DRUNKENESS AND DRUGS AS NEGATING REQUISITE ELEMENTS IN OFFENCES

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INTRODUCTION

There are distinct periods in the history of the effect of drunkeness upon criminal responsibility up to 1900. During the first period up to 1800, drunkeness was considered to aggravate crime. The second period [illegible] afford an answer, if only partially [illegible]. Finally, from 1838 to 1900, the first attempt to relate drunkenness to the mental element in crime was seen. With this came the formulation of the 'specific intention' test. Coleridge J in Monkhouse (1849) 4 Cox c.c 55. The accused had to show that his intoxication was such [illegible] of forming any specific intention".

The Twentieth Century opened with the test in terms of mens rea formulated by the Court of Criminal Appeal in Meade (1909) 73J 309 : a person may rebut the presumption that he intended the natural consequences of his acts, by showing that he was so drunk that he was incapable of knowing that what he was doing was dangerous.

In Beard (1920 All E.R. 21,[1] the above formulation was considered by the House of Lords and narrowed. The basic principle emerged in Beard (which is still the leading case in the field) is found in the second of the three propositions set out by Lord Birkenhead L.C. at p. 501:

> "Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent."

From this use of the words 'specific intent' most controversy and difficulty has arisen. In the cases following Beard, it has been held time and again, that where the crime requires a 'specific intent', drunkeness does excuse, where the crime requires a 'mental intent' [illegible]. Accordingly, murder is excused, manslaughter cannot be: Lipman (1969) [illegible] assault with intent to cause grievous bodily harm is excused, [illegible] cannot be.

This paper will be divided into four parts. The first two will suggest several variations on the above formulation of the defence; the third will relate the effect of alcohol and drugs to a concept of voluntary purposeful action while the fourth part will suggest why a conceptually more logical formulation for at least one which is more consistent with the principles of criminal law is not adopted.

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From this use of the words "specific intent" much controversy and difficulty has arisen. In the cases following Beard, it has been held time and again, that where the crime requires a "specific intent", drunkeness does excuse; where the crime requires a "general intent" drunkeness does not excuse. Thus murder is excused, manslaughter cannot be: Lipman (1969)3 W.L.R. 819; assault with intent to cause grevious bodily harm is excused, assault cannot be.

This paper will be divided into four parts: the first two will suggest several variations on the above formulation of the defence; the third will relate the effect of alcohol and drugs to a concept of voluntary purposeful action while the fourth part will suggest why a theoretically more logical formulation (or at least one which is more consistent with the principles of Criminal Law) is not adopted.

1. DRUNKENESS AND MENS REA

The Beard test, as elaborated by Denning in Gallagher 1963 AC 349 and in Lipman, would seem to set out the relevant principles of the defence of drunkeness as applied by courts today: "if a man is charged with an offence in which a specific intention is essential (as in murder though not in manslaughter) then evidence of drunkeness which renders him incapable of forming the intention is an answer." Denning in Gallagher at p. 381.

The first theoretically possible variation from this formulation of the defense of drunkeness is attained by applying the principles of mens rea to the defense and carrying such application to a logical conclusion.

For both this and the next variation it is necessary to regard the drunkeness referred to as total. The actual effects of drink and drug taking will be considered in the third section of this paper.

The starting point is a dictum of Lord Birkenhead L.C.: "the use of the words "defence of drunkeness" is inaccurate, in fact the defence "does not mean that the drunkeness is itself an excuse for the crime but that the state of drunkeness may be incompatible with the actual crime charged and may therefore negative the commission of that crime.", Beard at p. 499. See also Ortt (1970) 1CCC 223 "drunkeness is simply one factor relevant to the prosecutions duty to prove the accused's guilt." Thus it is clear that it is the required intent which is at issue. In essence the question becomes: is the state of drunkeness incompatible with the element of mens rea required by that particular offence. Mens rea is defined in Burns A Casebook on the Law of Crimes p. 48 as "whatever mental state is expressly or impliedly required to be proved in the definition of the offence charge. These mental states are, broadly, (a) Intention, (b) Recklessness, and (c) Negligence." All crimes require mens rea to be proved unless they are "strict liability" offences: absence of mens rea is a fundamental defence. The two mental states relevant to this discussion of Drunkeness and Mens Rea are (a) and (b) - Intention and Recklessness. Intention may possibly be defined as acting with the object of producing a consequence while recklessness connotes a realisation that it was highly probable that the consequence would result from his conduct although the person may not have acted in order to produce it. Thus concepts of knowledge and foresight are involved. Assuming that acute intoxication can erase both knowledge and foresight of consequence, it is submitted this will be a good "defence", i.e. be available as proof of the lack of the required intent for any crime in which mens rea is required. Thus as far as the dichotomy of "specific intent/ general intent" goes, the distinction is meaningless. The adjective

"specific" is pointless for the intent is no more specific than any other intent required in the criminal law. There would seem no reason in logic why the concept of mens rea should be divided into two intents, one specific and one general, unless it is to enable the courts to reach a decision which might be technically impossible if the ordinary concept of mens rea was applied.(3)

In essence it is suggested that whenever mens rea (in the sense of intention or recklessness) is an essential element of an offence, evidence of drunkeness should be taken into account with all the other evidence in determining whether the offender had the necessary state of mind and if the jury is left in doubt he should be acquitted. In fact Lord Birkenhead in Beard seemed to suggest that the defence was not limited to cases where it was necessary to prove a "specific intent". He went on to say that "a person cannot be convicted of a crime unless the mens was rea" at p. 504. In Beard it was held that where the accused has been unable by reason of his drunkeness to form the necessary intent to kill or to cause grevious bodily harm, he must be acquitted of a charge of murder. Surely the rationale behind this decision is of general application; whenever any element of mens rea is required in the crime charged, the defence of drunkeness should succeed when it negatives that mens rea. If an offence is defined so as to require foresight or knowledge and the offender in fact lacks such foresight or knowledge, then it should be irrelevant that this is the result of drunkeness: whatever the reason an essential element of the offence is lacking and he should be acquitted.

Rupert Cross (4) in considering "specific intent" thought that the term as used in Beard (supra) "is meaningless because of the broad use" of that phrase. Thus he asserts that Lord Birkenhead used the phrase to describe whatever intent the prosecution have to prove on each particular charge to which drunkeness is pleaded as a defence. Whatever Lord Birkenhead originally meant, the confusion which resulted still remains, as evidenced, for instance, by Lord Denning in Bratty 1963 AC 388 at 410:

> "If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which specific intent is necessary."

However unlawful wounding requires at least recklessness. If the use of the term "specific intent" is thus meant to indicate that drunkeness can provide no defence where it is sufficient to prove mere foresight of consequences it seems wrong in principle for it requires that a drunkard be deemed to foresee consequences although the evidence may suggest the contrary. Whether a drunkard "is still liable to be convicted of manslaughter" will be considered in the next section.

In conclusion, the specific intent concept, although initiated to mitigate the ancient doctrine that drunkeness is no excuse for crime, has today been given a restricted meaning. This distinction should no longer form the boundaries of the "defence" of drunkeness. Although many eminent Judges have used the term "specific intent" it is still shrouded in obscurity. One is still not sure what it means or to what offences it relates. At present it is requiring courts to confuse and twist the notion of intention in order to do justice. In its place, the courts should state that intention is required for all the essential elements in the actus reus of a crime unless otherwise stated. If Parliament considers a person who voluntarily consumes alcohol to be negligent, they should legislate accordingly. A new offence - "drunkeness resulting in harm" - may be possible and will be considered in the final section of this paper. For the present it is not the duty of the Courts to continue convicting persons for crimes requiring mens rea, when the accused did not have the required intent.

2. DRUNKENESS AND AUTOMATISM

The second variation on the present formulation of the defence of drunkeness is best seen in its application to crimes based on negligence. There would seem to be considerable agreement between both Judges (as in Beard, Gallagher 1963 AC 349 and Bratty 1963 AC 386) and commentators (as with Glenville Williams [5]) that drunkeness can never provide a defence to a charge of manslaughter on the basis that manslaughter is committed if death is caused by negligence, even if no unlawful act can be identified as the cause of the death. Thus, because drunkeness is a "defence" only in so far as it negatives a requisite intent or foresight, it cannot be a defence where negligence suffices for criminal responsibility for whether conduct is negligent will be determined without reference to intention or recklessness (i.e. state of mind) but will depend on whether conduct falls below the standard of the reasonable man. The standard of care of a drunkard is that required of anyone else: the reasonable man remains sober. Thus Glazebrook [redacted] asserts that in Lipman, if the Court of Appeal's decision had been based on a finding that Lipman's acts were grossly negligent "it would have been unassailable". It is with this premise that I would disagree.

One of the basic principles of the criminal law is that one is only responsible for acts or ommissions which are "voluntary". This requirement of voluntariness probably goes to the actus reus. Though some writers and Judges consider this element goes to the mens rea, Halsbury's states [6A]: a person cannot be convicted of any crime unless he has committed an overt act prohibited by the law ..... the act or ommission must be voluntary."

In contrast Adams 2nd edition "Criminal Law and Practice in New Zealand" states: "we diverge, with respect, from the view expressed by Woodhouse J in Kilbride v Lake 1962 NZLR 590 where he treated voluntariness as mental element requiring to be established before embarking on any enquiry into mens rea." p. 104. Such an analysis was said to have no authority and only would lead to confusion. (6B) To my mind, however, the element of voluntariness can easily be distinguished from the other mental elements required for any one crime and when looked for in strict liability offences or the defence of drunkeness or automatism, can only clarify the issues.

Reference?

R. S. Clark cites Kilbride v. Lake 1906 WCLR 232, Hardgrave v. The King 1951 SASR 59 and Snell v. Ryan in support of this proposition that the defendant "must be shown to be responsible for the physical ingredient of the crime or offence." On the basis that it goes to the actus reus evidence of voluntariness would seem just as fundamental to proof of guilt as is evidence of the necessary mens rea. If this element of voluntariness is not present, the necessary actus reus has not been established and a person cannot be found guilty of any offence which he may appear to have committed. The defence thus raised is often one of automatism. Nigel Walker (6) tentatively defines automatism as actions "of a kind which are normally carried out with a purpose and by a person who is paying some attention to what he is doing but which seem to involve the person concerned in doing things which are inconsistent with his normal desires and behaviour and of which afterwards he has no recollection, or only a faint, inaccurate memory." Similarly Gresson P in Cottle considered automatism to involve "a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements". One example is sleepwalking. It is instructive to note that in many of the cases in which this has been argued, the mere assertion by the accused that he was sleepwalking, has been sufficient to relieve him of guilt. One Pattridge in 1951 strangled his wife and then hit her with an axe which he had to go down-stairs to get. The jury took ten minutes to acquit him on the defence that he had been asleep. In 1960 one Boshears strangled a girl who had come back to his flat; yet he was acquitted on his evidence that he had gone to sleep and woke up to find himself on top of her dead body. One wonders what a Judge's direction and a jury's verdict would have been if the sleep had been caused by drugs. In fact the circumstances of both the above cases closely resemble Lipman except for the L.S.D. taking in the latter. Possibly a verdict of "guilty but asleep" would be more in line with Lipman.

Important cases on automatism include Charlson 1955 1 AllER 859 (automatism defence succeeded for blackout), Kemp 1957 1QB 399 (two types of automatism recognised - insane and non-insane automatism) and

Cottle 1958 NZLR 999. It is not intended to give a treatise on the defence of automatism; rather it is merely stated that the defence exists and the amount of evidence required by some courts of its presence has often been minimal and in fact restricted to merely the accused's assertion of its presence. The burden of proof placed on the accused is in fact to adduce sufficient evidence to provide a "proper foundation" for the defence: Bratty v. A.G. for Northern Ireland 1963 AC 386. Where successfully pleaded, automatism leads to a complete acquittal.

The issue is thus raised: where drink or more especially drugs have reduced a person to a state of automatism, where his limbs are not controlled by his conscious mind; how can there be a conviction of a crime involving negligence, let alone any crime. The basic requisite of voluntariness is absent.

This issue has been considered in very few cases. In Cottle the Judges were concerned with automatism as negativing a requisite intent rather than whether such a condition will lead to a complete acquittal.[6C] In Hartridge 1966 57 D.L.R. 2d 332 and in Johnson (1969) 1 SA 201 (A.D.) where the only cause of the alleged automatism was self-induced drunkeness, it was held that the complete defence of automatism ought not to be left to the jury but only the defence of drunkeness entitling acquittal of murder but not of manslaughter. Surely, however such a rule which disregards the fact that conduct was involuntary, simply because it was caused by drink or drugs voluntarily taken, is too arbitrary an exception to the general rule that one is not responsible for one's involuntary conduct (except in strict liability offences).

In contrast one Australian case has recognised the necessity for conduct to be voluntary, even where drink or drugs is involved.[6D] In Haywood 1971 VR 755 Crockett J held that in respect of either murder or manslaughter the Crown must show that the act of the accused causing the death was a conscious, voluntary and deliberate act. If not the proper verdict is one of acquittal. In that case, Haywood, a 15 year old boy consumed a quantity of Valium tablets and a quantity of whisky. He then fired shots from a rifle within a house, one of which went beyond it and killed a woman. Psychiatric evidence stated that the act of firing the rifle might have been performed in a state of automatism. The Crown sought a ruling that since the condition was due to self-induction of the drug in question it was not open to the jury to do other than consider the alternatives of murder or manslaughter.

Crockett J's judgment is worthy of close analysis. After noting that a person cannot be guilty of murder if, by reason of drink or drug, no intent can be established, Crockett J went on "to have regard to the mental element or the mental state of the accused person in respect of the first and foremost element of a crime of murder, namely that the

act which caused the death must be a conscious, voluntary and deliberate act" at p. 757. Although not expressing an opinion as to whether this element goes to the actus reus i.e. an involuntary act is not an act at all; or goes to the mens rea, i.e. it stems from the absence of a state of mind which prevents the act being an intentional one; Crockett required that this element be present. Thus he would require that even with constructive manslaughter e.g. Church 1966 1QB59, that the act which causes the death must be conscious, deliberate and voluntary. This is not to detract from the test propounded in Church: that a reasonable person in the situation of the accused would realise that the act would expose the deceased to an appreciable danger of some serious injury; rather this is to say that the Church test is not sufficient in itself to establish guilt - one must go further and consider whether the act is voluntary.

Crockett cites Ryan 1967 A.L.R. 577 in which Sir Garfield Barwick at p. 583 states "in my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act." Taylor and Owen J.J. in the same case at p. 594 conclude that on the same reasoning the accused would not be guilty of murder or manslaughter "for the simple reason that it was not his act that caused the death."

Finally Crockett J's observations on Lipman are highly pertinent: "Lipman's case was that the act of assault attributed to him was non-voluntary because of his drug-induced hallucinatory state. That case does not seem to me to be met by the Court saying of it, as it did: We can dispose of the present application by reiterating 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 ..... and the verdict of manslaughter, at the least was inevitable." Crockett J thus refused to follow Lipman and this writer contends that his reasoning for not doing so, is valid. Crockett J, Barwick, Taylor, Owen J.J. in Ryan and Woodhouse J in Kilbride v. Lake to name only a few Judges, all require an element of voluntariness to be present before guilt can be established. This, one would think, accords both with logic and commonsense; and is surely applicable to all, except strict liability, offences. Why then the divergence between, for instance, Haywood and Lipman. One may not be far from the truth if one asserts that the different decisions relate to the different fact situations involved: to the use of Valium tablets in Haywood which had been legitimately prescribed for a friend of the accused; in contrast to the drug L.S.D. in Lipman, possession of which renders one liable to a long prison sentence. Or to the fact that Lipman and his girlfriend were described by Widgery C.J. as "addicted to drugs." Whilst it is difficult to find much in the Court of Appeals approach to the subject which can be supported on grounds of logic as a general account of the

defence of drunkeness, its obvious attraction to many on policy grounds shows the strain imposed on the traditional approach to the basis of criminal liability by modern analysis of the nature and implications of human action.

In summary, the courts have been wary when a concept of involuntariness is presented as negativing guilt; where the alleged state was said to have arisen from drink or drugs. Further, in the leading automatism case of Hill v. Baxter 1958 1QB 277, the court accepted that there may well be a period before the onset of automatism when its occurrence may be anticipated. Thus there was no defence available in that case where the motorist was overcome by sleep which he must have realised was imminent. In Watmore v. Jenkins 1962 3WLR 463 the rule was very strictly applied: the diabetic motorist who was found by the Justices to have reached a state which could be likened to "sleepwalking or to a fit of epilepsy" was not found to be actually in a state of automatism for the whole of the five miles during which his driving was admittedly dangerous. This writer would contend, however, that the principle applied in these two cases will seldom be applicable in a case of automative behaviour resulting from drink or drugs. In the above two cases, the accused was in control of a car at the time when he must have realised that sleep/the fit was imminent. As such, he was in a much more dangerous position, than for instance Lipman, sitting at home, with no mechanical objects under his control. The death which Lipman did in fact bring about was very remotely foreseeable, if at all; the accident which both Baxter and Jenkins brought about was highly probable when they decided to continue driving a car with lack of consciousness imminent. To require Lipman to refrain from taking L.S.D. because there is a very remote chance that he might kill his girlfriend as a result of it; is as absurd as requiring someone to refrain from driving home because they might accidentally kill someone in the process.

It is perfectly valid to find a connection between a negligent, but conscious act and a subsequent death, so long as the requirements of legal negligence are kept firmly in mind. The issue becomes what should a reasonable man in the position of the accused have foreseen would be the likely consequences of his taking of the drink and drugs. Obviously this will depend very much on the circumstances: previous offences committed while under the influence would be strong evidence that the accused should have foreseen that if he imbibed or got high again, his resulting action would likewise be similar. In my opinion, the reasonable man would only foresee such deterioration in his actions if he had actually experienced such deterioration previously; knowledge that other people's actions deteriorated in such a way would be insufficient. Note however, that: In Spicer (1969) 69 WWR 590 Flynn P.B. disposed of the defence by saying that, although the accused may not have known that a blackout would follow if he took the drug, "he knew or ought to have known that the possibility existed and he must be presumed to intend

the natural and probable consequences of his act".

A more realistic approach runs: with, for instance, manslaughter it will be sufficient if, when he was conscious of his actions it was reasonably foreseeable that death or serious injury would be inflicted on another if he continued with his course of action. In Scarth 1945 St RQd the judgment continued: "But if a driver of a motor vehicle fell asleep at the wheel without any prior warning of his inability to keep awake and in circumstances where a reasonably careful driver would not have been aware that he was likely to fall asleep, no criminal liability would attend to the driver." Similarly if a person goes on a "trip" without any prior warning that his subsequent conduct might endanger limb or life and where such danger was not reasonably foreseeable no criminal liability should attach to him.

Basically these are just questions of where to draw the line: the important point to note is that this foreseeability test could be a major restriction on the use of the automatism defence where the involuntary action results from drink or drugs. However it must be remembered that negligence should turn on whether the defendant negligently failed to foresee a certain consequence of his actions rather than on the undesirability of his conduct in general.

3. DRINK AND DRUGS: THE EVIDENTIAL SIDE

A. Alcohol

This paper, and many of the reported cases on drunkeness, rest heavily on the initial assumption that it is possible to become so drunk, that mens rea is negated and conduct can become involuntary. In McArthy 1954 2 AllE.R. 262 it was held that the fact that drunkeness rendered the accused more susceptible to provocation was not relevant. Lord Birkenhead in Beard also recognised that something more was required than evidence "establishing that his mind was affected by drink so that he more readily gave way to some violent passion" p. 502.

Sufficient evidence that the accused was so intoxicated he did not know what he was doing, is essential before any of the theoretical defences outlined in this paper can be raised. Though much is still unknown, medical science does know in broad terms the effects of alcohol on behaviour. Intoxication impairs perception, judgment and muscular co-ordination; while self-confidence is increased, inhibitions lessened and aggressive impulses released. In other words, alcohol brings about a diminuition of the repressive mechanisms, allowing one's instincts to take over. These repressive mechanisms are of emotional, not intellectual origin. Thus an acutely intoxicated person has lost his power of self-control, his ability to make judgments is impaired and he

may be incapable of foreseeing the consequences of his acts. The Canadian Royal Commission on the Law of Insanity (1956)(7) noted the similarity between the mind of the insane and the mind of the drunk. Both are deprived of "the mental capacity to foresee and measure the consequences of the act". The acutely intoxicated offender may have no more appreciation of the nature of an act and its consequences than the insane offender who may be excused from liability (though not incarceration) under S 43 Crimes Act.

No doubt cases where a person is so drunk that he can perform apparently purposive actions without intending to do so are rare; and any claims of such drunkeness should be carefully scrutinised. They should not, however, be arbitrarily rejected in disregard of any evidence which might be adduced in support of them. Undoubtedly the medical profession considers that it is possible for a person heavily intoxicated by drink to commit and crime in a state of automatism and it has in fact given evidence of this in many cases. The evidential problem remains however; proof of such acute intoxication must be hard.

B. Drugs

The English Court of Appeal in Lipman and the Ceylon Court of Appeal in Marikker VR (1969) 72 NLR 57 both held that there is no reason to distinguish between the effect of drugs taken voluntarily and drunkeness voluntarily induced. As a matter of evidence, one would think there is a profound difference. Although it may be difficult to prove a total lack of consciousness or voluntariness due to drink, it is well recognised that the mere fact that certain drugs have been taken will automatically mean that a total lack of consciousness will in many cases result. Whether a total state of involuntariness can be reached as a result of drink as opposed to drugs may be doubtful. A further distinction can be based on the fact that involuntariness while high on drugs will leave the person affected more able to exercise bodily movements and thus commit a crime than if he was drunk on alcohol, the result of which is a complete slowing of movements and eventually a heavy sleep. Thus if the same legal principles apply to drugs as to alcohol, it is important to reject any artificial rule that denies the possibility of such conduct resulting from the effect of alcohol. It may be noted that in a Saskatchewan case: R v. Spicer the opposite was suggested, that lack of intention resulting from the taking of hallucinogenic drugs should not enjoy the grudging recognition that the law has extended to a similar condition induced by alcohol.

A closer examination of the effect of certain drugs is instructive. In particular I will examine the effects of the hallucinogens. These include L.S.D. and manifest their presence through the creation of mental impressions (hallucinations). Although a person under the influence of L.S.D. may be able to distinguish his visions from reality even when the

visions seem compelling; the user may at times not realise he is under the influence. Thus a person, under the influence of the drug, might walk out a window not realising he was several stories above ground level; or he might believe he was an orange and that anybody touching him would turn him into orange juice.(8)

The taking of the drug can also produce a variety of intense and unusual psychic effects. These range from a loss of time and space perception to panic, severe elation and deep depression. Paranoid delusions about other people trying to kill or harm the subject may occur where there is a loss of insight into the drug induced nature of the reaction(9). Deep feelings of self-loathing with suicidal tendencies or feelings of mystical revelation may develop(10). Researchers have reported severe paranoid reactions and reactions of explosive behaviour. These descriptions are the subjective analysis of the researchers involved, however most researchers agree that a mental disturbance of some kind develops.which is sufficient to negate the knowledge, intention or foresight required for any crime. In contrast to their opinions on the effects of alcohol, the medical profession, scientists and researchers in general, will state categorically that a state of automatism can be and often is the result of the taking of certain drugs.

That it is possible to commit a crime while in this state seems obvious; in Lipman the jury accepted the appellant had killed his girlfriend while experiencing an L.S.D. trip. He had had the illusion of descending to the centre of the earth and being attacked by snakes, with which he had fought.

In summary, it is contended that both the use of alcohol and more especially drugs, can negate the requisite intent and further, can reduce the subject to a state of automatism. Certainly in terms of medical science, an acutely intoxicated offender (whether by alcohol or more especially by drugs) does not possess a mind capable of forming a "general intent" (nor a "specific intent") and many doctors and researchers would further testify that a state of automatism is possible. In Keogh 1964 VR 400, Monahan J recognised that alcohol could cause a state of "automatism", though it must be noted that he considered the importance of the defense of automatism lay in the fact that it negatived a required intent. In Cottle it was recognised that such a state could be caused by drink or drugs but again automatism was said simply to negate a requisite intent and the Judges were concerned in that case to distinguish cases of automatism which are caused by a disease of the mind from others. It is also interesting to note the number of traffic cases in which prescribed drugs taken by, for instance epileptics, have been recognised as resulting in a state of automatism, e.g. Watmore v. Jenkins. There is surely no basis for distinguishing between whether the drug has been legally prescribed and whether it was a prohibited drug like L.S.D. If the former is recognised as resulting in automatism;

there is no reason why the latter cannot merely because its possession is illegal.

Why then is the drunken offender not excused from responsibility? Why is there the compromise between the requirement of criminal law for a responsible or voluntary act and the judgment of society that a wrong-doer not be exonerated simply because he was drunk? This is the subject of the final part of this paper.

4. POLICY CONSIDERATIONS: THE REASONS WHY

Why have the courts adopted "the specific/general intent" dichotomy, instead of the seemingly more logical approach outlined here (logical in its consistency with the principles of the criminal law)? There has certainly been a vague and nebulous approach by the courts in this area; highlighted by various conflicts of opinion and decision. Two further examples will suffice: In Broadhurst 1964 AC 442, the Privy Council stated that the dictum of Lord Birkenhead L.C. in Beard (supra at 502) that "evidence of drunkeness falling short of a proved incapacity in the accused to form the intent necessary to commit the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act" could not be treated as laying down the law upon the burden of proof and it was unwise to use the dictum in a direction to a jury! With respect, it is submitted that the Privy Council's analysis of Lord Birkenhead's judgment correctly states the law. The only presumption as to proof in the criminal law, apart from the special exception of insanity, is that an accused is innocent until proved guilty and the burden of proving each element of the crime beyond a reasonable doubt rests always and at all times on the prosecution: Woolmington 1905 A.C. 462. This does not change because in a particular case the defence is using evidence of intoxication to establish a lack of intent. Undoubtedly for an accused to establish the defence of drunkeness it will be necessary for him to offer some evidence. However to start with a rebuttable presumption that a man intends the natural consequences of his acts presumes the presence of mens rea as soon as the actus reus has been established. Thus the persuasive burden is shifted from the prosecution and a burden is placed on the accused to raise a reasonable doubt as to his lack of intent. This would not only seem to substitute the objective test of civil liability for the subjective criminal test but also reverse the burden of proof as set out in Woolmington.

However with minor exceptions there would seem to be a clear trend in the authorities. Since Beard the development of the defence of drunkeness has proceeded in one direction: backwards. In essence, development has been to limit the availability and scope of the drunkeness defence. Thus the main purpose of the "specific intent"

dichotomy would seem to be to remove the crime of manslaughter from the defence of drunkeness. In Lipman despite S 8/1967 Criminal Justice Act (U.K.) which requires the jury to decide "whether the accused did intend or foresee .... by reference to all the evidence" which must surely include evidence of his drunkeness; the court repeated the assertation that the defence of drunkeness is confined to offences requiring "specific intent" and has no application to manslaughter. Lipman was a case of constructive manslaughter i.e. killing in the course of doing some unlawful act. The accused must have intended to do, or at least knowingly done, the unlawful act which caused the death. The unlawful act here was the assault on the girl but Lipman did not know he was attacking her. On this element of the offence, i.e. intent to do an unlawful act, Lipman should have been able to plead a defence of intoxication successfully. Lipman was charged with unlawful act manslaughter as opposed to negligent manslaughter. It is therefore hard to see why it was "impossible" for evidence of drunkeness to lead to an acquittal given that it is necessary to prove intention in order to establish the commission of the unlawful act. Lipman certainly intended to take the drug but this is not an unlawful act; it is illegal only to possess the drug: Tansley v. Painter and Wenell 1969 Crim L.R. 140, and even if it is; it is very dubious whether there is a sufficient degree of connection between the unlawful act and the death to make the latter a killing by an unlawful act. In effect the judgment seems to assume that Lipman's act was unlawful without covering the possible effects on that part of the case of his intoxication by drugs. A similar conclusion is reached in Bolton v. Crawley 1972 Crim L.R. 221. On a charge of assault occasioning bodily harm, the accused was found guilty despite the trial court's finding that the defendant had taken drugs so as not to be in control of himself; his mind and action had been affected and therefore that court could not be satisfied that he had the required intent. The appeal by the prosecutor was allowed (once again with Widgery C.J. on the Bench) on the basis that the particular offence did not need a specific intent and drugs provided no answer. On the same reasoning, as above this also is surely contrary to the U.K. S.8 1967 Criminal Justice Act and principles of mens rea. The ruling that drugs provide no answer seems to say that evidence of drug taking cannot be considered on a charge under this section. This is contrary to S.8 which requires reference to "all" evidence.

In effect, the development of the defence of drunkeness has consisted of the use of the concept of "specific intent" as a device by which special rules have been created to deal with the intoxicated offender. Certainly there would seem to be little substance to the distinction between "specific" and "general intent"; and analysis in terms of mens rea and actus reus is extremely difficult. In fact it is suggested by this writer that these cases are only understandable if they are viewed as policy decisions. Basically this policy is aimed at limiting as far

as possible, the use of self induced intoxication as a defence. In Lipman the Court appeared to proceed on the assumption that any death in which drink or drugs plays a part must inevitably be manslaughter. The issue raised therefore is whether or not such a policy is defensible. Three broad grounds of justification for such a policy have been argued from time to time.

I In 1843 the Criminal Law Commissioners[12] considered such a policy defensible on the grounds of the possibility of abuse: "the pretence would be constantly resorted to as a cloak for committing the most horrible outrages with impunity; what is worse, the reality would be incurred not only to ensure safety to the most notorious offenders, but for the enabling them to inflict atrocious injuries with the greater confidence .... (with eventually) .... the acquittal of the most heinous criminals."

The fears of the Commissioners are possibly exaggerated. There is little evidence that potential criminals get drunk in order to avoid punishment for their crime. In fact it is suggested that if drink is consumed before committing a crime it is either for the purpose of mustering Dutch courage or merely out of nervousness or habit. Further it is only total drunkeness which will affect guilt; such a state would surely render the crime doubly hard to commit. Finally, the possibility of a potential criminal knowing of this defence is extremely unlikely[13].

Possibly the situation is different when looked at after the crime. The nature of these defences and the tightness of the evidentiary burden which they place on the accused, means they can be abused by unscrupulous defendants, and not many people have scruples when faced with a serious charge.

II A more impressive argument is stated in the Model Penal Code[14]: "Awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence."

Once again the case is stated in eloquent language, but its reasoning must be studied more closely. Certainly it is true that there

is little or no social value involved in becoming grossly intoxicated, however it is a large step from there to the proposition that drinking to excess is conduct sufficiently culpable to justify a criminal conviction. The assumption must be that it is just as wrong to drink to excess as it is to commit a crime. This train of thought, though often advocated, possibly misses the real point. A look at the statistics to see if there is a "potential danger" which counterbalances the "social value" if any, may be more instructive. On first thoughts, one would think that the vast majority of people who get very drunk do not go about killing or raping. However, McGeorge asserts that "not only violence, but a wide range of sexual offences would probably have never occurred had control not been lessened and primitive passions not been unleashed by drink(15)". Among adults of over 25 there is no doubt about the close connection between violent offences and excessive drinking. With a criminal record and especially if he has a sex offence he is almost certain to be an excessive drinker, if not a chronic alcoholic. Among recidivists in prison 1/4 - 1/3 maintain they were the worse for drink when they committed the crime for which they have been convicted(16). The Annual Report of the Police Department N.S.W. shows a positive relationship between alcohol and crime: 37% of all those convicted for serious crimes had a history of heavy drinking. Of those convicted of assault and robbery, 59% were heavy drinkers. Some points must be noted of course; these figures do not state that at the time of the crime the person had been drinking heavily; further it may not be untrue to assert that the majority of offenders are in the lower socio-economic groups and part of the culture of these groups is heavy drinking.

W. C. Sullivan, medical superintendent of Broadmoor Lunatic Asylum, with a wide experience of criminals, is instructive: "There is the history of the common drunken quarrel, ending in manslaughter or wounding. It may also happen in normal drunkeness that after a theft or sexual assault an obscure realisation of the possible consequences leads the criminal to commit murder in an unintelligent effort to escape detection. Homicide related to sexual jealousy is the most common and characteristic form of alcoholic crime with conscious motive."

The above figures and quotes are not only relevant to prove the connection between alcohol and crime but also to provide a sound basis for an offence of "guilty but drunk" (which will be dealt with later in this paper). For the moment it suffices to state that the anaesthetic effect of alcohol provokes much of the irresponsible behaviour and release of repressed resentments which in turn release one, often viciously, from all inhibitions and controls. Thus the widely held view that a man who lets himself get very drunk and then gets into trouble has only himself to blame; may be fairly realistic.

Over and above this, public opinion would not approve of laws which totally excused those who committed crimes while intoxicated. Lipman's application for leave to appeal against sentence was refused on the ground that "the sentence was fully justified to bring home

the grave consequences which may result from the taking of drugs of this kind". This was so even though the House of Lords was presented with a case where confusion of legal principles was rife and a clarification from the highest authority was called for.

The result is a "compromise solution to a mixed problem of social policy, mens rea and responsibility[17]". This compromise is of an interesting nature: the defence is permitted to meet those offences which are the most serious ("specific intent" offences) and excluded in the case of the less serious offences ("general intent" offences). It may be noted that some offences could not be committed while a man was totally drunk. These would include, for instance, bigamy and rape: as D. A. Stroud said in 1920: "In such a mental condition he would be as harmless as a log, and incapable of committing the active crime in question[18]". Stroud would approve the "strict/general intent" dichotomy and consider that "by allowing himself to get drunk and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such lack of regard as amounts to mens rea for the purpose of all ordinary crimes".

Hooker, in a commentary on Lipman[19] considers that "intoxication by drink or drugs which produces behaviour that endangers the lives of others must surely be regarded a s grossly unreasonable conduct and a sufficient ground to support the present conviction". Again, however, a distinction between alcohol and drugs may be valid. While there is ample evidence of a fairly close correlation between heavy drinking and offences, it is very difficult to find documentation of a similar correlation between drug-taking and offences actually committed while high on drugs. Possibly public policy requires that any offences committed, with any connection to drugs, are a sufficient evil to justify the present approach of the Courts in this area. Such offences would include; distribution and selling of drugs, theft and burglary committed in order to obtain supplies and possibly accompanying assaults. I feel also that the approach of the Courts may be influenced by even wider factors: the tragedys which have resulted from addiction, the decrease in physical and mental health associated with drug-taking and the non-utilitarian nature of drug-taking, while a class factor inevitably is present. With a probable future trend whereby already courts will become more and more the reception centre for Welfare Agencies, the present approach of the courts may be, if not legally, at least morally justifiable.

In summary, the rationale is obvious, neither total drunkeness nor trips on drugs are socially acceptable behaviour. This however is a policy reason, and if the courts refuse to consistently apply the principles of Criminal Law to this branch of it, they should unequivocally state the policy reasons for not doing so.

With the present reaction to any form of drug-taking, it is little wonder that Lipman got his six years and this is obviously the clear

policy behind the decision. Little further can be said except that this policy exists; and that it is a strong factor in cases in this area and until society's attitude changes, it can only be hoped the courts will openly come out and recognise it. Possibly Beck and Parker put it most succinctly: "drunkeness is still regarded as voluntarily contracted madness, and therefore in accordance with a moral, though not necessarily rational judgment, it shall not excuse[20]".

III Deterrence is one of the major justifications for punishment in our society. However if a man when drunk commits a crime which he would not have done if sober and which he did not know himself capable of doing when drunk, what is the justification for inflicting punishment? The risk of punishment will certainly not deter people in his situation getting drunk and the fact of punishment will probably not deter the particular offender from getting drunk again. It must be noted that if he did and committed a second offence while in a drunken (or drug-induced) state, he would not be in the same position as he was the first time for he would have had knowledge prior to getting drunk, that he was capable of committing a crime while drunk. This point has been covered earlier in this paper: where the crime is one which can be committed by negligence, the court would examine the preceeding course of conduct before drunkeness resulted. If the accused was negligent in getting drunk, he would be held responsible for his actions: "he culpably created the situation in which his involuntary act occurred[21]".

IV Resocialization

One possible solution to the problem of the drunken offender could be to create a new offence of being "drunk and dangerous"[22] or "drunkeness resulting in harm"[23]. Such an offence would be designed to have a wide flexibility in sentencing power in order to deal with the various types of harm and different circumstances involved in each offence. It would catch both the drink and drug offender and especially with the extremes of each: (the alcoholic and the addict) would provide a very useful function in funnelling them into institutions where they can be treated for their specific problems.

Such an offence has been recognised in Denmark and would allow for the identification and treatment of the habitual drunkard and probably the sexual offender in other than penal institutions. Those who are simply criminals could be treated as such. Those without a criminal record (including no history of previous offences of being "drunk and dangerous") could be placed on probation. For this final category - the problem is vexing. Both in a criminal mental hospital and in prison the environmental condition can only detrimentally affect a "criminal"of this type. He would probably behave in a perfect fashion while there, but would always present the problem: could he, if released, be relied on never to get so drunk again and if not, would there be a chance of,

during another round of drunkeness, him committing another crime. If his personality is not psychopathic or manifestly abnormal, the offender will, within a few hours of his crime, be sober again.

In effect the "drunk and dangerous" offence is not a justification for the present approach of the courts. Rather it is a suggested new approach which would take into account all the policy considerations which the courts refuse to recognise at present, while at the same time providing flexibility, where flexibility is most needed: in sentencing. This is surely in line with the recognition that is slowly entering our criminal justice system: different people commit different crimes for different reasons and require different treatments.

A possible alternative would be the recognition of a defence of intoxication on the same basis as the defence of insanity. Either the accused or the prosecution could raise the issue, a similar burden of proof would apply and the accused who was acquitted on the basis of drunkeness could be treated, where necessary, on the same basis as the accused who is found "Not Guilty, But Insane". This would render unnecessary the legal fiction of "specific/general intent" and it would be possible to incarcerate the accused despite a finding of "Not Guilty". Once a verdict of "Not Guilty But Intoxicated" had been reached, such treatment as may be appropriate could be provided. That the underlying philosophy of such a defence approaches a Social Defence concept is admitted and approved by this writer. Treatment, rather than punishment, should be the basic principle of our criminal justice system. Thus for the problem cases where public policy, notwithstanding the technical requirements of mens rea/actus reus requires that an ordinary acquittal is not satisfactory; this special verdict provides a realistic solution, free from all the "distortion and fictionalization of those general and fundamental principles upon which our basic criminal model is founded[24]".

CONCLUSION

Defences based on non-insane automatism and drunkeness have one feature in common: the courts seem to regard both as the beginnings of slippery slopes and therefore resist them in practice while recognising them in theory. Unless and until the judiciary are prepared to spell out exactly what the policy reasons are behind their decisions in this area of the law; it is suggested that only a consistent application of the basic principles of the Criminal Law will provide a rational approach. Thus the prosecution in any case will have a strong prima facie case from the commission of the act. But there is no logical reason why drunkeness (or a state induced by drugs) should not negate the requisite mens rea or the actus reus. What is required is an analysis of the requisite mental elements of each crime and the application of consistent principles in showing the absence of one or more of these elements. If there is sufficient evidence that the state of drunkeness is incompatible with the

actual crime charged, the accused is entitled to the benefit of any reasonable doubt.

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(1) For a detailed analysis of the history up to Beard, see Singh "History of the Defence of Drunkeness in English Criminal Law" 49 L.Q.R. 528.

(3) It has been suggested that the original use of this term was to refer to the intent when it is specifically referred to in the indictment: Parker and Beck at p. 587.

(4) 1961 Crim L.R. 511

(5) "Criminal Law - The General Part" at p. 572

(6) "Crime and Insanity in the U.K." at p. 165

(6A) Halsbury's Laws of England 3rd ed. 272

(6B) Adams elaborates on this in an article "Voluntariness in Crime" 1972 Otago L.R. 426 at 435 which discusses Kilbride v. Lake. Thus - "there arises a two tiered analysis of the mental elements of an offence with one of them occupying a predominant position, and seemingly governed by principles different from those governing the other." This gave the judgment in that case " a specious appearance of logical validity".
I have stated in my paper that I consider that the two tiered analysis leads to clarity rather than confusion. Further it seems clear to me that the concept of voluntariness is so closely related to the actus reus (i.e. the prohibited conduct in particular and the surrounding relevant circumstances) that the two must be considered together. Possibly the element of voluntariness could be said to be one of the "surrounding relevant principles".

(6C) In Burr 1969 N.Z.L.R. 736, it was accepted that automatism can provide a complete defence (following Bratty 1963 A.C. 386) but the defence failed as at the time of the act, Burr was found to be functioning at some level of consciousness.

(6D) In Terei Moana (Unreported Supreme Court decision in 1962) the defence of automatism was considered to provide a complete defence, even though it was alleged to have resulted from a combination of liquor and a blow to the head in a tractor accident. Possibly without the previous blow to the head, Mr Justice Leicester would have not permitted the defence to go to the jury, and the case cannot be classed as a self-induced drunkeness resulting in automatism case. Certainly J.C. Pike notes, "Moana; remains uncharted on the present judicial rea": p. 416 of 1972 Otago L.R. 408 "The Forgotten Rules in R v. Terei Moana",

(7) At p. 11

(8) Davidson "The Hidden Evils of L.S.D." - Davidson notes these two examples in 1967 in the U.S.A.

(9) Rosenthal "Persistent Hallucinosis Following Repeated Administration of Hallucinatory Drugs" 1964-5 121 Am. J. Psychiatry 238

(11) Cole & Katz: "The Psychotominetic Drugs" 1964 187 A.M.A.J. 758

(12) 7th Rep. Parliamentary Papers XIX 23

(13) J. McGeorge asserts the contrary: "surely it is obvious that they do take advantage of this mitigation either consciously or unconsciously in a very large number of cases, if court records of pleas of drunkeness as an excuse are any criterion".

(14) Tentative Draft No. 9 (1959) Art 2 S2.08.

(15) p. 35

(16) Gribben & Silberman 1970

(17) Beck and Parker p. 607

(18) 1920 36 L.Q.R. 272

(19) 1967 Crim L.R. 549

(20) at p. 580

(21) Elliot 1968 41 A.L.J. 497 at 502

(22) Glenville Williams: "Criminal Law - The General Part" p. 573-4 Note u., Berner U.B.C. L.R. 348, Parker & Beck p. 607

(23) G. A. Ferguson: 1970/1 Ottawa L.R. 388

(24) Berner at p. 751.

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16. "The Forgotten Rules in R v. Terei Moana" - 1972 Otago L.R. 408

17. "The Intoxicated Offender - A Problem of Responsibility" Parker & Beck 44 Can. Bar. Rev. 563

18. "Voluntariness in Crime: A Critical Examination of Kilbride v. Lake" 1972 Otago L.R. 426