

## PART X – DOCTRINES OF INTOXICATION

### I *Effects of Intoxication*

#### A *The United Kingdom Approach*

Here we are concerned with articulating the effect of intoxication on various kinds of criminal responsibility.

Before examining the Victorian approach to intoxication, it is valuable to consider that which is applied in UK courts. In doing so, it is necessary to explain the distinction there drawn between offences of general and specific intent:

- **General Intent**  
Crimes of general (or 'basic') intent are those, such as an assault, where there is no need to prove that the act charged was done to achieve a particular purpose. All that needs to be established by the prosecution is that the accused intended to do the physical act constituting the offence (eg, touch the victim in the case of an assault occasioned by unwanted touching)
- **Specific Intent**  
Crimes of specific intent are those where the prosecution must prove that the accused intended to bring about a particular consequence or to achieve a particular purpose in addition to intending to perform the physical acts forming the foundation of the offence (eg, assault [touching] *with* an intent to resist arrest, theft, etc)

This framework becomes significant in the context of intoxication. Where a defendant becomes intoxicated by virtue of their own acts and decisions ('self-induced intoxication'), and the crime is one of general intent, they may be convicted despite not intending to the act charged (*DPP v Majewski*).

#### ***DPP v Majewski (1977) HL:***

##### Facts:

- M assaults several police officers during a drunken brawl and again the next morning at a police station
- M is charged with three counts of assault occasioning actual bodily harm and three counts of assaulting a police constable
- At the time of the assaults, M was under the influence of a mixture of drugs and alcohol
- M claims that, as a result of the intoxication, he did not what he was doing at the time
- M has no recollection of the events giving rise to the charge

##### Issue:

- Can Majewski be convicted of assault notwithstanding the fact that his self-induced intoxication precluded him from forming the intent necessary to commit the crime?

##### Reasoning:

- A defendant may properly be convicted of assault notwithstanding that, by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault
  - This is because assault is a crime of *basic intent*

- For crimes of basic intent, voluntary intoxication is not relevant evidence
  - The assumption is that the accused acted voluntarily and with the necessary basic intent
  - This is based on a policy of protecting the community from violent offenders under the influence of drugs or alcohol
  - This means that evidence of self-induced intoxication cannot be used to negate the actus reus (eg, voluntariness) or mens rea (eg, intent) elements of an offence of basic intent
- Specific intent: where intoxication is operative, the accused is not capable of forming the specific intent, so he will be convicted of a lesser crime of basic intent instead

To illustrate the effects of this approach, consider *R v Litman*. There, the accused was under the influence of LSD at the time he committed the acts constituting the relevant offence. Under Australian law, his acts were not done with the requisite degree of volition and so the actus reus could not have been satisfied. According to the UK approach, however, the accused's intoxication was self-induced, and the crime one of basic intent, so evidence supporting involuntariness or an inability to form intent is inadmissible.

## B      *The Victorian Approach*

In *R v O'Connor*, the High Court of Australia unequivocally rejects the UK approach in *Majewski*:

*Proof of a state of intoxication, whether self-induced or not, is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility. Such a doubt, if not removed by the Crown to the satisfaction of the tribunal of fact, will warrant an acquittal, not because the accused was intoxicated but because the charge will not have been proved beyond reasonable doubt (per Barwick CJ)*

### ***R v O'Connor (1980) HCA:***

#### Facts:

- O'Connor, the respondent, is discovered stealing a car by a neighbour
- The car belongs to a police officer, who is alerted by the neighbour witnessing the theft
- The officer identifies himself and approaches O'Connor, who has removed a map holder and a knife from the car
- O'Connor does not respond to the officer when asked why he has taken these objects, instead running away
- The officer catches up with O'Connor and attempts to arrest him, but he is stabbed by O'Connor, who says: 'I don't know anything, I wasn't there'
- O'Connor was under the influence of drugs and alcohol at the time of the attack and had no recollection of the events other than placing his foot on the door of the car
- Medical evidence is led suggesting that drugs and alcohol may have rendered the accused incapable of reasoning and of forming an intention to steal or to wound, and may well have had a hallucinogenic effect
- The respondent is indicted with sealing and wounding with intent to resist arrest
- The trial judge instructed the jury that evidence of intoxication could not be considered in

- relation to unlawful wounding (a crime of basic intent) on the basis of *Majewski*
  - Evidence of intoxication in relation to theft and wounding with intent to resist arrest is directed to be relevant, as these are crimes of specific intent
- O'Connor is acquitted of theft and wounding with intent to resist arrest but convicted of unlawful wounding
- On appeal, The Court of Criminal Appeal of Victoria overturned *Majewski* on the basis of *Ryan*, acquitting the respondent on the verdict of unlawful wounding
- The Attorney-General of Victoria appeals to the High Court

Issue:

- Can evidence of self-induced intoxication be used to cast doubt on the voluntariness with which the act of unlawful wounding was done by O'Connor?

Reasoning:

- Barwick CJ: drunkenness can vary greatly in degree
  - Intoxication can warp a person's will and weaken self-control so that he does acts voluntarily and intentionally which, in a sober state, or probably would not have done
    - Intoxication to this extent explains his actions, but will not destroy his will or preclude the formation of any relevant intent
    - So long as will and intent are related at least to the physical act involved in the crime charged, the fact that the state of intoxication has prevented the accused from knowing or appreciating the nature and quality of the act which he is doing will not be relevant to the determination of guilt or innocence
    - Such a state of intoxication is irrelevant to criminal liability, whether self-induced or the result of the activity of another
    - The concurrence of will, intent, and physical act is sufficient to attract criminal liability
  - However, intoxication may (more rarely) 'divorce the will from the movements of the body so that they are truly involuntary'
  - Perhaps more frequently, intoxication (though not being of such a degree as to prevent the exercise of will) will prevent the formation of an intent to do the physical act
    - An accused in a state of intoxication that renders his acts involuntary and precludes the formation of a relevant intent cannot be found guilty of any common law offence
      - *Majewski* establishes this much in relation to intoxication induced by others (but *not* self-induced)
    - 'What his body had done, he had not done, or what he had done had not been done with intent to do it'
    - Lack of recollection is not necessarily indicative of these latter two states of intoxication
  - Intoxication deliberately induced as a means of performing an act (so-called 'Dutch courage') results in the intent to do that act being formed prior to the eventuation of the intoxicated state
    - See, eg, *Gallagher*: the act is voluntary when its intention was formed before intoxication
    - See also *R v Egan* (per Madden CJ)
    - Where the intent to do the act was not formed before intoxication, these cases are not relevant
  - A state of intoxication may be reached unintentionally or inadvertently (eg, not observing the frequency with which a waiter tops up one's glass)
    - It is unsatisfactory to group together all instances of intoxication caused

by the voluntary imbibing of alcohol or another drug under the heading 'self-induced'

- *Majewski*: accused liable for assaulting a police officer in a drunken brawl at a public house, despite being drunk
  - According to UK authorities, a defendant may be convicted of assault notwithstanding that self-induced intoxication prevented him from intending to do the relevant act
    - The UK view is that '[t]he voluntary taking or administration of alcohol or another drug producing an intoxicated state so infects the situation that what is done in that state must incontestably be accounted to be voluntary'
  - Barwick CJ: takes a 'minimum position' in relation to what constitutes intent
    - In order for criminal responsibility to attach to an act, it must be done with 'at the least an intent to do the physical act involved in the crime charged'
    - There just needs to be an intent to do the physical act involved in the crime (eg, the act of stabbing) – not any intent to achieve a particular purpose (eg, unlawful wounding)
  - The English distinction between crimes of basic and so-called specific intent is 'less logically attractive' and based more on public policy than any real difference
    - Safeguarding the citizen and maintaining social order by outlawing self-induced intoxication is perhaps better left to the enforcement of specific offences for drunk and disorderly behaviour, rather than the discretionary and largely incoherent categorisation of crimes along fine semantic lines
    - Australian jurors are unlikely to be easily persuaded by a defence of intoxication, so the concern that a guilty accused could be wrongfully acquitted, and the predication of the UK court in *Majewski* that 'the floodgates will open and hordes of guilty men will descend on the community' are overstated
    - However, admission of evidence supporting intoxication requires careful direction by the trial judge
    - The classification 'obscures more than it reveals'
    - The purpose with which an act is done is part of the description of the actus reus; 'intent', as understood by the UK courts, connotes the purposive quality of the proscribed act, but, as referred to in *Majewski*, does not refer to the *mens rea* or intention to commit the act in question
    - Therefore, the basis on which UK crimes are classified is not based on a distinction between the nature and extent of the mens rea, but rather a distinction founded on the description of the actus reus
    - *Majewski* is 'a departure from fundamental principles of criminal responsibility' and is not to be followed
- Barwick CJ: to be convicted, the accused must have acted voluntarily – ie, with the accompanying will to the act (*Ryan* per Barwick CJ)
  - This principle applies universally and without qualification, even in respect of statutory offences
  - It is 'exceedingly strange' that a person incapable of forming intent may be guilty of an offence requiring only an intent to do the physical act, but may not be found guilty of doing that act to attain a specific result
  - If the evidence of intoxication is sufficient to raise a doubt as to voluntariness or as to the presence of requisite intent, its admissibility should not be determined upon a distinction between crimes requiring only an immediate result and those requiring a further result or purpose
  - It is 'completely inconsistent' with the principles of the common law to presume

- an intent to do an act which is not, in fact, held
- A person who takes alcohol or another drug to such an extent that he has no will to act or capacity to do an act is blameworthy and ought to be visited with severe consequences
  - Eg, where the accused, by their own conduct, brings themselves to a state where they are not responsible for their acts, a substantial penalty should be imposed as an alternative charge to the primary criminal act committed in that state
- However, an accused ought not be convicted where there is doubt as to the voluntariness or intent with which they perform the relevant act by reason of their inebriated state
  - Evidence of the state of the body and mind of an accused is admissible to raise doubt as to the voluntary character of the physical act involved in the crime charged
  - Such evidence is admissible for any crime – whether common law or statutory – except for crimes of absolute liability
  - 'If the evidence is capable of raising a doubt either as to voluntariness or the existence of an actual intent, the jury should be told that if that evidence raises in their minds a reasonable doubt as to voluntariness or actual intent, it is for the Crown to remove that doubt from their minds and to satisfy them beyond reasonable doubt that the accused voluntarily did the act with which he is charged and that he did so with the actual intent appropriate to the crim charged'
- Barwick CJ:
  - Intoxication may be relevant to defending a criminal charge in two primary ways:
    - Where intoxication operates to 'divorce the will from the movements of the body so that they are truly involuntary'
      - This is inconsistent with the existence of the actus reus of an offence
    - (More commonly) where intoxication is not so complete as to preclude the exercise of the will, but is nevertheless sufficient to prevent the formation of the intent constituting the mens rea of the crime charged
      - This is inconsistent with the existence of the mens rea of an offence (assuming it is not strict or absolute liability)
  - The relevance of intoxication to criminal liability is to be determined by reference to general principles of criminal responsibility
    - An unchallengeable presumption of voluntariness and intent arising merely from the fact of becoming intoxicated is at odds with the basic principles of modern criminal jurisprudence
    - The social problem of 'intoxicated violence' is very real, but this does not warrant such a 'radical departure' from the common law
  - The illogical character of the distinction between specific and general intent suggests it is flawed
    - Merely consuming alcohol voluntarily cannot be said to import the mens rea for all crimes of basic intent
    - For a mere act of voluntarily consuming alcohol to transfer mens rea to all subsequent conduct would be a legal fiction
    - The protection of society from violent and wrongful conduct must be balanced against the need to maintain common law principles of criminal responsibility
  - Juries, if properly directed, will not readily acquit on the basis of intoxication
    - The House of Lords lacked faith in jurors
  - Parliament should create specific offences to deal with blameworthy conduct in relation to intoxication; however, it is not for judges to do so

- An accused should not be convicted for acts not voluntarily done or mentalities not actually possessed
  - Cf constructive murder: the accused already had mens rea for a *violent* crime, so the inference is more capable of being drawn that such a mentality extends to causing death or grievous bodily harm
  - There needs to be a higher degree of moral culpability before such an inference is made; an indictable crime of violence is said to demarcate this threshold
- Murphy J:
  - The problem with the *Majewski* approach is that it creates an exception to general principles of criminal responsibility whereby an intoxicated defendant will be liable for criminal offences despite an absence of criminal intent
  - Following *Majewski* would invent a species of constructive crimes whereby the prosecution would need only to establish intoxication and not mens rea itself
  - It is up to Parliament to create specific offences to respond to the policy issues arising from this (eg, an offence of killing whilst intoxicated, etc)
- Aickin J:
  - The decision in *Majewski* is a retreat from basic principles of criminal responsibility
    - The House of Lords recognised that their decision was illogical
    - They knowingly sacrificed legal logic to make social policy
  - Excessive usage of alcohol and drugs is a serious social problem, but if an act done when in such a condition is to be made criminal, it is for the legislature to do so
- Mason J (dissenting):
  - The rule in *Majewski*, while flawed, represents an appropriate exception to the basic principle that an act must be voluntary for criminal liability to attach to it
  - This conclusion is based on:
    - (1) A moral judgment that an accused should not escape liability because they got themselves so intoxicated they could not act voluntarily or form the requisite mens rea to commit a specific crime; and
    - (2) Public policy: it is expected and necessary that persons will be punished for criminal acts; there would be an uproar if being intoxicated absolved accused persons of liability
- Gibbs J (dissenting):
  - *Majewski* is consistent with established legal authority
  - Recklessness in becoming intoxicated provides an ethical rather than a legal basis for attaching guilt to conduct committed under its influence
  - The common law is founded on common sense and experience rather than on strict logic
- Wilson J (dissenting):
  - *Majewski* is not revolutionary, but merely confirms the approach of the common law to intoxication
  - The difficulty in distinguishing between crimes of basic and specific intent has been 'exaggerated'
  - The 'wrongfulness' of voluntarily becoming intoxicated is what provides the mens

- rea for crimes of basic intent
- Emphasises the importance of protecting the community

**Decision:**

- The Court of Criminal Appeal was justified in rejecting *Majewski*
- Evidence of intoxication is of general applicability
- Based on the jury's acquittal at trial, it is evident that they took the view that there was doubt as to the intent (or voluntariness) of O'Connor's act of stabbing
- This finding should not be disturbed; the appeal is dismissed

Arguably, the criminal law is more dependent upon the logical and consistent application of coherent legal rules than abstract notions of social policy. Common law principles of criminal responsibility should be the primary determinants of liability. In a judicial context, legal coherence ought to be favoured over social policy, over which Parliament alone has democratically legitimated jurisdiction.

### C *Other Australian Approaches*

The approach in New South Wales and other areas of the Commonwealth is essentially a codified form the *Majewski* approach. *O'Connor* is overruled by legislation in these jurisdictions.

To alleviate the difficulty of separating offences of specific and general intent, the New South Wales legislature has enumerated the specific intent offences in full.

Victoria is the only state with an entirely *O'Connor*-based approach to intoxication. However, there are relatively few successful acquittals based on intoxication, suggesting that floodgates arguments raised against reforming intoxication laws in other states are overstated.

## II ***Applications of Intoxication***

### A *Limitations on a Defence Strategy*

#### 1 *Anticipated violence*

An accused who believes he will become violent when drunk may be sufficiently reckless as to the consequences of his intoxication to have liability attributed for acts committed under it (Aickin J in *O'Connor*).

#### 2 *Intoxication as explanation*

Intoxication plays a persuasive explanative role in linking violent conduct to the individual accused.

The tribunal of fact is a posteriori aware that alcohol is a disinhibiting agent, which makes it more believable that, for example, the accused disregarded the victim's lack of consent or was prone to react violently. Though alcohol could also be used to explain the formation of an irrational belief

in the victim's consent (the reasonableness of the accused's belief is not considered in a rape prosecution).

### 3 'Dutch courage'

An accused who becomes intoxicated as a means to commit a crime (the so-called 'Dutch courage' defence) cannot use evidence of intoxication to negate voluntariness or intention, since it is (as a matter of fact) highly unlikely that the acts of a person who, intending to kill the victim, and who does, in fact, kill the victim could reasonably be considered involuntary or unintentional.

Intent to commit a crime, where formed before intoxication, carries through to the commission of the offence. The drinking becomes only the mechanism by which the defendant's sober and wilful intent is carried out. The deliberate induction of a state of intoxication for the purposes of performing criminal acts therefore renders those acts both intentional and voluntary (*Galaghan*).

### 4 Involuntary intoxication

The fact that an accused was involuntarily inebriated does not lessen the extent of any resulting intent. If it can be established by the prosecution that the accused nevertheless acted voluntarily and with the necessary intent, then the fact that the intoxication was caused by a third party is irrelevant (*R v Kingston* – except, perhaps, to sentencing).

#### ***R v Kingston* (1984) HL:**

##### Facts:

- The accused commits a sexual assault whilst intoxicated
- He claims his drink was laced, and that the resulting sexual assault must be treated as caused by involuntary conduct
- The accused's intoxication is caused by an ex-business partner seeking to blackmail him into agreeing to a proposition
- The accused claims he was unaware of his insobriety

##### Issue:

- Was the conduct that constituted the offence voluntarily and intentionally committed?

##### Reasoning:

- House of Lords: the fact that the accused was disinhibited by alcohol does not lessen the extent of his intent to commit a crime
- Engaging in the sexual assault was his choice and was a result of his intention alone

##### Decision:

- On the facts, mens rea was actually formed
- The fact of lacing is relevant to sentencing only
- The conduct was not involuntary and duress does not apply

## B *Actus Reus and Voluntariness*

Intoxication is relevant to both actus reus and mens rea of all common law crimes. It is relevant to the actus reus in crimes of strict (and absolute) liability (*R v O'Regan* [1961] Qd R 78).



Intoxication is logically inconsistent with the existence of the actus reus of a crime where it can be shown that the accused acted involuntarily or in a state of automatism. The question to be asked is whether the defendant's act was, as a matter of fact, voluntary (and not whether the defendant was *capable* of voluntary conduct: *O'Connor*).

The onus is on the defence to raise evidence of intoxication; however, given satisfaction of the evidentiary hurdle, the ultimate legal burden rests on the prosecution to prove beyond reasonable doubt that the defendant acted voluntarily and with the required mens rea (*O'Connor*).

Generally, a far greater level of intoxication will be necessary to render the conduct of an accused involuntary, as compared with that required to negate the mental element of a crime (*O'Connor* per Barwick CJ). It is only where the defendant is 'grossly drunk' that evidence of intoxication will potentially be relevant to the question of voluntariness (*O'Connor* per Barwick CJ).

Do amount to involuntary conduct, intoxication must 'divorce the will from the movements of the body so that they are truly involuntary' (*O'Connor* per Barwick CJ). This is rare. Such an act must be 'not the product of his conscious will'.

Note, however, that lack of recollection on the part of the accused does not necessarily indicate that their intoxication was sufficient to negate the actus reus or mens rea of the crime (*O'Connor* per Barwick CJ).

## C Intention

Intoxication may only be used to negate a subjective mental element in the mens rea of a crime. That is, it cannot alter or reduce the objective standard against which an accused's awareness is measured (though it can, of course, be relevant to the circumstances in which and the perception against which the evaluation takes place – see Part II, section D(1) below).

Because offences of strict and absolute liability do not require mens rea, intoxication is unable to negate their elements beyond the physical aspects of the crime.

### 1 Intent

Intoxication is inconsistent with the existence of mens rea where it precludes an accused from forming the relevant intent in respect of the commission of the crime (*O'Connor*). The question to be asked is whether the accused in fact possessed the required mental state (and not whether they were *capable* of forming intent).

It is sufficient that an accused's will and intent relate to the physical act involved (eg, the taking of an apple). The fact that intoxication prevents the accused from appreciating the full 'nature and quality' of the act (eg, the resulting appropriation) is irrelevant (*O'Connor*). Note, however, that where an intent to achieve a particular result is part of the mens rea (eg, murder), the intent held by the accused may need to be directed at achieving the relevant result (eg, death or grievous bodily harm) and not merely the physical act itself (*O'Connor* per Barwick CJ).

### 2 Recklessness

Intoxication may also be inconsistent with the accused's possession of the relevant foresight of a probability of death or grievous bodily harm. The question to be asked is whether the accused did in fact conceive of the probability of death or grievous bodily harm following the commission of

the physical elements of the offence (and not whether the accused was *capable* of conceiving of such a result).

If the accused knows that they have a tendency to commit violent crimes when intoxicated, this may itself constitute evidence of recklessness sufficient to satisfy mens rea in respect of crimes committed while intoxicated (*O'Connor* per Stephen J). The relevant recklessness is, of course, not recklessness as to becoming intoxicated, but rather recklessness as to the commission of the crime itself.

### 3 Negligence

Even if the prosecution is unable to establish intent or reckless for murder, they may still be able to secure a conviction for negligent manslaughter. This will be possible when becoming intoxicated is itself sufficiently negligent to justify attributing criminal liability for the victim's death. However, the actus reus of the offence will still need to be established to have been committed voluntarily.

Intoxication will be evidence of criminal negligence where the reasonable person would not have become intoxicated (*R v Martin*). For example, a police officer or bus driver may be criminally negligent due to their intoxication; in becoming intoxicated, they have breached the standard of care required of someone in their position.

## D Defences

### 1 Self-defence

The current formulation of self-defence is contained in *Zecevic's* 'simple question'; namely:

*Whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did.*

This test has two elements:

- That the Accused honestly believed it was necessary in all of the circumstances to do in self-defence what he or she did
  - Entirely subjective: concerned with what the accused actually believed
- That there were reasonable grounds making it necessary for the accused to do in self-defence what he or she did
  - Subjective and objective
  - Assess all relevant circumstances from the perspective of the accused
  - Assess whether there were, in light of those identified circumstances, reasonable grounds that made it necessary for the accused to do in self-defence what he or she did

This means that account is to be taken of all personal characteristics of the accused, including factors that may have impacted on their understanding of the circumstances in which they found themselves, including intoxication (*R v Conlon*).

**R v Conlon (1993) NSWSC:**Facts:

- A lives alone in a remote farmhouse on the Murray River
- After a day chopping wood with a friend he goes home, lights a fire, watches TV and smokes a 'considerable amount of marijuana' (one dozen joints) and drinks a 'considerable amount' of alcohol (almost an entire bottle of scotch)
- Sadly, the idyllic night is shattered by the barking of his dog
- He ventures outside and discovers one of his 10 marijuana plants had been stolen
- Using his torch, he locates two men (Hulands and Neill) hiding in the bushes
- Hulands and Neill run towards the accused, who retreats into his house; they follow him
- Conlon hits Hulands once with his torch; the two men break a plate over his head
- Conlon escapes to his lounge room where he grabs his loaded .22 calibre rifle and switches the safety off
- It is not entirely clear quite happened next; however, the evidence at trial indicates that Conlon now runs toward the two men, shooting as he advances
  - The relevant shots are fired outside the house
- It appears that Conlon chases the intruders with the gun, shooting them as they attempt to escape, shooting Huland in the head at close range
- He finds Neill bleeding from a gunshot wound and attempts to shoot him in the head
- However, no bullets remain; Conlon instead beats Neill's head with the butt of the rifle until the rifle breaks
- Conlon locates an axe and proceeds to hit Neill with its handle
- He now goes inside, returning with a kitchen knife and stabbing Neill in the throat
- Conlon buries Neill, but gives himself up to police some two days later
- The cause of deaths is established as being 'shot through the head' and 'bashed with rifle butt or axe', in the case of Hulland and Neill, respectively

Issues:

- Is evidence of Conlon's self-induced intoxication admissible?
  - If so, were Conlon's actions voluntary?
  - If they were, was Conlon capable of forming an intention to kill or cause grievous bodily harm?
- Did the accused believe on reasonable grounds that it was necessary to do what he did in self-defence?

Reasoning:

- Hunt CJ:
  - Intoxication is relevant to both the accused's subjective perception of the circumstances and the reasonableness of his response to the threat as perceived:
    - The subjective aspect of the assessment as to whether the accused's belief was based on reasonable grounds requires that, where relevant, intoxication be taken into account
    - '[A]ccount must be taken of those personal characteristics of this particular accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his response to that danger'
  - On the facts, intoxication lead Conlon to genuinely believe his life was under threat
    - 'It is reasonably possible that the circumstance in which the accused found himself – *as he in fact perceived those circumstances to be*, affected though that perception may have been by intoxication – created

- such a fear in the accused that these two men (and perhaps others) were going to kill him if they could as to have justified the extreme action which the accused took when he killed Hulands'
- The question relates to whether the accused's belief is reasonable, not a hypothetical person
    - In postulating an answer, relevant characteristics include intoxication
    - Here, it was reasonable for him to believe he had to kill Hulands
    - However, it was not reasonable for him to believe he had to kill Neill

Decision:

- Intoxication is relevant to the accused's perception of the threat
- The reasonableness of their response must be evaluated by reference to this perception
- In the circumstances, self-defence is available in respect of Conlon's killing of Hulands
- However, it is not available in respect of the killing of Neill

## 2 *Provocation*

Intoxication is not relevant to the gravity of provocative conduct. However, it may have a bearing on whether the accused was in fact out of control (subjective element). Intoxication is relevant only to the subjective element of the defence (*R v O'Neill* [1982] VR 150).

### III *Reform of Intoxication*

#### A *Relevant Materials*

- Intoxication in the context of sexual offences in Canada [AM 10.3]
- Victorian Law Reform Committee, *Report on Self-Induced Intoxication* (1999) RY597
  - Recommend keeping *O'Connor*
  - An offence of 'committing a dangerous act whilst intoxicated' could be created to ensure culpable offenders are not completely exculpated for wrongful conduct committed involuntarily or whilst incapable of forming intent
  - However, they ultimately recommend against its introduction
    - It could result in plea bargaining or unjustifiably diminished sentences
    - Juries could be more prone to impose a lesser conviction where it is charged in the alternative to a more violent crime (especially in regard to murder)
    - The level of culpability addressed by the offence is too broad, as many offences of varying severity can be committed whilst intoxicated