one view can be held. I would just add that the area of disputation into which this topic falls, like a number of subjects which I have touched on tonight, I freely acknowledge is calculated to produce a classic confrontation between the members of those two disciplines who by their conjunction have enabled me to have the pleasure of being here this evening.

DR. BUSH:

In accepting this brief tonight, I recognize my own inadequacy to comment on a learned legal paper presented in such an interesting manner by a learned judge. I claim no expert knowledge of the criminal law and I readily acknowledge my usual role of unquestioning acceptance from the witness box of your Honour's opinion. Mine is not to question tonight. I would like to congratulate and thank Mr. Justice Crockett for his paper.

I believe that the matter before us tonight is a vital one, not only for the unfortunate individual in the dock but for the whole community, for it strikes at the very heart of our judicial system. It is vital on two scores. Not only is it necessary for justice to be seen to be done; it is also necessary for individuals and the community as well for justice itself to be done. The second score is, I believe, that it is likely to be an increasing problem in the future.

Any mention of the drug addict produces an emotional response, and the criminal responsibility of the drug addict is bound to be an evocative phrase. Mr. Justice Crockett has used the connotation of drug user or abuser and not stressed the matter of true addiction. There are perhaps at least four views on this problem which may or may not occur. There is the legal or judicial; there is the psychiatric; there is the medical; and there is the popular. The popular view is, as Mr. Justice Crockett has hinted, frequently unreliable. A study of the reluctance of juries to convict, in the face of heavy argument of counsel urging manslaughter, in the case of drinking drivers, indicates a "There but for the grace of God go I" attitude. The medical and possibly the psychiatric views are likely to be directed towards the fact of culpability being related to the mental state producing a disease of drug addiction and in the condition produced by the drug administration which exists at the time of the offence. In other

words, the state of mind which precipitates him into actions predisposing the criminal acts. By medical standards, he is sick. By legal standards, is he responsible? By popular standards, he is responsible but sick; and therefore, perhaps, it is his punishment or his treatment and not his responsibility which is in doubt.

Our speaker poses the critical question, is not the law deficient when a taker of drugs for pleasure may escape punishment for the antisocial results of his drug-induced actions and ought not that deficiency be corrected? He proposes there is no such deficiency and, as I understand his arguments, suggests that juries predominantly act in a responsible manner, with the possible exception I have already mentioned. In addition, where deficiencies in the law exist, these generally are made; and, to suggest an example of the law following public opinion, let me mention the charge of causing death by culpable driving. But is this too simple? Apart from some references to alcohol and its effects on drivers, Mr. Justice Crockett has confined his attention primarily to homicide. What of the rapist? The man who, after a party at which alcohol is freely imbibed, possibly associated with other drugs, hard or soft, who then assaults and rapes? Is he to be allowed to advance a defence that his actions were not voluntary or intentional by virtue of the fact that he was suffering from a temporary disease of the kind, albeit a self-induced and temporary one? Character references and assertions of a reasonably non-aggressive nature when not affected by drugs, with or without alcohol, will be produced.

Do the M'Naughten rules here give society the protection it requires? Are we to develop different standards for different drugs or states of mind caused by different diseases? How can we differentiate?

I believe this problem will become more frequent and more complex. The introduction and more extensive use of hallucinogenes is going to produce greater problems. Certainly, individual actions on a trip can have far greater consequences than when in a non-drugged state, but are we to allow this drug administration as an acceptable defence? For in the long run, as Mr. Justice Crockett has more than hinted, it is public opinion that, in the end, moulds the law; and, whereas the introduction of infanticide recognized a reduction in the severity of a crime from murder to manslaughter because of a disturbed mental state, this surely cannot always remove culpability.

There is a difference here, too, and I believe we must differentiate between a natural or disease-induced state and a state of mind induced voluntarily by the self-administration of an intoxicating agent. Are we to accept the principle of non-culpability for the hallucinogenic addict? If for him, why not for the alcoholic? Is one any more diseased than the other? If for homicide, murder and manslaughter, why not rape or causing death by culpable driving and negligence? Why, under these conditions, cannot the drug-taker shoplifter enter a successful plea of non-culpability when apprehended breaking into a chemist's or doctor's premises, frequently stealing drugs and drugs only, rejecting other articles of value? In fact he is merely carrying out an extension of his own disease process, the craving and taking of drugs. Isn't this a disease of the mind?

Surely, public opinion—and, presumably, therefore, in the course of time, the law—is going to accept that the man who takes alcohol, valium, L.S.D. or any other drug must accept responsibility for his actions. The streaker: will he claim he streaked (or perhaps stroke) because he was under the influence of alcohol? Will this be an acceptable defence? These are all voluntary acts and quite different from the state of post-epileptic automatism, diabetic-induced hyperglycaemia or acts which can be attributed to brain tumours and such mental conditions. Are we going to accept, perhaps slowly, a psychiatric explanation that drug addiction is a disease and must be treated by the law in the same manner as a disease of the mind under the M'Naughten ruling and therefore carry a degree of non-culpability?

I agree with our speaker that the solution must, in the future, be to tighten the law concerning drug consumption and, if necessary, upgrade the penalties attaching to the consumption of drugs virtually on a sliding scale according to the harmful effects resulting from such drug consumption.