Mistake, intoxication, self-defence

Mistake

Introduction

English law divides mistake in criminal law into two parts: mistake of law and mistake of fact. The general rule is that if the accused makes a mistake of law, he is guilty, whereas if he makes a mistake of fact, he is not. Unfortunately the law is more complex than these propositions allow. A preliminary point is that if an accused because of a ‘disease of the mind’ makes a mistake of law, he may have a defence of insanity. This defence is discussed in the next chapter.

Mistake and ignorance of law

In *Esop* (1836) 173 ER 203 the accused was convicted of an offence under English law, buggery; under his personal law no such offence existed. Accordingly, where the accused has the relevant *actus reus* and *mens rea* for the crime, he is guilty even though he did not know that the *actus reus* was forbidden by the criminal law. He was mistaken as to the rules of English law. Moreover, ignorance of the law is no defence: *Bailey* (1800) 168 ER 657. The accused was convicted of a crime which Parliament had created while he was on the high seas, and there was no way of finding out that a law had been enacted. The case has been taken to hold that impossibility is no defence. However, it may be that *Bailey* should be read differently. The case was referred to all the judges. They recommended a pardon. Since at that time a pardon was the sole way of reversing the first instance decision, it may be that they disagreed with the proposition that ignorance of the law was no defence. *Bailey* has nevertheless been treated as deciding that, and the rule has been accepted in, e.g., *Carter v McLaren* (1871) LR 2 Sc & D 120. The rule was stated by the Court of Appeal in *Lightfoot* (1993) 97 Cr App R 24: ‘... Knowledge of the law ... is irrelevant ... The fact that a man does not know what is criminal and what is not ... cannot save him from conviction if what he does, coupled with the state of his mind, satisfies all the elements of the crime of which he is accused.’ An illustration is *Broad* [1997] Crim LR 666 (CA). The defendants were convicted even though they were ignorant of the law. They did not know that what they were making was a controlled drug proscribed by criminal law. Certainly it is not always easy to discover that a Bill has
been enacted or that a statute has come into force. If the accused believes that he is using force to prevent a crime, but there is no such crime, he has made a mistake as to the law and has no defence.

A fairly recent illustration of a mistake of law is *Hipperson v DPP*, unreported, 3 July 1996 (DC). The defendants had used bolt-cutters to break through the perimeter fence of the Atomic Weapons Establishment, Aldermaston, where the UK’s atomic deterrent is produced. They contended that they had a defence to criminal damage in that they were acting to prevent genocide or conspiracy to commit genocide. However, the definition of genocide in the UK is restricted to acting ‘with intent to destroy in whole or in part a national, ethnical, social or religious group as such’, and does not extend, as the defendants submitted, to the destruction in whole or in part of the human race. Therefore, the defendants had made a mistake of law and had no defence.

The rule that ignorance of the law is no defence is supported by the arguments that if it were a defence, the floodgates would open and the courts would be swamped by bogus claims of ignorance, people would not try and find out what the law is; ‘floodgates’ is a weak argument against justice and it would be impossible for the prosecution to show that the accused was truly ignorant of the law. However, it has to be said that no person could know all possible offences, and it may well be unjust to convict a person when only a few people would know of the crime. Judges, lawyers and law students in their professional lives are not expected to know all crimes. Surely ordinary citizens should not be!

There is no defence if the accused consulted a lawyer who stated that their activity was not a crime when it was: *Shaw v DPP* [1962] AC 220 (HL). The defendants wanted to know whether publishing a list of prostitutes and their services, *The Ladies’ Directory*, was lawful. The Lords held they were guilty of conspiracy despite the legal advice that they had been given. *A fortiori* reliance on legal advice from a para-legal provides no answer: *Brockley* [1994] Crim LR 671 (CA). Reliance on local authority or police advice is also no defence: *Cambridgeshire and Isle of Ely CC v Rust* [1972] 2 QB 426. The Divisional Court directed magistrates to convict the accused of the crime of setting up a stall on a highway without lawful excuse, even though he had sought advice and had paid rates on the stall to the local council. It is arguable that mistake of law should be a defence if the accused tried to find out the law or relied on official advice. He attempted to comply with the law, but failed. It is doubtful whether convicting him serves any purpose other than preventing bogus defences, and the triers of fact could do that: finding flimsy defences to be untrue is part of their role. At present reliance on official advice does not exculpate, but only mitigates the sentence, e.g. *Howell v Falmouth Boat Construction Co* [1951] AC 837 (HL), *obiter*, and *Surrey CC v Battersby* [1965] 2 QB 194 (DC). The latter case involved a crime of undertaking childcare without informing the council that the children were to spend more than a month in the house. She had taken advice that she was not guilty of the offence because no one period extended beyond a month because the parents took the children away at certain weekends. She was held to be guilty. Breaks counted only if a fresh arrangement were made after the break. One might have thought that the Divisional Court might have held that penal statutes should be construed in favour of the accused. To grant her an absolute discharge does not resolve the issue. She had acted in good faith; she was a proper person to take care of the children; and she had taken the advice of the council, the same council which prosecuted her, and the council should have known the law it was administering. No advantage was gained from stigmatising the accused as a criminal, and the outcome may be to bring the legal system into disrepute. There has been some indication in the cases that where an accused relies on official advice, it is an abuse of authority for the body which gave the advice to prosecute, and while no
defence is afforded, the criminal proceedings are stayed as being an abuse of process. In one case where the defendants relied on advice from the planning department of a local authority that they did not need planning permission to erect advertising boards but the authority prosecuted them for erecting hoardings, the Divisional Court stayed the proceedings. Trials which are an abuse of process may well breach Article 6 of the European Convention on Human Rights, which concerns the right to a fair trial.

The same rule applies to a reliance on a judicial decision which is later overruled: Younger (1793) 101 ER 253 (by inference). There is also no defence where the accused relies on ultra vires delegated legislation. No doubt with increasing EC legislation and judgments, reliance on UK law which is later found to be in conflict with EC norms will afford no defence. Such people are not at fault. Judges make mistakes of law: why do we have the doctrine of per incuriam, the Court of Appeal and House of Lords and the Practice Statement permitting the House of Lords to overrule its previous authorities? Yet they are not guilty of an offence. In Campbell (1972) 1 CRNS 273 Kearns DCJ thought that the outcome that if citizens relying on judgments make an error they are guilty but judges whose decisions are overturned on appeal are not was ‘amusing’. Surely it cannot really be the law that ordinary people should be expected to know the law better than the judiciary. The heavens will not fall if mistake of law in reliance on official advice is accepted as a defence. South Africa does not have the rule: S v de Blom (1977) 3 SA 513 (A), and Canada has such a defence (MacDougall (1983) 1 CCC (3d) 65 (SCC)), and some US states have such a defence. For example, the New York Penal Code, s 15.20(2), relying on the Model Penal Code, provides a defence. Some states do not give a defence. In the Maryland case of Hopkins v State (1950) 69 A 2d 456 reliance on the State Attorney’s advice was no defence. In summary P. Brett ‘Mistake of law as a criminal defence’ (1966) 5 Melb ULR 179 at 203, wrote:

[i]f we are seeking to achieve respect for law, it is surely unwise to tell citizens that they must disregard the considered advice of the public officials whose duty it is to administer the law and who may therefore be expected to tell citizens in effect that the advice which they received bona fide from qualified lawyers is to be treated as worthless.

Brett called Battersby a ‘glaring injustice’. It is unjust that the state through its courts can disregard the advice of its officials such as the Director of Public Prosecutions and convict defendants of offences on facts which the officials informed them were not offences.

It is not unknown for Parliament to afford a defence to a person who relies on official advice. In the Control of Pollution Act 1974, s 3(4), it is a defence to the offence of unlicensed waste disposal that the accused ‘took care to inform himself from persons who were in a position to provide information’.

There are in fact a few stray cases where mistake of law was a defence. Parliament may give a defence to a person who has made a mistake of law. The obvious illustration is s 2(1)(a) of the Theft Act 1968, which provides that the accused is not dishonest for the purposes of theft if he believes, whether on reasonable grounds or not, that he had a legal right to deprive the victim of his property. If he believes he did but was mistaken, he is not guilty. In Secretary of State for Trade and Industry v Hart [1982] 1 All ER 817, the Divisional Court in relation to an offence under the companies legislation of acting as an auditor, knowing oneself to be disqualified, held that the accused was not guilty because he did not know that he was disqualified. It was not sufficient that he knew the facts which made him disqualified. His ignorance of the law was a defence. He did not have the requisite mens rea. He ought not to have acted as auditor because he was a director of the companies he was auditing. (If he knew he was disqualified but not that acting as an
auditor when disqualified was an offence, he would not have a defence: he would have made a mistake of law.) Present law is stated in Smith [1974] QB 354, where a tenant destroyed property which had become his landlord’s as a result of civil law in the belief that it was still his. The accused did intend to damage property, but he did not intend to damage property belonging to another. Indeed, he intended to damage property belonging to himself. He made a mistake as regards to whom the property belonged. Current law is sometimes stated as a mistake of civil law excuses. Hart could be explained as being a case on mistake of civil law.

One problem with having different effects depending on the type of mistake, civil or criminal, is that it may not be obvious whether the error is as to civil or criminal law, e.g. a mistake as to whether goods are ‘stolen’ for the purposes of handling is a mistake of criminal law. In Grant v Borg [1982] 1 WLR 638 the House of Lords held that an error as to whether leave has been granted to a visitor to remain in the UK was not a defence though ‘leave’ looks very much like a civil law concept. Either the House of Lords themselves made a mistake (and Hart is inconsistent with the decision) or Smith is a questionable decision if it lays down this rule that a mistake of civil law is a defence.

The basic rule that ignorance or mistake of law is no defence was preserved in the draft Criminal Code (Law Com. No. 177, A Criminal Code for England and Wales, 1989), cl 21. Parliament of course retains the power to create exceptions. Also preserved was the present rule that mistake of law provides a defence ‘where it negatives a fault element of the offence’. The Law Commission (para 8.32) rephrases the exception as the accused’s not having the fault element. The Law Commission did not feel able to provide a defence of reliance on official advice or court decision. The draft Criminal Code, cl 46, also restated current law that:

(1) A person is not guilty of an offence consisting of a contravention of a statutory instrument if –
   (a) at the time of his act the instrument has not been issued by Her Majesty’s Stationery Office; and
   (b) by that time reasonable steps have not been taken to bring the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of that person.

The legal burden of proof in relation to (a) would be on the accused: cl 46(2).

**Mistake of fact**

**Introduction**

English law draws a sharp line between mistake of law (guilty) and mistake of fact (usually not guilty), yet the line is not always clear. According to the House of Lords in Brutus v Cozens [1973] AC 854, a case on the meaning of ‘insulting’ within s 5 of the Public Order Act 1936, which has since been repealed, the construction of an ordinary word in a statute is a matter of fact, not of law, though the rule seems to have been honoured in the breach more than in the observance. Two cases which are hard to reconcile are Norton v Knowles [1967] 3 All ER 1061 and Phekoo [1981] 1 WLR 1117, both of which concerned the term ‘residential occupier’. In the former case whether the accused believed his victim to be a residential occupier was an issue of law and therefore he had no defence; in the latter the term was held to be a question of fact and accordingly the accused had a defence where he believed that the victim was a squatter and not a
residential occupier. It is postulated that mistake of fact is a defence because as with some other defences punishing the accused would not deter him. This rationale is said to derive from J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Methuen, 1982, first published 1789) Chapter 13, Section 3, though it can be argued that, while punishing a mistaken person would not deter him, it might deter others.

Logically mistake of fact should negate *mens rea*, i.e. the prosecution has not proved this element. There is nothing special about mistake. In this sense mistake is not a defence. The courts have, however, developed special restrictive rules. Three reasons might be hypothesised to explain this development. First, in the nineteenth century the current theory of subjective *mens rea* had not been formulated; therefore, the courts missed the opportunity of stating that mistake was incompatible with the fault element. Secondly, the judges were anxious not to let off an accused who, though telling the truth, had formed his opinion negligently. Thirdly, judges were worried that juries would accept bogus defences. Accordingly they laid down the rule that mistakes had to be reasonable. More recently the courts have brought mistake generally speaking more in line with *mens rea*. It should be remembered that while the courts have moved away from the requirement that a mistake had to be made on reasonable grounds, Parliament can stipulate that a mistake must be a reasonable one. An example was s 14(3) of the Sexual Offences Act 1956 (defence to a charge of the then existing crime of indecent assault when his marriage to a girl under 16 is invalid ‘if he believes her to be his wife and has reasonable cause for the belief’).

‘Irrelevant mistakes’

Since mistake is intertwined with *mens rea*, if the offence is a strict one, the accused will not have the defence if his mistake is one as to the strict element. In *Prince* (1875) LR 2 CCR 154, s 55 of the Offences Against the Person Act 1861 was at issue: ‘Whosoever shall unlawfully take . . . any unmarried girl, being under the age of 16 years, out of the possession of her father . . .’ shall be guilty of an offence. The accused believed that the girl was over 16. He had no intention of doing what the law forbade. The court held that he was guilty. The abductee was a girl; she was unmarried; she was under 16; she was taken out of the possession of her parents. He knew that she was a girl, that she was unmarried, and that he was taking her out of the possession of her parents. He did not have to know that she was under 16. He was guilty because his mistake was an irrelevant one in that he was mistaken as to her age. Mistake is relevant only where the mistake is as to a *mens rea* element. In *Hibbert* (1869) LR 1 CCR 184 the accused was charged with the same offence. His conviction was quashed. He did not know that the girl had any parents. His mistake was a relevant one, because it related to a *mens rea* element. Before he could be convicted, he had to know that she had parents. He did not know that fact. Therefore, his conviction was quashed. The rule in *Prince* is not affected by developments in the next three sections but, as we have seen in Chapter 4, the doctrine of strict liability is in retreat: the fewer strict offences there are, the less scope there is for ‘irrelevant mistakes’.

**Tolson**

Where there is a relevant mistake, it was stated for many years that the accused did not have a defence unless his mistake was made reasonably. If he made a mistake unreasonably in that he was careless, he had no defence. The principal authority was *Tolson* (1889) 23 QBD 168. The accused did not intend, being married, to marry again as
required by the crime of bigamy, because she thought her husband was dead. The court
gave her the defence of mistake. It argued that when Parliament gave a defence to bigamy
that the spouse has been absent for seven years, it cannot have intended to penalise
someone who believed on grounds other than seven years’ absence that her spouse was
dead. There was nothing in the statute about a defence for a person who believed on
reasonable grounds that her spouse was dead. The reasonable grounds were that she
thought he had been lost at sea.

Several comments may be made.

(a) Mrs Tolson did not intend to marry again; Mr Prince did not intend to elope with or
abduct a girl under 16. She was not guilty; he was guilty. In legal terms she made a
relevant mistake, he made an irrelevant one.

(b) The court decided that a mistaken belief was a defence only if reasonably held.
Stephen J in Tolson had no doubt:

> It may be laid down as a general rule that an alleged offender is deemed to have acted
under that state of facts which he in good faith and on reasonable grounds believed to
exist when he did the act alleged to be an offence. I am unable to suggest any real
exception to this rule, nor has one ever been suggested to me.

Saying that mistake is a defence only if reasonably made is equivalent to saying that
the accused will not have the defence if he was careless. Bray CJ commented on the
Australian law which is the same as Tolson that ‘the criminal law is designed to pun-
ish the vicious, not the stupid or the credulous’ (Brown (1975) 10 SASR 139) and that
the rule was an ‘anomalous and unwarrantable excrescence’ (Brambles Holdings Ltd
v Carey (1976) 15 SASR 270). In this respect the Tolson defence shifts the question
from mens rea to negligence. Bigamy has in this sense become a crime of negligence.
If the view is held that mistake ought to negate mens rea, what Tolson seems to have
done is to mix up evidence and substantive law. A defendant who sets up a defence
of unreasonable belief may well fail to put forward sufficient evidence to raise a
reasonable doubt as to guilt in the minds of the triers of fact; yet even an unreason-
able belief should as a matter of substance avail if the triers of fact accept the
accused’s evidence.

(c) The mistake in Tolson did not relate to a failure by the prosecution to prove an ele-
ment of the offence of bigamy. The accused was given a defence. Her mistake related
to that defence.

Diplock J followed Tolson in Gould [1968] 2 QB 65 where the accused believed that
the first marriage had been dissolved. Only a reasonable mistake would afford a defence.
Similarly, a belief that the first marriage was void exculpates the accused, provided that
his mistake was reasonable: King [1964] 1 QB 285 (CA). On the Tolson approach the
‘being married’ element in bigamy is satisfied by carelessness. If bigamy is viewed as a
serious offence, it is strange that one can commit it carelessly. The most important case
in this area is DPP v Morgan.

DPP v Morgan [1976] AC 182

One of the accused, a sergeant in the RAF, invited three men to have sexual intercourse with
his wife. He told them that if she resisted or screamed, she was merely enjoying the sexual
act. The men had intercourse with her by force. In fact she did not consent. The men were
charged with rape as it was then defined. By a majority of three to two the House of Lords
ruled that the men had a defence if they (honestly) believed that the woman was consenting. Their mistaken belief did not have to be reasonably held. (In fact the House of Lords determined that no reasonable jury would believe their story, and accordingly there was no miscarriage of justice. This procedure is called ‘applying the proviso’: on the law the men would not have been guilty had their evidence been believed, but it was not. By their verdict the jury believed the appellants’ evidence to be ‘a pack of lies’ and that there was ‘a multiple rape’, not ‘a sexual orgy’ as Lord Cross put it.)

The House of Lords did not overrule Tolson. No good reason for retaining Tolson was provided by the majority. The House also had the opportunity to overrule Tolson in B v DPP [2000] 2 AC 428 but it did not take it. However, Lord Nicholls criticised the requirement of reasonableness found in Tolson. ‘Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind. . . . To the extent that an overriding objective limit (‘on reasonable grounds’) is introduced, the subjective element is displaced.’ It could be that the element of the crime of bigamy, ‘being married’, has the mens rea of negligence attached to it. That is, if a person has the mental element of negligence as to the actus reus of being married, this element of the offence is satisfied. Since an unreasonable mistake demonstrates negligence, only a reasonable mistake will lead to an acquittal.

There are several ways of reconciling Morgan with Tolson.

(a) Tolson applies to statutory offences, Morgan to common law ones. This argument will not wash. Morgan has been applied to statutory offences and was itself put into statutory form for rape in the Sexual Offences (Amendment) Act 1976 which, however, was repealed by the Sexual Offences Act 2003. That statute provides for a test of belief in consent based on reasonable grounds.

(b) There may be a distinction between the mistake in Tolson which related to a defence and that in Morgan which related to the failure by the prosecution to prove part of the offence (or would have done so, had the men’s evidence been believed). However, the line between offence and defence is hard if not impossible to draw, as can be argued from the discussion in Chapter 1 about the third exception to Woolmington. Parliament could easily have created a defence to bigamy of belief in the spouse’s death but formulated as part of the offence: ‘anyone without belief in the spouse’s death who was married marries again . . .’. It should, however, be recalled that mistake in duress and duress of circumstances must be reasonably made. Is the mistake as to the unlawfulness of the act or is it one as to the defence? If one believes one is being subjected to duress when one is not, is one acting lawfully because one does not have the mens rea of the offence charged or does one have a defence? If the former, according to the distinction the mistake would exculpate, but under present law it does not because a reasonable mistake is needed.

(c) There is something peculiar about the layout of the offence of bigamy. The relevant section, the Offences Against the Person Act 1861, s 57, stipulates an offence followed by provisos. There is no such distinctiveness about the offence of rape. Lord Hailsham seemed to hint at this distinction when he held that Tolson was a narrow decision based on the interpretation of the statute.

(d) The House of Lords in Morgan said that it did not intend to upset the bigamy cases. Therefore, different rules apply to different offences. Obviously consistency was not
seen as a virtue. However, in recent years the House of Lords has consistently taken a subjective view: *B v DPP* [2000] AC 428, *K* [2002] 1 AC 462 and *G* [2004] 1 AC 1034. It may nowadays be that *Tolson* would not survive challenge in the Lords.

(e) Lord Cross in *Morgan* apparently took the view that *Morgan* was confined to rape, but the others did not. Lord Cross did, however, draw another distinction: one between offences such as rape where the defining words expressly or impliedly provide that the accused is not guilty if he believes something to be true and ones such as bigamy where the definition is on its face one giving rise to strict liability.

(f) *Tolson* may apply beyond bigamy, but only to crimes of negligence. There may be other offences and defences of which this can be said. In relation to self-defence, e.g., take the situation of *Pagett* (1983) 76 Cr App R 279, discussed in Chapter 2. If the police had time to check what the victim was doing, surely only a reasonable mistake as to that conduct should exculpate: it is not far fetched to expect the police to check before shooting, provided that there is no danger to themselves or others.

(g) In situations involving the prevention of crime, there must, of course, be a crime to prevent. In *Baker* (CA), above, Brooke LJ, adopting counsel’s argument, said: ‘If a defendant honestly believes that somebody is eating fish and chips and that eating fish and chips is a crime, the law will not permit him to rely on s 3 [of the Criminal Law Act 1967] as a defence to a charge of assaulting the person eating fish and chips because as a matter of law no crime . . . is committed.’ In other words, a mistake of law is no defence.

It was argued that the law in *Morgan* was unsatisfactory in relation to rape: the accused could easily have checked whether the victim was consenting. His carelessness should not exonerate him. Parliament took this view in the Sexual Offences Act 2003. The principle in *Morgan* was abrogated for sex crimes but it still remains authoritative elsewhere.

**‘The retreat from Morgan’ and the ascendency of Morgan**

For some time it was thought that the Court of Appeal was restricting *Morgan* to rape. In *Barrett* (1981) 72 Cr App R 212 the defendants thought that the court order which sent in the bailiffs had been obtained by fraud, and they used force to repel them. The court held that a mistake of civil law availed only if it was based on reasonable grounds. In *Phekoo* [1981] 1 WLR 1117 it was said, *obiter*, that a mistake that a residential occupier was a squatter provided a defence only when it was reasonably made. *Barrett* could be justified as being a case not concerned with mistake of fact. However that may be, *Morgan* came to prevail.

It came to prevail because of what Lord Hailsham in *Morgan* called ‘inexorable logic’.

Once one has accepted . . . that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems . . . to follow as a matter of inexorable logic that there is no room either for a ‘defence’ of honest belief or mistake or a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent or it does not. In the former case it succeeds, and in the latter it fails.

The Court of Appeal ruled in *Kimber* [1983] 1 WLR 1118 on the then existing crime of indecent assault that *Morgan* was not restricted to rape and that *dicta* to that effect in *Phekoo* were wrong. The accused was charged with indecent assault after he had sexually
interfered with a mental patient. The court held that a mistaken belief that the woman was consenting was a defence, whether or not the mistake was based on reasonable grounds. It is now accepted that Morgan applies to all offences of subjective mens rea. The law is the same in Canada: Pappajohn v R (1980) 111 DLR (3d) 1. It may be that Tolson is restricted to bigamy.

Morgan is also applied to some defences. In Williams [1987] 3 All ER 411 the accused believed that a person was being attacked by X. In fact X was arresting him lawfully. It was said by the Court of Appeal that the accused was to be judged on the facts as he believed them to be. He believed that an assault was taking place. Therefore, he was not guilty of assault occasioning actual bodily harm on X when he attacked X. The accused did not intend to use unlawful force. He intended to use lawful force; that is, force to prevent a crime or in self-defence. His mistake negated his mens rea. Williams is thus an application of Morgan. (The conviction was overturned because the trial judge had misdirected the jury as to the burden of proof, so the above was obiter.) The court stressed that it was not dealing with any mental element necessary for a defence and the case could be distinguished on this basis. Williams was approved by the Privy Council in the following case.

Beckford v R [1988] AC 130

The accused, an armed police officer, was investigating a report that an armed man was terrorising his family. In fact the man was unarmed. The accused alleged that the man had been shooting and was killed when fire was returned. It was held that he had the defence of self-defence on the facts which he mistakenly thought existed.

The question to be asked in a case of mistaken self-defence is whether the accused’s response was commensurate with the degree of risk which he believed to have been created by the attack under which he believed himself to be: Oatridge (1992) 94 Cr App R 367 (CA). The development of the law that in general both offences and defences require only an honest belief was approved by the House of Lords in B v DPP [2000] 2 AC 428. Lord Nicholls said:

By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit (‘on reasonable grounds’) is introduced, the subjective element is displaced. To that extent a person who lacks the necessary intent or belief may nevertheless commit the offence. When that occurs the defendant’s ‘fault’ lies exclusively in falling short of an objective standard. His crime lies in his negligence. A statute may so provide expressly or by necessary implication. But this can have no place in a common law principle, of general application, which is concerned with the need for a mental element as an essential ingredient of a criminal offence.

B v DPP was followed by the House of Lords in K [2002] 1 AC 462. A mistake as to the victim’s age in the then existing crime of indecent assault was a defence if the error was honestly made. The belief need not be on reasonable grounds.

The law is different in duress and presumably duress of circumstances. The accused must believe on reasonable grounds that he is under a threat. The line sometimes drawn between Williams and Graham [1982] 1 WLR 294 is that in the former case the mistake negated the mental element in respect of an element of the actus reus whereas in the latter the mistake related to a true defence, a concept separate from actus reus and mens rea. It is uncertain whether this distinction is the law. Certainly the mistake in duress
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does not negate the *mens rea*. A suggested reconciliation is that in respect of justificatory defences, such as prevention of crime, any mistake exculpates, but a reasonable mistake is needed in respect of excuses such as duress. Besides the line being difficult to draw it is hard to discern any reason for the distinction. Although the law is that outside bigamy and some defences a mistake, reasonable or not, as to a relevant element of an offence or defence grants a defence, the courts do not always apply the law correctly. In *Brown* (1985) 80 Cr App R 36 the court required reasonable grounds for a belief that a woman was not a common prostitute on a charge of attempting to procure a woman to become a common prostitute. Lord Nicholls in *B v DPP* did not advert to duress when he dealt with the common law presumption that an honest mistake exculpates. Lord Steyn spoke of the ‘disharmony’ which would occur if in respect of some offences only a reasonable mistake exculpated but again he made no attempt to overrule inconsistent authorities. *Tolson* is one of those authorities.

The rule in *Morgan* does not affect offences where Parliament provides a defence only where a mistake was reasonable. In relation to rape the Sexual Offences Act 2003 reversed *Morgan*: a defence is now available only if the accused believed on reasonable grounds that the victim consented. Similarly *Morgan* does not affect the defences of duress by threats and duress of circumstances where the accused had to believe something on reasonable grounds (e.g. the existence of serious threats). This rule was indeed laid down after *Morgan*. There seems to be no justification for treating duress and self-defence differently.

Mistake and crimes of recklessness and negligence

A person who makes an unreasonable mistake behaves negligently. Therefore he can be convicted of an offence of negligence. Only a defence based on reasonable grounds would exculpate. Crimes of *Cunningham* recklessness are treated under the principle in *Morgan*.

Intoxication and mistake

This topic is dealt with in the section on intoxication.

(a) Evidence of drunkenness to support a mistaken belief in the woman’s consent to sexual intercourse was not admitted in *Woods* (1982) 74 Cr App R 312. Intoxication does not explain a mistake as to consent. Clause 88 of the draft Criminal Code, 1989, accepts the principle of *Woods* in sexual offences. However, for other offences evidence of intoxication causing a mistake will be admitted when intoxication is a defence to the crime charged.

(b) In *Fotheringham* (1988) 88 Cr App R 206 (CA), drunken sexual intercourse with a 14-year-old babysitter in the matrimonial bed in the mistaken belief that it was his wife did not give rise to a defence. A drunken mistake as to identity was irrelevant.

(c) Generally speaking a mistake brought about by drunkenness is no defence.

*O’Grady* [1987] QB 995 (CA)

The accused drank eight flagons of cider. He then killed his friend. He argued that if he had not killed his friend he would have been killed by him. The court held, seemingly by way of *dictum*, that where the defendant was mistaken in his belief that any force, or the force he used, was necessary, but that the mistake was caused by voluntary drunkenness, the defence failed. It did not matter whether the offence was one of basic or specific intent.
There was no drunkenness in Williams, above, so that case could be distinguished. Lord Lane CJ, who gave judgment in both authorities, said that the court was faced with two competing principles. The first was that the accused had acted only according to what he believed was necessary to protect himself. The second was that the victim was killed through the accused’s drunken mistake and the public had to be protected. ‘Reason recoils from the conclusion that in such circumstances a defendant is entitled to leave the court without a stain on his character.’

O’Grady was followed in O’Connor [1991] Crim LR 135 (CA). The accused had been drinking heavily. He got into an argument with the victim, whom he head-butted three times. It was held that where the defendant, due to self-induced intoxication, formed a mistaken belief that he was acting in self-defence, that plea failed. The trial judge was correct in not directing the jury how drunkenness affected self-defence. In O’Connor the court assumed that O’Grady was binding, but in fact the accused in O’Grady was convicted of manslaughter. Anything that court said about murder was obiter.

O’Grady is open to criticism. It creates an exception to the rule in Williams that a person has the defence of self-defence if he makes a mistake of fact. There is nothing in Williams to suggest that the court intended such an exception. One result of O’Grady is that if the accused is so drunk that he does not have the fault element, he will be acquitted of murder; however, if the accused was drunk and believed that the victim was attacking him, he cannot rely on self-defence. O’Grady is out of line with cases which give a defence to drunkenness for offences of specific intent.

The Law Commission, Report No. 177, A Criminal Code for England and Wales, 1989, recommended in para 8.42 that the O’Grady principle should be abolished because it was ‘unthinkable to convict of murder a person who thought for whatever reason that he was acting to save his life and would have been acting reasonably if he had been right’. In the proposals drunkenness would be taken into account to determine whether the accused believed in the existence of exempting conditions such as self-defence. Another possibility suggested by J.C. Smith in [1994] CLP 101 is to convict the accused of gross negligence manslaughter.

Summary of the law of mistake of fact

If the accused makes a mistake of fact as to an element of the actus reus, the mistake is irrelevant if the offence is one of strict liability (Prince); if the offence is one of mens rea, the accused has a defence if he made the mistake honestly (Morgan), unless the offence is one of bigamy in which event the mistake must have been made on reasonable grounds (Tolson). Parliament can change any of these rules as it did in the Sexual Offences Act 2003.

Reform

The draft Criminal Code did not create a clause dealing with mistake of fact. The team of academics which drafted the precursor to the draft Criminal Code did provide a clause that ‘ignorance or mistake . . . of fact . . . may negative a fault element of an offence’. In a footnote to para 8.32 the Law Commission commented:

The real point of this statement was that even a mistake for which there are no reasonable grounds may be the reason why a person lacks the fault required for an offence. That this has not always been obvious is apparent from modern decisions in which it has had to be
pointed out that if, to constitute an offence, a person’s conduct must be intentional with respect to a given circumstance, it is inconsistent to demand that, to exclude liability, a mistake with respect to the circumstance must be based on reasonable grounds.

By cl 41(1), ‘unless otherwise provided, a person who acts in the belief that a circumstance exists has any defence that he would have if the circumstance existed’. There is no requirement of reasonableness, though the absence of reasonableness is a matter of evidence towards showing that the accused did not have the belief. Therefore, if enacted this clause would change the law relating to mistakes and some defences such as duress.

If the Law Commission’s recommendations are implemented, the law will be that there will be no ‘defence of mistake’, the logic being that mistake is simply a failure by the prosecution to prove intention, knowledge, or recklessness. J. M. Williams wrote ‘Mistake of fact: The legacy of Pappajohn v The Queen’ (1985) 63 CBR 597 at 604–605 (footnote and emphasis omitted):

Mistake of fact is not a ‘defence’ in the same sense that provocation, self-defence, duress, and necessity are defences. These latter defences justify or excuse, either partially or totally what would otherwise be criminal conduct. A mistake of fact which negates the mens rea renders the committed act innocent and thus there never arises any question of exonerating criminal conduct.

Mistake explains why the accused lacked mens rea. Clause 41 would override the present anomaly that a reasonable belief is needed in duress, but (only) an honest one in self-defence. That the present law’s distinction is indefensible was well demonstrated by Professor D. W. Elliott ‘Necessity, duress and self-defence’ [1989] Crim LR 611. If a motorist drove his car at X in self-defence, he would have the defence of self-defence, if he unreasonably made an error that X was attacking him when X was not. However, if he unreasonably believed that X was attacking him when X was not, he cannot rely on the defence of duress of circumstances.

The reader is invited to speculate why the courts in Tolson, Prince and Morgan came to three different conclusions when they were faced by three crimes falling within the broad field of sexual offences.

Reform of mistake in rape

The Law Commission in its Policy Paper, Consent in Sex Offences, 2000, examined the arguments in favour of introducing the requirement of reasonable belief in the victim’s consent. In favour of revising the law were the following:

(a) ‘Belief in consent is an easy defence to raise but hard to disprove.’

(b) ‘It encourages defences to run which pander to outmoded and offensive assumptions about the nature of sexual relationships. The more stupid and sexist the man and his attitudes, the better chance he has of being acquitted on this basis.’

(c) ‘The damage is done to the woman [sic] by the act of rape. She is entitled to expect the protection of the criminal law where, on any view, the man has acted on an unreasonably held assumption about her consent.’

(d) ‘The mistaken belief arises in a situation where the price of the man’s (gross) neglect is very high, and paid by the woman, whereas the cost to him in time and effort of informing himself of the position is minimal by comparison.’

CHAPTER 8 MISTAKE, INTOXICATION, SELF-DEFENCE

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In favour of the subjective test are these arguments:

(a) ‘A person should not be guilty of a serious sexual offence . . . on the basis of negligence.’

(b) ‘The burden is on those who argue for a change . . . to demonstrate that persons are being inappropriately acquitted . . . No such evidence has been produced.’

(c) Whose reasonableness would apply? Would it be that of the accused, that of the jury, that of the hypothetical reasonable person?

(d) Juries can sort out fact from fiction.

(e) It would be rare for an accused to contend that he has a belief for which he had no reasonable grounds.

(f) The introduction of reasonableness might make juries convict of rape even less than they do now.

The Law Commission thought that the subjective approach should be retained. However, the accused would have no defence if he was intoxicated and in assessing whether the accused believed the victim did consent, the jury should take into account whether he availed himself of the opportunity to ascertain whether the victim was consenting or not.

The government refused to accept the Commission’s recommendations and in the Sexual Offences Act 2003 only a reasonable mistake provides a defence. The result is, in the Law Commission’s words, ‘a person [is now] guilty of a serious sexual offence . . . on the basis of negligence.’

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**Intoxication**

**Introduction**

We confess that the doctrine touching cases of this character is not placed upon the clearest ground in the books (Bishop’s Criminal Law, Vol 1, 9th edn (Little, Brown & Co, 1923) para 320).

This section discusses intoxication as a defence, not as an offence. It concentrates on situations where the accused did the prohibited act, does not have the required mental element, but is responsible for the fact that he does not possess it because of his self-induced intoxication. Drunkenness was a crime punishable by imprisonment in the stocks or a fine from 1607 (4 James 1, c 5) to 1828 (9 Geo 4, c 61, s 35) but the law seems not to have been enforced. There is now no offence of (simple) drunkenness, but some instances are punished, e.g. being drunk and disorderly and drink-driving. The connection between intoxication and criminality is not a causal one: being drunk does not mean that the accused will necessarily commit an offence. Some drugs such as alcohol do, however, release inhibitions, and many who commit crimes have taken drugs, whether dangerous ones or ones not classified in law as being dangerous, e.g. alcohol. It is thought that the majority of non-fatal offences are committed when the accused was drunk. The then Home Secretary, Jack Straw, was reported in The Guardian, 18 July 2000, as saying: ‘Some 40% of violent crimes are committed when the offender is under the influence of alcohol, as are 78% of assaults and 88% of criminal damage incidents.’ Over 50% of rapists are intoxicated, according to the website of Alcohol Concern,
www.alcoholconcern.org.uk. Intoxication is considered here as a defence whether com-
plete or in part, but it should be noted that intoxication sometimes makes the crime
more serious than it otherwise would have been, as in drink-driving.

**Involuntary intoxication**

This section is largely restricted to voluntary intoxication. Where drunkenness was
caused by a medically prescribed drug, the accused’s mistaking an intoxicant for a non-
intoxicant (such as thinking a recreational drug is a paracetamol), someone spiking the
accused’s drink (by, for example, putting LSD or Rohypnol into the accused’s vodka),
forcing him to drink alcohol, or perhaps an adult deceiving a young person into taking
alcohol, the question whether the accused will be convicted of an offence was thought
to depend on his state of mind. Authorities are rare but include *Pearson* (1835) 168 ER
131. The sole modern authority is the controversial one of *Kingston* [1995] 2 AC 355. A
man enticed a 15-year-old boy to his flat and gave him some soporific drugs. The boy fell
asleep. In order to blackmail him the man invited the appellant to his flat. He apparently
also drugged him. The appellant sexually abused the boy. The man photographed and
taped him so doing. The appellant admitted that he was a homosexual paedophile. The
trial judge directed the jury that if the accused was so drugged that he did not intend to
commit the crime, he was not guilty but if he did despite the drugs intend to commit it,
he was guilty because a drugged intent is nevertheless an intent. The jury convicted but
the conviction was quashed. The Court of Appeal held that if alcohol or drugs were sur-
reptitiously given to the accused, he was not guilty if because of his intoxication he forms
an intention which he would not have formed had he been sober. ‘The intent itself arose
out of circumstances for which he bears no blame.’ Therefore, he was acquitted even
though he had the *mens rea* of the crime. He was morally blameless. *Kingston* in the
Court of Appeal was strongly criticised. The accused did intend to commit indecent
assault. He had the *mens rea*. Accordingly, he should have been convicted. The fact that
he could not resist his impulse is irrelevant (as in insanity), as is the fact that someone
made him intoxicated. Contrary to the court’s view his involuntary intoxication did not
negate his *mens rea*. Certainly he was not responsible for getting into a drugged state, but
he may be responsible for what he does in that state. If *Kingston* (CA) had been correct
it would presumably apply where a rogue has forced alcohol down the accused’s throat
or threatened him or another with violence if he did not drink it, and perhaps when the
accused has taken drugs by mistake. For an attempt to support *Kingston* (CA) if the
accused was not a practising paedophile, see G. R. Sullivan ‘Involuntary intoxication and
beyond’ [1994] Crim LR 272, who argues that: ‘It is not a fair test of character to remove
surreptitiously a person’s inhibitions and confront him with a temptation he ordinarily
seeks to avoid.’

On appeal [1995] 2 AC 355 Lord Mustill, with whom the other Lords agreed, said that
there was no principle in English law, as the Court of Appeal thought there was, that if
no blame was attached to the accused, he did not have the *mens rea* and therefore was
not guilty of any offence. Moral judgments do not affect the criminality of the act
though they may affect the sentence. ‘Rea’ means criminally, not morally, wrong. Blame
related to sentence, not to substantive law. It was no defence to argue that he would not
have done what he did had he been sober, except for insanity where the accused did
intend to commit the offence. Lord Mustill approved the views of academic commenta-
tors in relation to the Court of Appeal’s ruling. If the defence existed on these facts, bogus
claims as to involuntary intoxication might succeed. Whether the intoxication was
voluntary or involuntary, ‘a drunken intent is still an intent’, as was stated in Sheehan [1975] 1 WLR 739 (CA). While the House of Lords was not bound by any authority, it considered that when the accused was so involuntarily intoxicated that he did not form an intent, there is a defence. However, in terms of principle there was no defence of irresistible impulse deriving from innate causes (an example might be kleptomania), and therefore there should be no defence for irresistible impulse arising from a mixture of innate forces and ‘external disinhibition’. Accordingly, the appeal was allowed. It should be noted that the distinction between basic and specific intent offences does not apply to involuntary intoxication. In criticism of Kingston (HL) it can be said that excuse defences are not all predicated on the absence of mens rea.

Intoxication is not involuntary when the accused did not know that the wine drunk was of high alcohol content: Allen [1988] Crim LR 698 (CA). The outcome may be explained by saying that the effects of alcohol are in any case unpredictable. It is interesting to compare Allen with the law stated under preliminary point (e) below. Failure to foresee the consequences of wine led to guilt; failure to foresee the consequences of drugs led to acquittal! The law may be different where the accused thought that the wine was non-alcoholic, rather than low in alcohol. In Shippam [1971] Crim LR 434, it was held that spiking of drinks was a special reason not to disqualify a person for driving with a blood alcohol level above the prescribed limit, but the argument that he should not have been guilty at all does not appear to have been put. The successful argument in Shippam seems to have been that the accused was driving voluntarily. His involuntary drunkenness was irrelevant to that fact. It is uncertain whether intoxication is involuntary where the accused has a medical condition which he does not know about which predisposes him to becoming intoxicated more quickly than he otherwise would.

Drunkenness which is self-induced is also not a defence where the accused did possess the relevant mens rea. If a drunken person forms an intention to kill and does kill, he will be convicted of murder. If the accused killed his wife in a fit of temper, alcohol may explain why he was easily provoked. His inhibitions have been removed but the relaxation of inhibitions is not a defence. He is guilty of murder. Similarly, the fact that the accused would not have acted in the way that he did if he had not been drunk is no defence. The contrasting situation is where the accused while drunk stumbles against his wife, knocking her under a train. Drunkenness is relevant because he is claiming that he did not form malice aforethought. Intoxication is not a defence when the accused says that he did not foresee the consequence of his behaviour because of his intoxication.

**Preliminary points**

(a) The accused does not have this defence if he gets drunk to give himself Dutch courage. In Attorney-General for Northern Ireland v Gallagher [1963] AC 349 the accused formed the intent to kill his wife, drank most of a bottle of whiskey, and killed her. (See also Chapter 3 on contemporaneity.) He could not use drunkenness as a defence and was guilty of murder.

(b) Drunkenness must be ‘very extreme’ for the defence to apply: Stubbs (1989) 88 Cr App R 53. The Court of Appeal of New Zealand in Kamipeli [1975] 2 NZLR 610 seems to have approved the trial judge’s direction that the accused must be ‘blind drunk’, though as that court held the prosecution need not go so far as to prove that the accused was ‘acting as a sort of automaton without his mind functioning’. (If the evidence is not such that the accused’s mind was not working because of alcohol,
it may still be that the prosecution cannot prove that he intended to commit the
offence.) The Supreme Court of Canada in *Daviault v R* (1995) 118 DLR (4th) 469
said that the accused had to be ‘in such an extreme degree of intoxication that [he]
was in a state akin to automatism or insanity’. Only rarely will a person be in such
a condition. The court was relying on the judgment of Wilson J in *Bernard* [1988] 2
SCR 833. Accordingly, it is not enough to demonstrate that the accused has been
drinking heavily for the effect of alcohol varies from person to person: *Broadhurst v R*
[1964] AC 441. For example, in *Groark* [1999] Crim LR 669 the accused had drunk
10 pints of beer but was not drunk. English cases are to the effect that the accused
must be so intoxicated that he did not form the requisite intent as laid down by the
definition of the offence: see, e.g., *McKnight*, *The Times*, 5 May 2000 (CA), relying on
the advice of Lord Hope in *Sooklal v State of Trinidad and Tobago* [1999] 1 WLR
2011 (PC). In *McKnight* the accused said that while she was drunk, she was not
‘legless’. She gave a complete account of the incident in which she had killed the
victim. The Court of Appeal held that her perceptions had not been altered by the
alcohol and therefore she had no defence to a charge of murder. The trial judge was
correct in not leaving the defence of intoxication to the jury. There is no need for
the accused to be so drunk as to be almost unconscious: *Brown* [1998] Crim LR 485
(CA). Lord Denning in *Gallagher* said that the accused must be ‘rendered so stupid
by drinking that he does not know what he is doing . . . as where . . . a drunken man
thought his friend was a theatrical dummy and stabbed him to death’. As we shall
see, even if the accused is so drunk, he does not have a defence to all offences but
only specific intent ones. In fact the amount of intoxication needed to afford a
defence does not seem to have caused difficulties: Law Reform Commission of

(c) If the accused’s acts look involuntary, the defence is one of intoxication, not automat-
ism, if the involuntariness was due to drunkenness. In legal terms the accused is acting
voluntarily, and is so doing even though the imbibing and the deed are separated in
time. However, if the intoxication is such that it falls within the *M’Naghten* rules,
the defence is insanity, not intoxication. Since alcohol and other drugs are ‘external’
causes only rarely will intoxication amount to insanity. Delirium tremens (‘DTs’) is
an example of a disease of the mind within *M’Naghten*. Normally even though the
intoxication causes delusions there will not be a disease of the mind. In automatism
and insanity basically the accused could not avoid the condition; in drunkenness he
could. For the law on insanity, see Chapter 9. One issue which has arisen dealing
with the borderline between insanity and intoxication is the following. A person is
not insane if he cannot resist an impulse. If his irresolution in the face of an impulse
is exacerbated by alcohol, he still cannot have the defence of insanity: *Gallagher*.

(d) The burden of proof is on the prosecution. *Dicta* to the contrary in *DPP v Beard*
[1920] AC 479 are wrong: *Sheehan*. The Privy Council in *Broadhurst* accepted that
*Woolminton v DPP* [1935] AC 462 had altered the burden of proof.

(e) The rules on intoxication as a defence apply to both alcohol and those drugs which
are liable to make the user aggressive, dangerous or unpredictable. The definition of
‘intoxicant’ has not been a problem for the courts. Sedative drugs, however, such as
valium are not to be classed with alcohol, according to *Bailey* [1983] 2 All ER 503 (see
under automatism) and *Hardie* [1984] 3 All ER 848 (CA). In *Hardie* the accused was
charged with damaging property with intent to endanger life or being reckless as to
whether life would be endangered. He had taken valium (it had not been prescribed
for him) and set fire to a bedroom. It was held that the effect of sedative drugs was not the same as intoxicating drugs or alcohol, which can produce aggression and unpredictable behaviour. Therefore, the accused is not (subjectively) reckless in taking his tablets, if the accused does not appreciate the risk of volatile behaviour. It may not be easy to decide which drugs have these dangerous effects and which do not. Presumably drugs like cocaine and LSD would be classified as dangerous ones; heroin, which is an opiate, should for that reason be categorised with valium, but it is doubtful whether a court would so hold. The court did, however, say that he would nevertheless be guilty of reckless driving. If so, he would nowadays be guilty of dangerous driving. Presumably the argument is that he should not take any drug not knowing of the consequences of so doing. If, however, he does realise that he might act aggressively, unpredictably or uncontrollably, his behaviour is reckless and he is liable for any crime of recklessness which he commits under the influence of the drug. He need not foresee the actual occurrence of any specific risk. These rules apply whether or not these drugs were medically prescribed. The line between drugs which sedate and drugs which cause aggression is not necessarily a clear-cut one. Indeed valium causes aggressive behaviour in some people. It is strange that the determination whether each drug is dangerous or not is left to the judge.

(f) Presumably the accused would have a defence if the alcohol were prescribed by a doctor. Alcohol given to a person after an accident would, it is thought, be treated similarly.

(g) Loss of memory caused by drunkenness does not excuse the accused's behaviour if he did what he did intentionally: *R v C* [1992] Crim LR 642 (CA).

The defence of intoxication is confused (Fig. 8.1). There is no easy way of stating the law. One reason for this mess is that drunkenness provides an arena for two conflicting principles. The first is the need to punish people who have acted wrongly. The second is that an accused who is intoxicated may not realise what he is doing and is not therefore deserving of punishment.
The special rules on intoxication

The law is that if the jury accepts the evidence of intoxication, the accused will not be convicted if the crime is one of ‘specific intent’, but will if the offence is one of ‘basic intent’. For example, on a murder charge, murder being classified as a crime of specific intent, the accused’s intoxication is relevant on the question whether he had malice aforethought. In other words, intention and intoxication are put together in a specific intent case. Where the accused is charged with murder and the accused either had direct intent or he did not, intoxication is taken into account at the point of determining whether he intended to kill or commit GBH. In an oblique intent case of murder, ‘drink is relevant to the question whether the defendant appreciated that his actions were virtually certain to result in death or really serious bodily harm’ (Hayes [2002] EWCA Crim 1945). Contrary to what was thought at the time of Beard – and contrary to what is still sometimes said by the Court of Appeal (see McKnight, above) – one does not inquire whether the accused was capable of forming the specific intent but whether he did actually have the intent: Sheehan and other cases including O’Connor [1991] Crim LR 135 (CA), Horton, unreported, 20 January 1992, Cole [1993] Crim LR 301 (CA), Hawkins [1993] Crim LR 888 and Bowden [1993] Crim LR 380 (CA). The law is the same in Australia: O’Connor (1980) 54 ALJR 349 (HCA). If the accused did have the necessary fault element, he is guilty whether or not he was intoxicated. One looks at the accused’s mind, not at what a reasonable person might have thought. The term ‘basic intent’ covers all offences to which intoxication is not a defence including those which can be committed recklessly or negligently. If the crime is a basic intent one, the accused is convicted even though he did not know what he was doing. He is guilty even though he did not intend or advert to the consequences of his behaviour. The difficulty is to distinguish between basic and specific intent offences. As Lord Mustill said in Kingston, above: ‘this area of law is controversial, as regards the content of the rules, their intellectual foundations, and their capacity to furnish a practical and just solution’.

The law was first authoritatively declared in DPP v Beard [1920] AC 479. Before 1957 there was a rule that a killing in the course of a felony was murder. This rule was called constructive murder or the felony/murder rule. Rape was a felony. The accused was committing a rape on a girl. He pressed his thumbs on her neck and killed her. Because of the doctrine of constructive murder, he was guilty of murder if the prosecution could show that he intended to rape and did kill. There was no need as nowadays to show that he intended to kill or commit grievous bodily harm. Lord Birkenhead stated that in those circumstances the accused had no defence unless he was so drunk as to be incapable of forming the intent to commit rape. (The question now is whether he did form the intent.) The accused could form this intent. Therefore, he was guilty of murder. Lord Birkenhead went on to utter dicta of high authority.

(1) If the accused is insane through drink, such as when he has delirium tremens, his defence is insanity, not intoxication.

The fact that the insanity was caused by drunkenness is irrelevant.

(2) 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.

In Beard the accused did not make himself so drunk that he could not commit rape. The dictum is in terms of evidence. Therefore, the jury can reject the evidence and deal with
the case in the usual fashion. Moreover, since intoxication relates to evidence in crimes of specific intent, it is a misnomer to call intoxication a defence; rather, it is a failure by the prosecution to prove all elements of the offence, namely the intent required is the definition of the offence. It should also be noted that intoxication does not negate mens rea; it is part of the evidence which is added to all the other evidence to determine whether the accused did have the mens rea.

(3) Evidence of drunkenness falling short of a proved incapacity to form the intent necessary to constitute 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 conduct.

Section 8 of the Criminal Justice Act 1967 qualifies the third proposition. A court or jury is no longer bound to infer from the facts that a person intends the natural consequences of his action. The triers of fact must look at the whole evidence to decide whether the accused did have the requisite intent or foresight. Section 8 does not make drunkenness purely a matter of evidence whether the accused did or did not have mens rea. It is still treated as a matter of substantive law: *DPP v Majewski* [1977] AC 443.

The second proposition is the difficult one. There is no restriction to crimes of intention, though it is likely that Lord Birkenhead simply meant ‘specific intent’ to be ‘intent’. The necessity is to distinguish between specific and basic intent offences, though the term ‘basic intent’ occurs nowhere in Lord Birkenhead’s speech. As M. Goode put it ‘Some thoughts on the present state of the “defence” of intoxication’ (1984) 8 Crim LJ 104 at 105: ‘If there was no really coherent distinction, then the labels “specific” and “basic” intent were just that: labels. One might just as well have called murder a crime of “bacon” and manslaughter a crime of “eggs”.’ What has happened is that judges have thought that ‘specific intent’ bears a definite meaning in law different from ‘intent’ and they have sought to distinguish ‘specific’ from ‘basic’ intent. On the distinction rests English law.

The courts have struggled with defining the distinction. In *Gallagher*, Lord Denning followed *Beard* to hold that drunkenness was no defence unless it amounted to insanity or the crime was one of specific intent. He said that if drink impairs the accused’s powers of perception so that he does not realise that what he is doing is dangerous, he has no defence if a sober and reasonable person in his place would appreciate the danger. This proposition does not occur in *Beard*, and if drunkenness is incompatible with specific intent, why is it not incompatible with foresight? Lord Denning stated that lack of self-control or moral sense induced by intoxication was no defence. In *Gallagher* the fact that the accused’s psychomotor state was made worse by alcohol did not give him a defence of drunkenness if the effect of the alcohol made it harder for the accused to exercise self-control. Lord Denning relied on *Beard* and an anonymous case from 1748 (where a drunken nurse put a baby on a fire, thinking it was a log) to show that where the crime is one of specific intent, intoxication is a defence if the accused did not have that intent. It could be argued that the nurse’s case is not one of specific intent because she had no mens rea at all. Lord Denning seems to have defined specific intent to mean crimes of ulterior intent (doing X with intent to do X or Y). Certainly all such crimes are specific intent ones, but the term ‘specific intent’ is wider. Lord Birkenhead may have meant ‘specific intent’ to mean the intent which forms part of the mental element in the offence. The mental element in murder is the intent to kill or commit grievous bodily harm. That intent is the ‘specific’ intent of murder. On this approach ‘specific’ adds nothing to ‘intent’.
In *Gallagher* the earlier intention to kill was added to the *actus reus*, which took place after the accused had become drunk. This Dutch courage rule is at variance with the general principle of contemporaneity in criminal law. The argument is that such a breach is justified by catching dangerous people. *Lipman* [1970] 1 QB 152 exemplifies the continuing tendency of judges not to let defendants go free as they would if general principles of law were applied but to bend the law or create exceptions in order to convict ‘manifestly guilty’ persons of something, though it might be argued that the accused was not manifestly guilty.

*Lipman* [1970] 1 QB 152

The accused and his girlfriend took some LSD. Under the influence of the drug he hallucinated that he was being attacked by giant snakes. He awoke the next morning to find his girlfriend dead, eight inches of sheet having been pushed down her throat. Lord Widgery CJ held that intoxication through drugs formed part of the defence of drunkenness. Applying *Gallagher* manslaughter was a crime of basic intent. Intoxication was no defence to basic intent offences. Therefore, the accused was guilty of manslaughter. The House of Lords refused leave to appeal.

Criticism of *Lipman* has been strong. In *Beard* the accused, who was guilty, intended to rape. In *Lipman* the defendant, who did not intend any offence, was guilty of manslaughter. The accused had no ‘mind’ because he was under the influence of drugs; how could he have a *mens rea*? At the time of the killing he had no *mens rea*. At the time of taking the drug he had committed no *actus reus*. The contemporaneity rule was broken. Lord Birkenhead did say in *Beard* that drunkenness was no defence to manslaughter but did not relate his remarks to a distinction between specific and basic intent. Even in manslaughter the accused is guilty only if he did have some type of *mens rea*. The type of manslaughter at issue in *Lipman* was constructive or unlawful act manslaughter. There has to be an unlawful act, but the accused did not commit one because his mind did not accompany his act. If the unlawful act was the stuffing of the sheet into the victim’s mouth, he was unconscious at that time. If the unlawful act was the taking of the drugs, that consumption did not cause her death and anyway taking drugs is not an offence: it is possession which is the crime. Possessing drugs did not kill the girlfriend. Lord Widgery CJ did not tackle this objection. It might be argued that the court could have relied on a different form of manslaughter, manslaughter by gross negligence, but if the accused was unconscious at the time, how could he be careless? There is still the separation in time between the grossly negligent taking of the drugs and the death. *Lipman* looks like the Court of Appeal’s response to drugs, as in part does the next case.

Both *Lipman* and *Majewski*, above, punish really the act of becoming intoxicated, but the punishment is based on the outcome of the actions of the accused, whether the accused was acting consciously or not. Lord Salmon in *Majewski* approved both *Lipman* and *Beard*.

*DPP v Majewski* [1977] AC 443

A man spent 24 hours getting drugged and drunk. He smashed windows and attacked a police officer. The seven judgments in the House of Lords say different things but basically there was wide support for Lord Russell’s analysis of Lord Birkenhead’s speech in *Beard*.

Specific intent covered:

- [a] ulterior or further intent such as wounding with intent to do grievous bodily harm;
[b] where the mens rea extends beyond the intent to do the act. On this approach assault is a basic intent crime. The actus reus includes the apprehension of force. The mens rea is intending or being reckless as to the victim’s apprehension of force. The mens rea does not extend beyond the actus reus.

Lord Simon considered that ‘specific intent’ meant the ‘purposive element’ (i.e. direct intent) in a crime. He did not further define purposive element, and the term is difficult to fit in with present law. Rape is a crime involving a purpose, but it is a crime of basic intent, to which drunkenness is not a defence. All Law Lords agreed that Beard should stand and that to depart from Beard would be contrary to public policy because the rule punished persons who got drunk and misbehaved. The community needs protection from drunken violence, and if violent drunks were not convicted, the public would have contempt for the law. Therefore, this area of law is not based on logic. Lord Salmon stated:

I accept that there is a degree of illogicality in the rule that intoxication may excuse . . . one type of intention and not another. This illogicality is, however, acceptable because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule . . . as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic.

As Lord Edmund-Davies said, ‘It is unethical to convict a man of a crime requiring a guilty state of mind when ex hypothesi he lacked it.’ Another way of putting this is to say that drunkenness is not in conformity with criminal law principles. For example, intoxication is a defence to grievous bodily harm with intent, but not to maliciously inflicting grievous bodily harm. Yet, if intoxication negates the mens rea of the former offence, why does it prove it in the latter? To say as Lord Simon did that performing a prohibited act when insensible through drink is as wrongful as mens rea does not mean that the insensible accused has mens rea. Before a person can be convicted of an offence where the mental element is subjective recklessness, the prosecution should have to prove that state of mind. They do not have to prove it when the accused is intoxicated. If the accused contends that he thought because of intoxication there was no risk, Majewski will convict him automatically of a ‘subjective recklessness’ offence. The presumption of innocence is not applied. The outcome of Majewski was that the highest court had decided that there was a distinction between basic and specific intent, but could not say what that difference was.

The public policy concerns in Majewski have come in for criticism. A drunken person is hardly likely to be deterred by the law, even if he knew what it was. In countries where intoxication is taken into account with the other evidence in determining mens rea there is not proportionally more crime than in England. Indeed intoxication by stripping away inhibitions may well show that the accused did have the requisite fault element for the crime charged. It is also argued that it is morally wrong to convict people of an offence when the form of behaviour which the law should penalise is that of getting into the intoxicated state. At present people are convicted of offences when they did not have the required mens rea.

The most authoritative case at present is MPC v Caldwell [1982] AC 341, which in relation to intoxication is unaffected by the overruling in G [2004] 1 AC 1034 (HL) of Lord Diplock’s definition of recklessness.
The accused did some work for the owner of a hotel. They quarrelled. The accused got drunk and set fire to the hotel. No one was injured, but there was some damage. He was charged, *inter alia*, with arson contrary to s 1(2) and (3) of the Criminal Damage Act 1971 in that he damaged property with intent to endanger life or being reckless whether life was endangered. He claimed he was so drunk that he never thought he was endangering life.

The majority’s speech was delivered by Lord Diplock. He argued:

(a) ‘If the only mental state capable of constituting the necessary *mens rea* for an offence under s 1(2) were that expressed in the words intending by the destruction or damage to endanger the life of another, it would have been necessary to consider whether the offence was to be classified as one of “specific” intent for the purposes of the rule of law which this House affirmed and applied in *DPP v Majewski* (1977); and plainly it is.’ (That is, the *mens rea*, intent to endanger life, goes beyond the *actus reus*, criminal damage.)

(b) ‘However, this is not . . . a relevant enquiry where “being reckless, as to whether the life of another should be thereby endangered” is an alternative mental state.’

(c) ‘The speech of Lord Elwyn-Jones in *Majewski*, with which Lord Simon, Lord Kilbrandon and I agreed, is authority that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary *mens rea*.’

(d) ‘Reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct.’ (There is a slippage in the reasoning between (c) and (d). ‘Reckless’ is used in two different senses. In (c) ‘reckless’ bears its *mens rea* meaning. In (d) it bears a non-criminal law meaning. By becoming drunk the accused does not become aware of the *actus reus* he may perform when he is drunk. The effect is that the accused is guilty of a crime of basic intent even though he did not have the *mens rea* of the crime.)

(e) ‘In the instant case, the fact that the respondent was unaware of the risk of endangering the lives of residents in the hotel owing to his self-induced intoxication would be no defence if that risk would have been obvious to him had he been sober.’

The difference between the previous definition (*mens rea* goes beyond the *actus reus*) and the *Caldwell* recklessness one is seen from the crime charged in *Caldwell* itself. In s 1(2) of the 1971 Act the *mens rea* (intent to endanger life or recklessness thereto) goes beyond the *actus reus* (criminal damage). However, recklessness forms part of the *mens rea*, and therefore the crime is one of basic intent.

Accordingly where the defence was solely defined in terms of intention the distinction between basic and specific intent was relevant. If the offence were defined in terms of recklessness, getting drunk was reckless and the accused was guilty of the offence without the prosecution having to prove recklessness. Proof of intoxication amounted to proof of recklessness. The accused is deemed to be reckless. There is no need to show that at the time of getting intoxicated the accused foresaw the *actus reus* of the offence with which he is charged. In the words of the Law Commission in its Report No. 229, *Legislating the Criminal Code: Intoxication and Criminal Liability*, 1995, para 1.19, ‘The intentional taking of an intoxicant without regard to its possible consequences is properly treated as a substitute for the mental element normally required.’ Lord Mustill spoke to this effect in *Kingston*, above. The accused cannot rely on the absence of *mens rea*
when that is caused by his own act of getting intoxicated. This approach, however, takes no account of the principle of concurrence stated at the start of Chapter 1. Once the accused has got intoxicated, he should no longer be regarded as reckless. Therefore, he is not reckless at the time of the actus reus. In Cullen [1993] Crim LR 936 (CA) the court laid down English law: once the prosecution proved that the accused started a fire, he was guilty of (aggravated) arson if there was an obvious and serious risk of damage to property and of danger to life. He did not have to foresee either risk. The position is even stronger with regard to strict offences and crimes of negligence. The accused is guilty without proof of recklessness. Intoxication shows that the accused was negligent, and in strict offences no state of mind is relevant. The rule applies despite the separation in time between getting drunk and the forbidden conduct.

This ‘constructive recklessness’ is also impossible to justify from the viewpoint of the principle of legality, also discussed in Chapter 1. It is not the fault element stated in the crime which is relevant but the fact that the accused got drunk. After Caldwell all crimes of recklessness are basic intent offences, to which intoxication supplies the mental element of recklessness, for the prosecution do not have to prove recklessness, only drunkenness. It is neither subjective nor objective recklessness. (What happened to the principle that the prosecution must prove all elements of the offence beyond reasonable doubt?) The result is a fiction. The accused is deemed to be reckless. As with all fictions current law is difficult to justify rationally. The House of Lords in Caldwell were adamant that whether there was recklessness was a matter for the jury, but that proposition is difficult to accept when intoxication is the recklessness element in an offence. The effect of Caldwell on drunkenness is this: the prosecution has to show that the accused gave no thought to an obvious and serious risk. It is irrelevant why no thought was given. Therefore, it is immaterial that it was intoxication which caused the accused not to give any thought. Accordingly, Majewski is not in point. The risk of harm from getting intoxicated need not relate to the actual injury or damage caused. The test for the obviousness of the risk under Caldwell is whether or not the risk would have been obvious to a reasonable prudent bystander. That paragon is not intoxicated by alcohol or drugs. The fact that the accused was intoxicated is irrelevant. That he was drunk merely explains why he gave no thought but does not excuse him. His drunkenness supplies the mens rea of recklessness. He is guilty of a basic intent crime if he would have been aware of the risk but for his intoxication.

The Supreme Court of Canada in Daviault v R (1995) 118 DLR (4th) 469 by a majority rejected the Caldwell approach as being contrary to the fundamental principle of justice that each element of the offence has to be proved by the prosecution. The present English law by which proof of intoxication substitutes for proof of recklessness was in breach of this principle. The dissentients argued that a person who commits the actus reus of a general intent offence (in England a basic intent crime) when intoxicated deserves to be stigmatised as an offender and that the requirements of fundamental justice were satisfied by proof of intoxication without proof of mens rea. Sopinka J said that ‘the rules of fundamental justice are satisfied by showing that the drunken state was attained through the accused’s own blameworthy conduct’. The same rule applies to a person who puts himself into a state of automatism through his own fault. ‘Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community.’ Sopinka J added: ‘to allow generally an accused . . . to plead absence of mens rea where he has voluntarily caused himself to be incapable of mens rea would be to undermine, indeed negate, that very principle of moral responsibility
which the requirement of *mens rea* is intended to give effect to.\(^1\) Besides intoxication being deemed to be recklessness for crimes where the *mens rea* includes recklessness, the usual connection between *actus reus* and *mens rea* is rendered unnecessary. For example, the accused is guilty of reckless criminal damage if he is drunk and damage happens to occur as a result of what he did when drunk: he need not recklessly cause criminal damage, yet he is guilty of that offence.

### Outstanding problems

(a) One result of *Caldwell* is that the defence has been narrowed. Lord Birkenhead in *Beard* in one passage noted that specific intent was not exceptional. The minority in *Caldwell* saw that when *mens rea* is defined in terms of ‘intentionally or recklessly’, as modern statutes often are, there is no need for the prosecution to prove recklessness, only drunkenness. Only where intention alone is charged is intoxication possibly a defence.

Anomalies are created. Intoxication can be considered in a crime of attempted rape, but not in rape itself. Rape is a basic intent crime. After the Sexual Offences Act 2003 the *mens rea* includes negligence as to the victim’s consent. All attempts are specific intent offences. It is conceded, however, that the position is unclear and some academics have argued that since some attempts may be committed recklessly, these are now basic intent offences. The argument runs that after *Khan* \([1990]\) 1 WLR 815 the *mens rea* of rape and attempted rape is the same when the attempt is based on the failure of the accused to achieve penetration. Therefore, attempted rape based on this missing element is also a crime of basic intent. However, if the missing element in attempted rape is the victim’s lack of consent, the *mens rea* of attempted rape is different from that of the full offence. An intent to have sexual intercourse without the consent of the victim is required and this form of attempted rape is a specific intent crime.

In *Fotheringham* \((1988)\) 88 Cr App R 206 (CA), the accused made a drunken mistake that the person with whom he was having sexual intercourse was his wife, whereas it was a 14-year-old babysitter, whom his wife had told to sleep in the matrimonial bed. He was guilty of the offence of rape as then defined. If, however, he had stopped just short of penetration, he would not have been guilty of attempted rape. The law looks the wrong way round. In rape the accused’s *mens rea* is in part the intention to penetrate. Yet rape is always a basic intent offence.

*Fotheringham* may be criticised. On one view of *Majewski*, drunkenness supplies recklessness. Therefore, evidence other than that of intoxication, tending towards showing that the accused did not have the type of foresight required by the crime, is irrelevant: he is deemed to have the *mens rea* because he is intoxicated. In this case, however, the accused did not make a mistake as to a ‘reckless’ element, consent, but as to an element defined solely in terms of intent. The accused did not intend to have unlawful sexual intercourse, ‘unlawful’ being then understood as ‘outside marriage’. He intended to have sexual intercourse with his wife. That was lawful. His mistake was as to the identity of the woman and drunkenness explained why he made the error. Drunkenness does not supply intention. Another way of putting this proposition is to say that rape was a crime of basic intent as to consent (the accused was guilty at that time if he was reckless as to the woman’s consent: after 2003 only negligence as to consent is required), but was a crime of specific intent in relation to the victim not
being his wife. It is unlikely that the courts will hold that the answer to a question whether rape is a specific or basic intent crime depends on which element of the offence the accused has made a mistake. If Fotheringham is correct in stating that an offence is one of basic intent if any element of it may be committed recklessly, the list of specific offences in the section ‘The present position’ will have to be revised. For example, in burglary not all the elements of the actus reus need to be performed intentionally. The court stated: ‘In rape self-induced intoxication is no defence, whether the issue be intention, consent or . . . mistake as to the identity of the victim.’

In Woods (1982) 74 Cr App R 312, the accused had drunk a lot and said that he was not aware that the woman was not consenting. The Court of Appeal held that the accused was guilty of rape as then defined when he made a mistake as to the woman’s consent. Griffiths LJ said: ‘The law, as a matter of social policy, has declared that self-induced intoxication is not a legally relevant matter to be taken into account when deciding as to whether or not a woman consents to intercourse.’ This statement does not explain why the social policy does not apply to attempted rape and all specific intent offences. Woods is a decision to the effect that intoxication is not a legally relevant matter when the jury is considering whether the woman was consenting. By the law as it then existed, s 1(2) of the Sexual Offences (Amendment) Act 1976 as amended (now repealed), the jury had to judge the man’s belief that the woman (or man) was consenting and could take into account the reasonableness of his belief and ‘any other relevant matters’. Drunkenness was, however, held to be excluded. It was not one of the ‘relevant matters’. Therefore, the jury is invited to inquire whether the accused believed the alleged victim was consenting but to exclude his intoxication. Since the intoxication led him to believe that the woman was consenting, he cannot explain why he thought that the woman (or the man) was consenting. That is, he was guilty of rape, since had he not been in a state of intoxication, he would have known that she (or he) did not consent. In other words, since the accused would have realised that the alleged victim was not consenting if he had been sober, he is automatically guilty of rape. He was reckless as to consent, even though the jury has not taken drunkenness into account. There is a view that Woods is restricted to rape. In other offences being drunk takes away the requirement that the prosecution proves recklessness in offences of recklessness. In rape intoxication is excluded from consideration. Parliament surely did not have this distinction in mind when it enacted the 1976 Act. Woods is certainly inconsistent with the principle that in crimes of recklessness intoxication supplies recklessness, i.e. once intoxication is proved, so is recklessness. In Woods, however, the court said that the accused is to be acquitted if he would not have had the mens rea of the offence had he been sober. In other words, evidence other than that of intoxication is relevant if it shows that the accused did not have the foresight required by the offence. This is inconsistent with Majewski. Perhaps the ratio of Woods is restricted to rape for in other offences there is no such provision as s 1(2), and that sub-section was repealed by the Sexual Offences Act 2003. The difficulty with intoxication being proof of recklessness may have been resolved by Heard [2007] EMCA Crim 125. Instead of intoxication supplying recklessness, the two states would said to be of broad equivalence in terms of culpability.

A case to compare with Woods is Richardson [1999] 1 Cr App R 392 (CA) – a non-rape case. The two defendants and the victim had been drinking. While indulging in horseplay the former inadvertently dropped the latter over a balcony: the injuries to the victim were serious. The court said that the defendants were guilty if they
would have foreseen the risk of harm, had they been sober. However, the defendants
could lead evidence of intoxication to show any absence of belief in consent. This is
a surprising judgment. The charge was one of inflicting GBH, a basic intent offence,
yet intoxication was relevant to the proof of law of consent. However, since the
charge was one of s 20 of the Offences Against the Person Act 1861 the defendants’
drunkenness proved that they had the mens rea, foresight of some harm.

(b) It is sometimes said that drunkenness operates as a defence in relation to serious
offences and there is a lesser ‘fall-back’ crime. This proposition is not true. Lord
Salmon noted this point in Majewski, above, when he said that specific intent ‘was
not confined to cases in which, if the prosecution failed to prove [a specific] intent,
the accused could still be convicted of a lesser offence’. One might have thought that
rape would be a specific intent offence with indecent assault as the ‘fall-back’ crime
but in fact rape is a crime of basic intent. The present law was best summarised and
criticised on this point by C. M. V. Clarkson, Understanding Criminal Law, 4th edn

The whole concept of ‘specific intent’ was devised to enable drunkenness to operate as
a substantive mitigating factor to certain crimes, particularly murder. But . . . drunkenness
is sometimes a partial excuse (where there is a lesser included offence of basic intent)
but sometimes a complete defence – as with theft where no lesser included offence exists.
There is no rationale underlying such a distinction; the result is sheer chance.
[Emphasis added.]

(c) It is sometimes thought that s 8 of the Criminal Justice Act 1967 creates a difficulty.
By it the triers of fact are instructed to consider ‘all the evidence’. It does not say ‘all
the evidence except drunkenness’. Lord Diplock did not mention s 8 in Caldwell. (In
Majewski the House of Lords said that the law on drunkenness was a substantive, not
evidential, matter: s 8 deals only with legally relevant evidence. Drunkenness is not
legally relevant.) Caldwell demonstrates that evidence of recklessness is not required
if there is sufficient evidence of drunkenness. It looks as if the House of Lords has
disobeyed Parliament by creating a presumption of recklessness.

(d) The law on drunkenness in relation to other defences causes problems. In O’Grady
[1987] QB 995 (CA), the court said obiter that intoxication was not a defence where
it induced a mistake. It does not matter whether the offence was basic (where
Majewski would apply) or specific. In either event drunkenness is no defence. The
accused is guilty of murder although he did not intend to kill or cause grievous bod-
ily harm unlawfully for he believed that he was acting to prevent a crime on himself.
Compare Williams [1987] 3 All ER 411 (CA): the accused does have a defence of
preventing crime when he makes a mistake which is not induced by intoxication.
There is a failure to prove all the elements of the offence when a non-drunken error
occurs. P. Seago, Criminal Law, 4th edn (Sweet & Maxwell, 1994) 178, commented:

[although the case involved a manslaughter conviction, Lord Lane indicated obiter
that the same [i.e. guilty] would be true of murder. If this is so, then it means that a
man who, because of voluntary intoxication, mistakenly believes he is shooting at a
gorilla will have a defence to murder if he kills a human being, whereas a defendant
will have no defence if he mistakenly believes, because of voluntary intoxication, that
he is about to be violently attacked by a man whom he consequently shoots. It is hard
to justify such a distinction or see how you can keep the issues of mistake and intent
apart since they are merely different ways of looking at the same issue.
For the use of the ‘gorilla’ example in the successor text, see A. Reed and B. Fitzpatrick, Criminal Law, 3rd edn (Thomson, 2006) 199–200. (See also the English case of O’Connor, above, where drunkenness was relevant to intent but not to self-defence! A reasonable juror may not be able to perform this mental contortion. The court also thought that the dictum in O’Grady was ratio. It was in fact dictum because the accused had been acquitted of murder. Anything said about specific intent offences such as murder was not ratio.) Despite criticism by academics of O’Grady it was followed by the Court of Appeal in Hatton [2006] 1 Cr App R 247. The accused, who had consumed over 20 points of bear, killed the victim with a sledgehammer. He argued that he believed the accused was on SAS soldier armed with a sword. His appeal against a conviction for murder was dismissed. The court certified that a point of law of public importance was involved but refused leave to appeal. It is about time that this issue was resolved by the Lords. The policy argument against O’Grady is that if the reason for the rules on intoxication is that the public must be protected from the intoxicated, a conviction for manslaughter does that and there is no need to convict of murder.

The contrasting case is the controversial one of Jaggard v Dickinson [1981] QB 527 (DC) (see Chapter 18). Under the Criminal Damage Act 1971, s 5(2)(a), evidence of drunkenness was used to establish what the accused believed. The accused believed she was entering a friend’s house; in fact she was entering someone else’s. She was intoxicated and would not have made this mistake had she been sober. She was not guilty of criminal damage contrary to s 1(1) of the 1971 Act, a basic intent offence. She had the lawful excuse that the person, her friend, entitled to consent to the damage, would have done so, had the friend known of the circumstances. The decision of Lord Donaldson MR was based on the language of the statute. Mustill LJ spoke more generally. Drunkenness on the facts did not negative intention or recklessness. It explained why the accused had the belief she did. By s 5(2) Parliament had isolated belief from the general law of recklessness. However that may be, to allow drunkenness to a crime of belief but not to one of recklessness looks strange. This strangeness is exacerbated when one recalls s 8 of the Criminal Justice Act 1967 discussed in (c) above. Why is not s 5(2) of the 1971 Act read in the same way? If intoxication is not relevant in s 8, why is it in s 5(2)? The Courts-Martial Appeal Court in Young [1984] 1 WLR 654, 658 generalised Jaggard v Dickinson: ‘Where there is an exculpatory statutory defence of honest belief, self-induced intoxication is a factor which must be considered in the context of a subjective consideration of the individual state of mind.’ In Young it was held that self-induced intoxication was no defence where the accused, charged with possessing a controlled drug, seeks to prove within s 28(3)(b) of the Misuse of Drugs Act 1971 that he did not believe or suspect, nor had any reason to do so, that a substance or product was a controlled drug, when he would have done so when sober. The outcome of the interrelation between Caldwell and Jaggard v Dickinson is amazing. If the accused damages another’s property believing the property to be his own, that belief being induced by intoxication, he is guilty of criminal damage. If, however, he damages another’s property believing that it belongs to a third party who would consent to the damage, if he knew of the circumstances, he is not guilty. The point can be taken further. Jaggard v Dickinson makes the drunken accused not guilty of criminal damage if he believed in consent; however, a drunken accused is guilty of rape if he believed mistakenly in the woman’s consent. Lawyers have taken leave of their senses! One possible difference between O’Grady and Jaggard v Dickinson is that the former applies to
common law offences, the latter to statutory ones. This distinction does not reflect any policy value and if true is an unfortunate one dependent on chance.

(e) What about intoxication in relation to other defences? In provocation where the accused believes falsely because he is drunk that he is being provoked, a subjective view is taken. He is judged on the facts as he believed them to be: Letenock (1917) 12 Cr App R 221 (CCA). It is possible that Letenock would not be followed nowadays since the law on both intoxication and provocation have moved on since the First World War. However, in relation to duress and duress of circumstances, the law is that only a mistake made on reasonable grounds exculpates: Graham [1982] 1 WLR 294 (CA). A mistake occasioned by alcohol is not one which has been made reasonably. Therefore, in relation to these defences a drunken mistake does not avail.

In respect of consent to assaults the Court of Appeal ruled in Richardson, above, that an erroneous belief that the victim is consenting to rough horseplay is a defence to the offence of inflicting GBH contrary to s 20 of the Offences Against the Person Act 1861, even though the mistake was caused by intoxication. The law contrasts strongly with that in O’Grady where it was held that a drunken mistake as to self-defence did not provide the accused with a defence. The Court did not consider O’Grady or cases such as Woods and Fotheringham, above. Moreover, Richardson is inconsistent with the rule that intoxication is no defence to a crime of basic intent.

(f) The serious problem remains that lawyers have failed to provide an adequate statement of which offences are specific intent ones.

(i) As we have seen, Lord Simon in Majewski said that specific intent crimes have a purposive element. This definition has already been criticised.

(ii) Sometimes it has been said that specific intent crimes are those in which intention alone is the sole mental element in respect of one or more elements of the actus reus. Murder, however, for many years was not defined solely in terms of intention, yet it was never doubted that murder was a specific intent crime. Handling is a crime of specific intent yet intent is not part of the mens rea, which is dishonesty and knowledge or belief.

(iii) An accepted definition of specific intent is that the mens rea goes beyond the actus reus. This is a helpful tip but is not a definition. All ultraer intention offences are specific intent crimes, but the concept of specific intent crimes is not restricted to ultraer intention ones, as murder itself demonstrates. Another illustration is criminal damage with intent to endanger life or being reckless as to whether life is endangered. The crime is not solely defined in terms of intent but the mens rea does extend beyond the actus reus. One of the definitions must be wrong but it is unclear which one it is. Section 18 of the Offences Against the Person Act 1861 may be committed in several ways. One is by wounding with intent to do grievous bodily harm. On this definition this crime is a specific intent crime. Another form is causing grievous bodily harm with intent to do grievous bodily harm. On this definition this crime is a basic intent one. Davies [1991] Crim LR 469, though not well reported, seems to hold that grievous bodily harm with intent to resist arrest is a specific intent crime. If this approach were correct, the defence of intoxication is dependent not on the distinction between basic and specific intent crimes but basic and specific intent charges. Some mental elements in offences such as s 18 are basic intent ones, some are specific intent ones. The problem is that offences have been held to be basic intent ones even though part of the mens rea is satisfied only by proof of intent. An example
is rape. The accused must intend to have sexual intercourse and must intend to do so with a woman or a man, yet rape is classified as a crime of basic intent: see the discussion of Fotheringham above. One way of reconciling the authorities would be to say that rape is a crime of specific intent where the charge is one of rape knowing that the victim did not consent but one of basic intent where the charge is one of rape being negligent as to consent. The same reasoning could apply to all offences which are defined in terms of intentionally or recklessly misbehaving, such as criminal damage. The courts, however, classify by the crime, not by the charge or at least that was the majority view until Heard [2007] EWCA Crim 125, where Hughes LJ said: ‘. . . it should not be supposed that every offence can be categorised simply as either one of specific or of basic intent. The accused was charged with sexual assault contrary to s 3 of the sexual offence Act 2003. Section 3(1) reads:

A person (a) commits an offence if
(a) He intentionally touches another person (b),
(b) The touching is sexual,
(c) B does not consent to the touching, and
(d) A does not reasonably believe that B consents.

The accused, who was extremely intoxicated, rubbed his penis on the thigh of a police officer. The court held that specific intent meant ulterior intent (as in burglary) a state of mind going beyond the act. Therefore, even though the touching had to be intentional, the crime was one of basic intent. Therefore, even crimes which can be committed only intentionally may be ones of basic intent. Where does that leave murder? [?] The most acceptable categorisation of specific intent offences was provided by Sopinka J (dissenting, but not on this point) in Daviault v R, above. ‘In addition to the ulterior intent offences there are certain offences which by reason of their serious nature and importance of the mental element are classed as specific intent offences notwithstanding that they do not fit the criteria usually associated with ulterior intent offences. The outstanding example is murder.’

None of these three definitions gives full weight to the precedents. The operation of the basic/specific dichotomy looks capricious. For some offences such as murder there is a ‘fall-back’ basic intent crime, manslaughter; but for other crimes such as theft there is no ‘fall-back’ offence. There is no policy which rationalises this distinction. It is safe to say that Lord Birkenhead did not mean to create this dichotomy.

The present position

One way out of this difficulty, though unsatisfactory from the viewpoint of principle, is to list those precedents. Table 8.1 does that for the more important offences. It seems that all offences of dishonesty are specific intent crimes. Despite intoxication’s being a defence to theft, an accused will appropriate when he sobers up by assuming the rights of the owner such as hiding the item away. Therefore, the drunken taker does not avoid liability for theft.

It may be helpful at this point to give a concrete illustration. In relation to s 20 of the Offences Against the Person Act 1861 the judge would direct the jury that they are to convict if they are sure that the accused foresaw that he might cause some injury or would have foreseen that his act might cause some injury had he not been intoxicated.
Some suggestions for the reform of drunkenness

The difficulty in reforming the law was well stated by the Scottish Law Commission in its Discussion Paper, *Insanity and Diminished Responsibility*, No. 122, 2003: ‘The problem . . . is that of reconciling the basic principle of *mens rea* . . . with conditions in which persons can hardly be said to have any mental capacity at all. At the same time the social consequences of recognising . . . intoxication as [a] complete defence [ . . . ] in all circumstances would be extremely serious.’
Courts are reluctant to allow intoxicated persons to escape the consequences of their actions. Lipman and Majewski may be instanced. There is a feeling that these men should have been found guilty of something. There are few redeeming features of intoxication and drunkenness is the state in which many offences are committed. It could be said that in England and Wales people know the kind of events which can happen when a person becomes drunk or takes drugs. Nevertheless, as the High Court of Australia in O'Connor, above, demonstrated, the distinction between basic and specific intent makes no logical sense in mens rea terms. This breach of the fundamental principle of mens rea, the illogicality of the basic/specific intent distinction, and the lack of empirical support for the public policy concerns behind Majewski led to America’s rejection of English law. If the accused had no mens rea because of intoxication, he cannot be guilty. This rule even applies to murder: Martin (1984) 58 ALJR 217, also a decision of the High Court of Australia. It does not matter that the lack of mens rea was caused by intoxication. An accused is guilty only if he had the mental element of the offence charged at the time of the actus reus. The fact that the accused got drunk recklessly does not prove that he had the fault element later. (Despite the logic of the situation the Australian Criminal Code Bill 1994 did revert to the specific/basic intent distinction, New South Wales, having accepted O’Connor, reverted to the Majewski position and Queensland did not adopt the O’Connor rule but applied English law.) On this approach there are no special rules applying to drunkenness. The normal principles of criminal law govern. The Criminal Law Reform Committee recommended in its Report on Intoxication, 1984, that New Zealand should adopt the Australian subjectivist approach and should also not enact a special offence dealing with intoxicated persons who commit the actus reus of crimes, as has been proposed for England (see below). See also Kamipeli, above. South Africa follows the O’Connor doctrine: Chretien 1981 (1) SA 1097 (AD). Empirical research by Judge G. Smith in ‘Footnote to O’Connor’s case’ (1981) 5 Crim LJ 270 has shown that the Australian approach has not led to the breakdown of law. The Australian approach should be contrasted with the former Canadian authorities which followed Majewski. In Leary (1977) 74 DLR (3rd) 103 (by a majority), which was overruled in Daviault v R, above, and Bernard [1988] 2 SCR 833, the Supreme Court approved the policy behind Majewski. That policy was expressed by P. Healy ‘R v Bernard: difficulties with ‘voluntary intoxication’ (1990) 35 McGill LJ 610 at 612–613: ‘Sodden people who do bad things deserve punishment.’ A similar point was made over a century ago by Stephen J: ‘It is almost trivial for me to observe that a man is not excused from crime by reason of his drunkenness. If it were so, you might as well shut up the criminal courts, because drink is the occasion of a large proportion of the crime which is committed’ (Doherty (1887) 16 Cox CC 306). The contrary view is that endorsed by the majority in Daviault v R: ‘The mental aspect of an offence, or mens rea, has long been recognised as an integral part of crime. The concept is fundamental to our criminal law. . . . However, the substituted mens rea cannot establish the mens rea to commit the offence’ (per Cory J). The court rejected the Australian approach and retained the basic/specific intent distinction, but said that a person would be guilty of a basic intent offence if he had the minimum intent to do the prohibited act.

The Butler Committee on Mentally Abnormal Offences, Cmdn 6244, 1975, paras 18.51–18.59, suggested the creation of a new offence, being drunk and dangerous. The accused could be convicted of this offence if charged with a sexual assault, an offence against the person, and criminal damage endangering life. There are advantages in this proposal. The problem of distinguishing between basic and specific intent would disappear. Persons would not be totally acquitted as now happens when they are charged with a specific intent crime and there is no ‘fall-back’ basic intent offence. Moreover, if
the mischief is truly one of intoxication, this proposed crime would focus on that mischief unlike present law. Three Lords in Majewski rejected this recommendation. One of its drawbacks is that it would be a status offence with little or no mens rea attached to it. Other proposals have included the creation of a crime of negligently causing injury, reforming offences so that there is always a ‘fall-back’ basic intent offence and treating drunken offenders outside the criminal law system. The present law is out of line with what judges thought was social policy in earlier years. In Reniger v Fogossa (1551) 75 ER 1 (KB), the court stated that drunkenness was no defence, and a drunken killer was sentenced to be hanged. This attitude seemed to be based on the thought that, since many crimes were committed when the accused was drunk, to provide a defence would mean that few would be convicted. If intoxication was a defence to murder (as it is now), ‘there would be no safety for human life’ (Carroll (1835) 173 ER 64 (NP)). There is some evidence for the view that in the seventeenth and eighteenth centuries drunkenness aggravated the crime, unlike nowadays where it mitigates the offence or provides exculpation.

Present reform proposals are largely based on the Criminal Law Revision Committee’s Fourteenth Report, Offences Against the Person, Cmnd 7844, 1980. The recommendations were:

(a) The abolition of the basic/specific dichotomy and of the ‘constructive recklessness’ in Majewski.

(b) Intoxication which did not totally exclude mens rea should not be a defence.

(c) Involuntary drunkenness should remain a defence but only ‘if it negates the mental element’, and not if it loosens inhibitions.

(d) Self-induced intoxication was to be defined, as the Butler Committee did, as ‘intoxication resulting from the intentional taking of drink or drugs knowing that it is capable in sufficient quantity of having an intoxicating effect, provided that intoxication is not voluntary if it results from a fact unknown to the accused that increases his sensibility to the drink or drug’.

(e) The majority advocated that evidence of voluntary intoxication should be capable of negating the mental element in murder (which at that time was wider than intent) and the intention required for the commission of other offences. In offences where recklessness was an element, if the accused did not appreciate a risk which he would have appreciated when sober, he would not have a defence. These recommendations would largely enact the common law. The minority would allow the defence where the accused was not aware of the risk of causing the actus reus, but would have been, were he sober. The dissentients comprised the two law professors on the Criminal Law Revision Committee.

(f) There should be no offence of being dangerously intoxicated, as the Butler Committee had proposed. That crime would lump together the drunken child-killer and the inebriated brawler. The Committee’s majority thought that an offence in the area of intoxication should refer to the degree of harm so that, e.g., a drunken killer would still be convicted of manslaughter. The accused should not be labelled incorrectly. The majority opined that a drunken rapist should be guilty of rape, not of some general offence. The minority recommended a special verdict that the offence was committed while the defendant was intoxicated. He would be liable to the same potential penalty (except murder, where the penalty would be equivalent to manslaughter) as he would have been, had he been convicted. The sentence would reflect the harm. In this way the present ‘constructive recklessness’ rule would be abrogated.
The Law Commission’s 1989, 1993 and 1995 proposals

Recommendations appeared in the draft Criminal Code, Law Com. No. 177, 1989, which if enacted would remove some of the difficulties and anomalies of present law. The draft Criminal Code was based on 1980 recommendations of the Criminal Law Revision Committee. As stated in Chapter 1 the draft Criminal Code would have enacted recent recommendations of law reform bodies without amendment. The main clause is cl 22(1), which would be the replacement for basic intent offences and applies to crimes in which part of the actus reus is recklessness. The whole of the actus reus need not be recklessness. In rape one part of the fault element is the intent to have sexual intercourse, but rape is an offence in which recklessness as to consent suffices. The draft Criminal Code contains the following clauses.

Clause 22(1)
Where an offence requires a fault element of recklessness (however described), a person who was voluntarily intoxicated shall be treated –
(a) as having been aware of any risk of which he would have been aware had he been sober;
(b) as not having believed in the existence of an exempting circumstance (where the existence of such belief is in issue) if he would not have so believed had he been sober.

Clause 22(2)
Where an offence requires a fault element of failure to comply with a standard of care, or requires no fault, a person who was voluntarily intoxicated shall be treated as not having believed in the existence of an exempting circumstance (where the existence of such belief is in issue) if a reasonable sober person would not have so believed.

Clause 22(3)
Where the definition of a fault element or of a defence refers, or requires reference, to the state of mind or conduct to be expected of a reasonable person, such persons shall be understood to be one who is not intoxicated.

Clause 22(4)
Subsection (1) does not apply –
(a) to murder (to which section 55 applies); or
(b) to the case (to which section 36 applies) where a person’s unawareness or belief arises from a combination of mental disorder and voluntary intoxication.

Clause 55
A person is guilty of manslaughter if –
(b) he is not guilty of murder by reason only of the fact that, because of voluntary intoxication, he is not aware that death may be caused or believes that an exempting circumstance exists; . . .

Clause 36
A mental disorder verdict shall be returned if –
(a) the defendant is acquitted of an offence only because, by reason of evidence of mental disorder or a combination of mental disorder and intoxication, it is found that he acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed; . . .

Clause 56(3)
Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated. [Clause 56 concerns diminished responsibility.]
Since most offences in the draft Criminal Code would be defined in terms of intention or recklessness, intoxication would rarely be a defence.

By cl 22(5)(a) ‘intoxicant’ covers ‘alcohol or any other thing which when taken into the body may impair awareness or control’. Therefore, dangerous drugs are included. By sub-cl (5)(b) a ‘voluntary intoxication’ covers taking something as an intoxicant (except properly for a medicinal purpose), knowing that it is or may be an intoxicant. By sub-cl (5)(c) a person is deemed to take an intoxicant if it is administered to him. By sub-cl (6) Bailey and Hardie, above, would be enacted. The legal burden would remain on the prosecution, but the defendant would bear the evidential burden (sub-cl (7)). There would be no special provision for the ‘Dutch courage’ rule.

By these proposals the Law Commission sought to accomplish the abolition of specific and basic intent and the replacement of the present recklessness liability. The accused would be guilty of an offence which may be committed recklessly if he was intoxicated. Clause 22 restated current law. There was no need to have a special rule for crimes of specific intent because intoxication is simply part of the evidence. If crimes committable ‘maliciously’ survived the enactment of the Criminal Code, they would be treated as recklessness offences. By cl 33(1)(b) a person who is unconscious through drink does not have the defence of automatism.

Clause 22(1)(b) would reverse Jaggard v Dickinson, above. The Law Commission commented (Report No. 177, para 8.41) that ‘that decision created an anomalous distinction (between mistake as to the non-existence of an element of an offence and mistake as to the existence of a circumstance affording a defence) which it would be wrong to perpetrate in the Code’. The Law Commission also wished to reverse the dictum in O’Grady, above. The accused would be able to rely on a mistake brought about by intoxication in self-defence in offences where the sole mental element is intention, including murder. In the Law Commission’s view, ‘it would . . . be unthinkable to convict of murder a person who thought, for whatever reason, that he was acting to save his life and who would have been acting reasonably if he had been right’. This rule would bring self-defence into line with other defences when the accused was drunk. The law will be brought back into line with mistakes not based on intoxication (Williams [1987] 3 All ER 411). With regard to recklessness offences, the mistaken belief in self-defence will be irrelevant if that belief would not have been held if the accused had been sober. The Law Commission noted (Report No. 177, para 8.42) that the reversal of the dictum in O’Grady would not let the accused off scot-free: he would be convicted of manslaughter or the proposed offence of recklessly causing harm. The Law Commission was of the view that there should be no special rule for self-defence, or for public and private defence, defence of property, and self-defence.

It should be noted that the Law Commission had to provide a special rule for murder because by its recommendations murder would be in part an offence of recklessness to which cl 22(1) would otherwise apply. Murder is to contain the fault element of ‘being aware that he may kill’, a phrase of recklessness liability. The present law on intoxication and murder is preserved. As the Law Commission noted (Report No. 177, para 8.44) the accused is convicted of manslaughter, which has a maximum sentence of life imprisonment. Such a penalty was considered ‘sufficient to protect the public interest’.

As restated the law remains complex. Intoxication still would not simply negative mens rea. Special rules would remain. The thinking of the Law Commission developed and changed between 1989 and 1995. In 1993 the Law Commission issued a Consultation Paper, Intoxication and Criminal Liability, LCCP No. 127. The Consultation Paper investigated the present law on intoxication and various alternatives. The issue was seen to be
an arena for the conflict of two policies: the policy of not convicting persons who did not know what they were doing and the policy of safeguarding citizens from violence which resulted from drink or drugs. The current resolution of this clash of policies is the House of Lords decision in Majewski. However, Majewski is dependent on the distinction between basic and specific intent crimes. ‘The differences between these two types of offence, the policy reasons for the distinction, and the basis on which the distinction is made, are all obscure’ (LCCP No. 127, 3). The law is complex and it is possible that it is ignored by the triers of fact. It does not advance the policy of criminalising intoxicated individuals in a straightforward manner but through technical rules which do not always reflect that policy. English law is also out of step with that in other jurisdictions which have abolished the special rules on intoxication. There are also difficulties in knowing what Majewski decided. Is it that all offences are either basic or specific intent ones? On this view the offence found in s 18 of the Offences Against the Person Act 1861 is a specific intent crime. Or is the question whether an allegation is a specific or basic intent one? On this approach the allegation that the accused caused grievous bodily harm with intent to do so contrary to s 18 is a basic intent offence, but causing such harm with intent to resist or prevent apprehension is a specific intent crime. Whichever rule is adopted there is the difficulty of crimes which have intent as to one element but recklessness as to another one. Leaving aside intoxication the accused must intend to commit one of the offences listed in s 9(2) of the Theft Act 1968 if he is charged with a s 9(1)(a) type of burglary, but recklessness suffices in relation to the trespass. Applying Majewski intoxication is not to be taken into account in determining whether the accused knew he was entering as a trespasser but is considered with regard to the question whether he intended to commit an offence listed in s 9(2). Another question which arises in relation to Majewski is to say that the rule applies in relation to allegations of intent; i.e. ‘basic intent offences’ is a concept which is wider than crimes of recklessness for it covers some crimes of intention.

The Law Commission noted that most crimes have been allocated to the basic or specific intent category. However, there is difficulty with offences which have not been allocated, for the width of Majewski is uncertain. Moreover, the treatment of the distinction between the courts ‘means that there is no necessary connection between the seriousness of the offence involved and its categorisation . . .’. Murder is a specific intent crime but manslaughter is a basic intent one, yet both are serious offences. Manslaughter is more serious than the crime of grievous bodily harm with intent, yet the former crime is a basic intent one, the latter is a specific intent one. Furthermore, there are problems in applying Majewski to some offences, as we have seen with respect to burglary. Some serious specific intent offences have a ‘fall-back’ basic intent offence attached to them. For example, s 18 is a specific intent crime; an accused can be convicted of the s 20 crime, which is a basic intent offence. However, the same is not true of all serious offences. Intoxication is a defence to burglary and theft; the accused is not guilty, however, of some lesser crime if he was intoxicated. The Law Commission also adverted to the problem of O’Grady [1987] QB 995. The defendant is guilty of an offence where he makes a mistake as to an element of it whether that offence is a basic or a specific intent one. The Law Commission in its 1995 Report noted below disagreed with the Consultation Paper’s main recommendation but it did repeat these criticisms.

In the Consultation Paper, the Law Commission examined the options for reform of the defence. The first option is to leave the law as it is. The Law Commission rejected this proposal as failing to achieve the policy objectives of a law which was not complex, a law which was certain, and a law which fully implemented the aims of upholding public
order while permitting intoxicated defendants to be acquitted of serious offences. A second option was to codify the Majewski approach but rectify inconsistencies. This approach would of course ensure that the law was certain but would otherwise meet none of the other policy objectives just mentioned. The Law Commission also rejected the 1980 recommendation of the Criminal Law Revision Committee that an accused should not have a defence of intoxication in relation to an element of a crime which was defined in terms of recklessness if he would have appreciated the risk had he been sober. The effect of that proposal would be that, e.g., in rape intoxication would be relevant to the intent to have sexual intercourse but not to recklessness as to consent. Why should the accused be exculpated on the first ground but not on the second? Moreover, it is thought that many believe that intoxication should not on policy grounds be a defence to rape at all. The Law Commission thought that the Criminal Law Revision Committee’s proposal would be confusing to juries: they could for instance consider drunkenness in relation to the intent to have sexual intercourse but not in relation to recklessness as to consent. Moreover, the recommendation would lead to difficulties in sentencing. The drunken accused is to be treated as reckless. Should he be punished on the basis that he is reckless? The Law Commission opined that the offender should be penalised for what he was, not for what he was not, i.e. for being a reckless but sober individual.

The third option considered by the Law Commission was to disregard the effect of intoxication in any offence. The specific/basic intent rule would be abolished and the accused would not be able to rely on intoxication as negating the fault element in any offence – even ones nowadays categorised as specific intent ones. This option would be an undeniable deterrent, for drunken defendants would have no defence. The Law Commission considered that such a result would be ‘draconian’ in a society which tolerated alcohol. The effect would also be inappropriate in some crimes. In the type of burglary found in s 9(1)(a) of the Theft Act 1968 intoxication would not be relevant to the further or ulterior intent, the intent to commit one of the four offences listed in s 9(2). The result would be that the prosecution would have to prove only that the accused entered a building as a trespasser, but such an entry is not a crime: ‘where the entrant’s drunkenness prevents the formation of an ulterior intent, it is simply impossible to characterise the entry as a burglary, and thus similarly impossible to use a conviction for burglary as a sanction against such an entry.’

The fourth option outlined by the Law Commission was the same as the third but with the proviso that the accused would not be convicted if he could demonstrate that he did not have the mens rea required for the offence because he was voluntarily intoxicated. The Law Commission considered, however, that someone who caused harm in a drunken state should not go free, which would be the result if the accused established this defence.

The fifth option would be simply to abolish the Majewski approach. Intoxication would merely be part of the evidence of mens rea. The law would be simple. In view of jurisdictions such as the common law states of Australia which have adopted this solution, there is no need for special rules for drunken defendants. The mens rea principle should be supreme. The argument that Majewski deters the intoxicated is not supported by the facts. Victoria, which abolished the specific/basic intent rule, does not have a more serious problem with drunks who cause harm than states which have retained Majewski. The Law Commission, however, thought that public safety would suffer and respect for the law would diminish if a drunken accused would be completely acquitted.
voluntarily, not just to “move the goalposts” but to remove them altogether! The point was, neatly, couched in more traditional terms by Lord Mustill... in *Kingston*, when he held, first, that the intentional taking of an intoxicant without regard to its possible consequences is a substitute for the mental element normally required; and, secondly, that the defendant is “estopped”... from relying on the absence of a mental element if it is absent because of his own acts.’ The Irish Law Reform Commission wanted voluntary intoxication never to be a defence.

The sixth option would be to abolish Majewski but replace it with a new offence of criminal intoxication. Criminal law should protect against drunken defendants. Such persons are at fault for committing harm. To acquit them would, it may be thought, be morally wrong and give an incorrect message to them, for they must be deterred. ‘A new offence can be tailored by legislation to achieve more precisely the objective of the Majewski’s approach without the faults of Majewski itself, and in particular without the practical difficulties that attend its present operation. A new offence can implement directly and overtly... policy considerations... by laying down clear rules in the light of that policy.’

The Law Commission rejected the Butler Committee’s proposal of an offence of dangerous intoxication and the idea of the minority of the Criminal Law Revision Committee of an offence of ‘doing the act while in a state of voluntary intoxication’, partly because in regard to the latter recommendation it required the jury to answer the hypothetical question: would this defendant have done what he did, had he been sober? The Law Commission proposed, first, that intoxication should be taken into account in determining whether the accused had the *mens rea* of an offence, whether he had made a mistake as to whether he was in a state of automatism; secondly, the creation of a new offence of criminal intoxication. The crime would be committed by an accused who, while substantially intoxicated, caused the harm proscribed by a so-called ‘listed’ offence. It would not be relevant that the accused did not have the mental element of the listed offence or that he was in a state of automatism. The Butler Committee’s proposed offence would have applied only if the accused did not form the *mens rea* of an offence. A ‘listed’ offence is just that: one listed by the Law Commission. These were expressed as: homicide, bodily harm, criminal damage, rape, indecent assault, buggery, assaulting or obstructing a constable in the execution of his duty, violent disorder, affray, putting a person in fear of or provoking violence, and causing danger to road users. The offence would, therefore, not apply to other offences such as attempts, battery, theft and burglary. The maximum penalty would be less than for the substantive offence because a drunken defendant is less culpable than a person who intentionally or recklessly committed a crime. There should be no special maximum for the offence because having one maximum would not cater for punishment for the harm caused by an intoxicated accused. The Law Commission thought that there should be a maximum of two-thirds the maximum for the ‘listed’ offence but with a maximum of 10 years where the maximum for such offence was life. The Law Commission also recommended the abolition of the O’Grady principle, with the proviso that a drunken defendant would have the defence of mistake in a self-defence situation where a sober individual would have reasonably made the same mistake.

The Law Commission summarised the advantages of the proposed offence:

(i) Defendants will not be liable to be convicted of offences when, in law, they did not have the required mental state for guilt of that offence.

(ii) At the same time, the criminal law will be able to intervene in cases where the defendant, although not fulfilling the requirements for conviction of a specific crime, committed socially dangerous acts in a state of substantial intoxication.
(iii) This objective will be achieved by allowing the court and jury to apply a set of clear rules that require them to consider factual and not abstract or hypothetical questions; that clearly identify where the defendant has been convicted on grounds of intoxication rather than of actual intention or recklessness; and which accordingly give positive guidance to the sentencing tribunal as to the ground of his conviction. (LCCP No. 127, 93)

The Law Commission concluded by stating that the new offence could straightforwardly implement the policy of restraining intoxicated defendants, would concentrate on the damage or injury caused by them, and would abolish the complicated yet uncertain law found in Majewski.

One concern of commentators related to the sixth and favoured option. If the accused commits a listed offence when substantially intoxicated he has a defence. What, however, if despite his intoxication he intended to commit the offence? Surely as in Kingston, above, he should be liable for the (listed) offence, not just for the proposed offence. As Kingston confirmed, a drunken intent is nevertheless an intent.

The Law Commission published Report No. 229, Intoxication and Criminal Liability, 1995, which is noted below and which adopts a position very similar to that of the US Model Penal Code 1962, s 2.08(1), as the follow-up to LCCP No. 127. In the meantime it issued its Report No. 218, Legislating the Criminal Code – Offences against the Person and General Principles, 1993. Report No. 218 was restricted to non-fatal offences and three general defences. With regard to non-fatal offences, cl 21(1) provides that

a person who was voluntarily intoxicated at any material time shall be treated

(a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and

(b) as not having believed in any circumstances which he would have believed in had he not been intoxicated.

The Home Office Consultation Document, Violence: Reforming the Offences Against the Person Act 1861, 1998, accepted this definition for the purposes of its draft Offences against the Person Bill. What should be noted is that the accused will no longer be deemed to be reckless if he is intoxicated. He can adduce evidence to show that despite being intoxicated he did not have the requisite mens rea. For purposes of the revised offences, ‘a person who was voluntarily intoxicated at any material time shall be treated as not having believed in any circumstance which he would not then have believed in had he not been intoxicated’ (cl 33).

The Law Commission opined that the current distinction between basic and specific intent crimes could not be ‘expressed in statutory terms, because its limits are almost impossible to specify’. For convenience, the law was to be reformulated to apply ‘only to allegations of or cognate to recklessness’. In other words Majewski was for the purposes of the Criminal Law Bill attached to Report No. 218 restricted to offences of recklessness, just as Lord Elwyn-Jones thought in Majewski and Lord Diplock did in Caldwell. Evidence of intoxication can, however, be considered in respect of intention crimes such as the proposed one of intentionally causing serious injury. The retention of the law on intoxication is not consonant with the Law Commission’s insistence on subjective fault.

Clause 33 of the Criminal Law Bill was directed at preserving the rule in O’Grady pending the full Report on intoxication. It will be remembered that the Law Commission had previously called the effect of O’Grady ‘unthinkable’. Schedule 3, para 13(3) to the Bill would revise s 5(2)(b) (protection of property) of the Criminal Damage Act 1971 to make it consistent with the restatement in cl 33. Jaggard v Dickinson, a case in s 5(2)(a), would not be affected.
The Law Commission surprisingly resiled from the chief recommendation contained in its Consultation Paper when it published *Legislating the Criminal Code: Intoxication and Criminal Liability*, Report No. 229, 1995. The Law Commission considered that ‘prudent social policy’ (para 1.14) overrode the general principle of criminal law that defendants were guilty only when as a minimum they were aware of the risk that their conduct might cause harm. They should not escape liability because they were intoxicated for the public must be protected from violence. It is reasonable to hold them liable for misbehaviour when drunk. Consultees responded to the recommendations in the Consultation Paper that the abolition of the rule in *Majewski* without replacement (option 5) was unacceptable because it would result in the acquittal of drunken defendants and that the creation of a new offence (option 6) was also unacceptable on the ground that more trials would take place, expert evidence would be needed as to whether the accused was substantially impaired, more police time would be spent on uncovering the extent of his intoxication and the prosecution would not know in advance of trial whether the proposed offence should be included in the indictment. Options 3 and 4 were not supported on consultation. That left option 1, doing nothing, and option 2, codifying and amending current law. These options were supported by the consultees: ‘juries do not in fact experience as much difficulty with the present law as we had previously thought’ (para 1.28). Option 1 was rejected because it did not deal with the problems of the law such as whether a crime was one of basic or specific intent. That left option 2. Among the recommendations flowing from that decision were, first, that in respect of allegations of purpose, intent, knowledge, belief, fraud and dishonesty evidence of intoxication should be considered along with all the other evidence to determine whether that allegation was proved; secondly, in respect of other mental elements such as recklessness the accused should be deemed to be aware of anything he would have been aware of, had he not been intoxicated; and thirdly, if the accused when intoxicated whether involuntarily or voluntarily held a belief which would have exculpated him if he had been sober, the belief will not exculpate him if he would not have held it but for his intoxication and the crime is not one of purpose, intent, knowledge, belief, fraud or dishonesty: cf. *Jaggard v Dickinson*, above. An example of the first two propositions is attempt. The accused to be guilty must intend the full offence and intoxication would be taken into account; however, recklessness as to the circumstances suffices for the attempt if it suffices for the full crime: the accused will not be able to rely on intoxication in relation to recklessness such as recklessness as to the victim’s consent in rape. At least this is how the provision is expected to work. A court might say that where a crime consists of both allegations of intent and of recklessness, it is in fact a crime of recklessness. Therefore, the accused is guilty if sufficiently intoxicated. ‘Intoxicated’ would be defined as occurring when awareness, understanding or control was impaired by an intoxicant, which would be defined as ‘alcohol, a drug or any other substance (of whatever nature) which, once taken into the body, has the capacity to impair awareness, understanding or control’. Involuntary intoxication would cover situations where the accused took the substance not knowing that it was an intoxicant, he was given it without consent, he took it under duress or had some other defence, he was particularly susceptible to it and did not know, or finally he took it solely for a medical reason and either did not know of its propensity to give rise to aggressive or uncontrollable behaviour or (if he was aware) he took it with medical advice. If in spite of the voluntary intoxication he did have the requisite mental element he would be guilty: *Kingston*, above, would be unaffected.

The proposals would abolish the basic/specific intent divide and replace it with one based on the mental element alleged (though the difference in practice may be minimal
and the distinction seems to exist already: see above), would abrogate the rule in *Hardie,* above, and replace it with a rule about medical advice, would abolish the *O'Grady* principle and would tidy up the law of involuntary intoxication.

The proposals have been criticised for failing to conform with the general principles espoused in the draft Criminal Code. The recommendations are based on the workability, but they would lead to a complicated law.

The Home Office issued a Consultation Paper *Violence: Reforming the Officer against be Person Act 1861* in 1998. In it the government returned to the approach of the 1989 draft Criminal Code. Because of the nature of the document intoxication was restated only in relation to non-fatal offences but in its 2000 Consultation Paper on involuntary manslaughter the Home Office took the same view with regard to this offence. There has been no movement since by the government.

### The Law Commission’s 2006 recommendations

The Law Commission issued its Report no. 306 *Murder, Manslaughter and Infanticide* in November 2006. In it the Commission proposed a three-tier structure for fatal offences: first degree murder, second degree murder and manslaughter: see Chapter 11 for details. In respect of intoxication the Law Commission proposed that it should be a defence to first and second degree murder but not to manslaughter. The specific and basic intent formula would thus be mapped onto the new law. However, it should be noted that one form of the proposed mental element in first degree murder is ‘intent to cause serious injury being aware that there is a serious risk of death’. This is therefore a crime partly defined in terms of (subjective) recklessness: awareness of a serious risk of death. Nevertheless, this type of murder will remain a crime of specific intent. Similar points may be made about second degree murder.

### Self-defence and the prevention of crime

#### Introduction

This section deals with the statutory defence of prevention of crime and effecting or assisting in an arrest found in s 3(1) of the Criminal Law Act 1967 and the common law defence of self-defence insofar as it survives the enactment of s 3(1). The Criminal Justice and Immigration Act 2008, s 76, came into force on 14 July 2008. It was presented by the Minister of Justice, Jack Straw, as a measure which would protect those charged with crimes who were seeking to prevent the commission of offences against themselves, others or property, particularly householders who used force against burglars, but in fact it is an enactment of the caselaw authorities. Section 76 may be outlined thus:

1 ‘The question whether the degree of force used by D [the accused] was reasonable in the circumstances is to be decided by reference to the circumstances as d believed them to be . . .’ (s 76(3)).

2 Section 76(4) provides:

   If D claims to have held a particular belief as regards the existence of any circumstances –

   (a) the reasonableness or otherwise of that belief is relevant to the question whether
       D genuinely held it; but
PART 2 GENERAL PRINCIPLES

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not –
(i) it was mistaken, or
(ii) (if it was mistaken) the mistake was a reasonable one to have made.

3 Section 76(5) stipulates: ‘But subsection (4)(b) does not enable D to rely on any mistaken belief that was voluntarily induced.’

4 ‘The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in the circumstances.’ (s 76(6)).

5 Section 76(7) provides that:
   In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case) –
   (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
   (b) that evidence of a person’s having done what the person instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.
   Whether the accused has a legitimate purpose is determined by s 76(10)(a): common law self-defence and statutory prevention of crime and effecting or assisting in arrest under the 1967 Act.

6 The triers of fact are not restricted to these two pieces of evidence (s 76(8)).

7 Subsection (10) provides in part: ‘... (b) references to self-defence include acting in defence of another person; and (c) references to the degree of force used are to the type and amount of force used.’

All these points are dealt with below. For example, the point in s 76(5) about drunken mistakes is considered below in section (g) Mistake of fact. The reader will quickly find that the 2008 statute does not enact new law but codifies case law. Even the term ‘weigh to a nicety’ in s 76(7)(a) is taken from case precedents. However, s 76 is only a partial codification of self-defence and prevention of crime; moreover, to understand s 76 one needs to understand the law which it puts into statutory form.

The boundaries of self-defence and prevention of crime

It might be said that self-defence and the prevention of crime are not true defences but, like the defence of consent, are failures to prove that the accused did the act unlawfully. His act was justified and there is no actus reus. Therefore, there was no crime. The policy basis of the defence is to inhibit aggressive behaviour. The Court of Appeal in Abraham [1973] 1 WLR 1270 emphasised that a judge should point out to the jury that while a plea of self-defence is called a defence, the burden remains on the prosecution to disprove it. Other authorities are to similar effect, e.g. Khan [1995] Crim LR 78 (CA). A Privy Council authority is Chan Kau v R [1955] AC 206. For Australia see Viro (1978) 52 ALJR 418 (HCA). The judge must direct the jury on this defence if the facts raise it even though the accused did not seek to rely on it: DPP v Bailey [1995] 1 Cr App R 257 (PC).

By s 3(1) of the Criminal Law Act 1967:

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or in assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
This rule replaced the common law. The defence of one’s own person and others and of property is also a defence, this time at common law. This defence probably has the same bounds as s 3 except that possibly the common law defence is restricted to defence against the use of force whereas s 3 is not. The degree of force lawful in self-defence is the same as that under the Act: *McInnes* (1971) 55 Cr App R 551 and *Clegg* [1995] 1 AC 482 (HL). In the latter case Lord Lloyd rejected the view of Lord Diplock in *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975)* [1977] AC 105 that a person who uses force in self-defence is more blameworthy than he who uses it to prevent crime. Self-defence could in many circumstances fall within s 3, and both defences are available on the same facts: *Cousins* [1982] QB 526 and *Clegg*. This is another reason for rejecting Lord Diplock’s view. If the force used is not in the prevention of crime, such as where the accused is defending himself against an attack by a child under 10 or an insane person, s 3 cannot be used. Accordingly there is not a total overlap. It should be noted that to have a defence of self-defence the attack against which the accused defended himself need not be an unlawful one: *per* Ward LJ in *Re A (Children) (Conjoined Twins: Medical Treatment)* [2001] Fam 147 (CA), a civil case. The Court of Appeal (Criminal Division) in *Kelleher* [2003] EWCA Crim 3525, did say that there had to be an unlawful or criminal act against which the defendants were defending themselves, but it did not consider the position, for example, of children under 10. Since the planting of genetically modified maize seed was lawful, the defendants did not have the defence. (‘Unlawful’ here means tortious.)

The jury is entitled to take into account the physical characteristics of the accused in assessing whether his reaction was reasonable: *Martin* [2003] QB 1 (CA), the case of the Norfolk former who shot a fleeing burglar in the back, killing him. For example, the fact that the accused was weak or small or both when the victim was strong or tall or both can be taken into consideration. The court added that psychiatric conditions can ‘in exceptional circumstances’ be considered. What those circumstances are was left undefined. The accused in *Martin* suffered from paranoia but that psychiatric condition was not to be used. Therefore, the law is uncertain.

(a) *The interpretation of s 3.* The force must be used for the purposes specified. An example is *Renouf* [1986] 2 All ER 449 (CA). The accused was charged with reckless driving. He had forced a vehicle off the road and rammed it after the occupants had assaulted him and damaged his car. He was held to have been acting in order to assist in the lawful arrest of offenders. Whether the force was reasonable was a question for the jury. Another point of construction is that s 3 is limited to the use of force. There is no definition of ‘force’. The term seems to require some sort of violent behaviour. Therefore, writing with a felt-tip on a concrete pillar is not force within s 3: *Blake v DPP* [1993] Crim LR 586. What about using something less than force? One answer is that such conduct falls within the common law and in principle if force is permitted, something less should be allowed too. An example given by Jeremy Horder in ‘Self-defence, necessity and duress: understanding the relationship’ (1998) 11 Canadian Journal of Law and Jurisprudence 143 at 144 is this: ‘If the only way I can stop a would-be attacker killing me is to release a poisonous gas into a room through which he will pass to reach me, then I am entitled to have such a step considered as potentially necessary and proportionate, even though it does not involve the use of force.’ In *Cousins*, above, Milmo J said: ‘If force is permissible, something less, for example, a threat, must also be permissible . . .’. In *DPP v Bayer* [2004] 1 WLR 2856 (DC) the defendants chained themselves to tractors to prevent
genetically modified maize being drilled. The court suggested *obiter* that they might have had a defence if the other elements of defence of property had been satisfied. However, it cannot be said that the law is settled.

(b) The interpretation of self-defence. Self-defence includes the protection of others: *Duffy* [1967] 1 QB 63 (CCA). It also covers protection of property: *Hussey* (1924) 18 Cr App R 160 (CCA): a trespasser may be killed in defence of one’s home (but the force must be reasonable). The accused shot and wounded two of his landlady’s friends, who were trying to break into his room to evict him illegally. Had the facts occurred today, the friends would have been guilty of at least two offences and therefore the accused would be acting in prevention of crime. For example, one may kill another’s dog which is threatening other people or property. In *Workman v Cowper* [1961] 2 QB 143 (DC) the accused killed a foxhound which was running wild on common land where there were sheep. The dog was not worrying the sheep, but it was lambing season. In *Faraj* [2007] EWCA Crim 1033 it was held that a householder could rely on self-defence in order to detain a burglar. In fact the alleged burglar was a gas repair man. See (g) below for mistake of fact. Also included are preventing a trespass, breach of the peace and escaping from unlawful imprisonment. An act of self-defence need not be spontaneous: *Attorney-General's Reference (No. 2 of 1983)* [1984] QB 456, approved in *Beckford v R* [1998] AC 130. The accused therefore can prepare to repel an attack if that attack is about to start. This proposition could give a defence to a battered woman who is in fear of further violence provided, it is thought, that the attack is imminent. If, however, the abuser is asleep, no attack is imminent. Lord Griffiths in *Beckford* stressed the necessity for imminence. Northern Ireland law is the same. The requirement of imminence (or immediacy) means that people can ‘get their blow in first’ far in advance of any attack. The accused will not be acting in self-defence if he creates the dangerous situation for which he wished to use the defence. In other words, the defence is ruled out when the accused induces the victim to attack him. In *Malnik v DPP* [1989] Crim LR 451 the defendant was going to see a person who he believed had stolen cars belonging to his friend. Because the alleged thief was violent, the accused took with him a rice-flail, which is a weapon used in oriental martial arts. He was arrested before he reached the alleged thief’s house. The court rejected his contention that he was justified in carrying the weapon because he feared being attacked. It was he who had created the situation of danger. This case was approved in *Salih* [2007] EWCA Crim 2750. Hooper LJ agreed with Bingham LJ in *Malnik v DPP* that ‘the policy of the law’ was against arming oneself with offensive weapons and that the exceptions were narrow. The requirement of imminence is one reason why battered wives may find difficulty in having this defence. Stabbing a sleeping partner does not suggest a situation of imminent danger. Another difficulty for such persons is that the degree of force may be excessive. This issue is discussed in (c) below.

(c) The person attacked is under no duty to retreat: *Julien* [1969] 1 WLR 839. In *Bird* [1985] 2 All ER 513, the Court of Appeal said that it was not necessary for the accused to have demonstrated an unwillingness to fight to have this defence. Whether the accused did retreat or show an unwillingness to fight is one factor to be taken into account: *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975)*, above, and *Duffy v Chief Constable of Cleveland Police* [2007] EWHC 3169 (Admin). Trying to withdraw is therefore evidence of the accused’s acting reasonably.
(d) **The burden of proof is on the prosecution:** *Lobell* [1957] 1 QB 547. The accused shoulders the evidential burden. Even if the accused does not rely on the defence, if the facts raise it the judge must put it to the jury.

(e) **The degree of force.** Under both s 3 and the common law the force used must (in fact) be reasonable in the circumstances. What is reasonable depends on the nature of the threat. It is common to say that the force used must be both necessary and proportionate. There is no need for exact proportionality: *Palmer v R* [1971] AC 814. The Court of Appeal in *Rivolta* [1994] Crim LR 694 followed *Palmer*, which is a Privy Council case. In *Oatridge* (1992) 94 Cr App R 367 the Court of Appeal stated that one of the questions to be answered was whether the accused’s response was ‘commensurate with the degree of danger created by the attack’. What the accused instinctively believed was necessary is evidence of the reasonableness of the force: *Whyte* [1987] 3 All ER 416. If the accused uses excessive force and kills when no reasonable person would have done so, he is guilty of murder (if he has malice aforethought): *Palmer v R*, above. A killing in excessive self-defence is sometimes thought not to be as serious as a true murder, but the outcome is not manslaughter but murder. There have been several calls for the reform of this law. The House of Lords in *Clegg* rejected the opportunity to declare that a killing in self-defence was manslaughter. The question of reasonableness is for the jury: *Reference under s 48A; Cousins*, above. In *Cousins* it was said that a threat of force may be reasonable, when force would not be. As was held in *Clegg*, once the danger is over there is no necessity to use force. Therefore, force used then is not in self-defence or in the prevention of crime but is illegal. On the facts of *Clegg* the danger had passed and the accused was not acting in defence of another or to prevent the crime of death by dangerous driving. Provided that the accused did use reasonable force, it does not matter whether the accused was in a state of funk or was calm. See also the discussion of Article 2 of the European Convention on Human Rights in the ‘Conclusion’ below.

(f) **Self-defence and duress of circumstances.** Both defences are based on threats. If the accused grabs a knife and uses it to prevent himself being killed, he is acting in self-defence and under the influence of duress of circumstances. Self-defence is limited to the use of force, whereas duress is available for most offences. Therefore, if the accused does not use force, duress of circumstances is a possible defence. Self-defence is a defence to all crimes, though the Court of Appeal in *Symonds* [1998] Crim LR 280 had difficulty with the concept of self-defence applying beyond the realms of offences against the person (here, driving offences), but duress of circumstances is not a defence to murder. In duress the harm threatened must be of death or serious injury. In self-defence the accused has to use only reasonable force, whereas the test may be higher in duress of circumstances: did this accused fall short of the standard of a person of reasonable firmness? It is strange that the test where the accused need not use force (duress) is stricter than the test where he does use force (self-defence). This proposition applies also to the next point. The tests for mistake also differ. Duress of circumstances required reasonable belief. This difference can give rise to different verdicts. Take a variation on the facts of *Symonds*. Assume that the accused was mistaken as to what the victim was doing and to escape he drove his car at the victim. The defence is one of self-defence. The mistake, if honest, gives rise to a defence. If, however, in order to escape the accused drove away dangerously, the defence is one of duress of circumstances. An unreasonable mistake is
not a defence. The outcome does differ depending on the defence. The Court of Appeal said that self-defence and duress of circumstances shared the same elements, but in relation to a mistaken belief they do not (though the law seems to be changing). Moreover, duress is no defence to murder, attempted murder, being an accessory to murder and some forms of treason; the threat in duress must be of death or serious injury; and there is no defence of duress when the accused has voluntarily put himself in a position where a criminal gang may exert violent pressure on him. Mistake in self-defence is discussed next.

(g) **Mistake of fact.** The accused is to be judged on the facts as he perceives them to be. The test is subjective. To omit this part of the law constitutes a misdirection: *Duffy*, above. If the accused used excessive force because he made a mistake of fact, he has a defence if he would have had a defence on the facts as he believed them to be. There is no need for a reasonable mistake: *Williams* [1987] 3 All ER 411, *Jackson* [1984] Crim LR 674, *Fisher* [1987] Crim LR 334 (CA), *Beckford*, above *Morrow* [1994] Crim LR 58, where the cases on self-defence were applied to the statutory defence of prevention of crime, and *Faraj*, above, where the law on mistake of fact was applied to the defence of property. Lord Griffiths in *Beckford* emphasised that basing the law of mistaken self-defence on honest belief rather than reasonable belief would not allow bogus defences to succeed, for juries were adept at distinguishing truth from falsity. The Court of Appeal ruled in *Oatridge*, above, that in cases of honest mistake of fact in self-defence (in this case the fact that the accused believed her partner was going to kill her – he had abused her previously) the judge should direct the jury on whether the victim’s response was commensurate with the attack which he believed he faced. The force must still be (objectively) reasonable in the circumstances which the accused (subjectively) believed existed: *Owino* [1996] 2 Cr App R 128 (CA). Anything said by the Court of Appeal in *Scarlett* [1993] 4 All ER 629 to the effect that the accused was entitled to use such force as he believed reasonable was incorrect. *Owino* was followed in *Hughes* [1995] Crim LR 957 (CA). The court held that the trial judge must explain to the jury the effect of a mistaken belief. The law is that an accused who is mistaken that he is about to be attacked is entitled to be judged on the facts as he believed existed but he must use no more than reasonable force, reasonableness being assessed in the light of the circumstances the accused thought existed. Since Beldam LJ gave the judgment in *Scarlett* and in *Hughes*, *Scarlett* is now to be taken as incorrect. The Court of Appeal spoke to similar effect in *DPP v Armstrong-Braun* (1998) 163 JP 271. While the facts are to be judged as the accused honestly believed them to exist, the Court of Appeal in *Martin* [2003] QB 1 stated that his perception of the danger was to be assessed objectively. The fact that this accused because he had a paranoid personality saw danger when it did not exist was irrelevant. The court certified a question of law of general importance: ‘Whether expert psychiatric evidence is admissible on the issue of a defendant’s perception of the danger he faced . . .?’ Unfortunately leave to appeal was refused. However, the Privy Council advised in *Shaw v R* [2001] 1 WLR 1519 that the jury must take into account ‘the circumstances and the danger as the [accused] honestly believed them to be . . .’. There is a clash of authority. It is suggested that the Privy Council is correct, for there is no distinction between ‘facts’ and ‘danger’.

The contrast between *Williams* and *Clegg* should be noted. If the accused is mistaken as to whether there is a need for self-defence, he is acquitted: *Williams*. If, however, the accused is mistaken as to the degree of force, he is guilty, even of murder: *Clegg*. In respect of the latter situation, a comparison with provocation is
instructive. In self-defence an overreaction leads to guilt, not an acquittal, whereas in provocation overreaction leads to acquittal on a charge of murder. Since a successful defence of provocation leads to a conviction for manslaughter, it is arguable that when the accused kills in defence of self or others but uses excessive force, this too should be manslaughter. However, it may well be that any killing in defence of property cannot be justified.

Four final points on mistake of fact should be made. First, ‘If a defendant applies force to a police or court officer, which would be reasonable if that person were not a police or court officer, and the defendant believes that he is not, then even if his belief is unreasonable, he has a good plea of self-defence’: Blackburn v Bowering [1994] 3 All ER 380 (CA, Civil Division). Secondly, if the mistake is caused by intoxication, the accused has no defence: O’Grady [1987] 3 All ER 420, which was approved in Hatton [2006] 1 Cr App R 247. Thirdly, if the accused does not believe that he is acting reasonably in preventing crime or in self-defence but circumstances in fact exist which would have given him a defence, had he known of them, he has no defence, for the principle in Dadson (1850) 4 Cox CC 358 explained in Chapter 2 applies. Fourthly, while the point has not been conclusively settled by the European Court of Human Rights, current English law laid down in Williams may be inconsistent with Article 2 of the European Convention, which the Court has interpreted as requiring the accused’s belief to be based on reasonable grounds: see McCann v UK (1995) 21 EHRR 97, Andronicou v Cyprus (1998) 25 EHRR 491 and Gul v Turkey (2002) 34 EHRR 28. The European Court in Brady v UK (2001) 3 April had the opportunity to consider this issue but it seems that the Court failed to realise that a difference exists. The same must be said of Caraher v UK (2000) 11 January, an admissibility decision, and Bubbins v UK, 17 June 2005, where the requirement that force used by the police be ‘absolutely necessary’ was satisfied by a constable’s honest belief that there was ‘a real and immediate risk to his life and the lives of his colleagues’. Collins J in the Administrative Court said that English law and Article 2 were the same when it came to assessing the reasonableness of the force: R (on the Application of Bennett) v H.M. Coroner for Inner South London (2006) 170 JP 109. He added that Article 2 applies to both intentional and non-intentional killings. It should be noted that Article 2 is restricted to the use of fatal force in self-defence. It would be absurd if different rules applied to the use of non-fatal force.

(h) The same rules as apply to ordinary citizens govern the conduct of the security forces: Clegg. Lord Lloyd noted that there was no defence of superior orders in criminal law and that to create an exception for the armed services would be to make new law. Similarly, the High Court in R (Bennett) v HM Coroner for Inner South London held that Article 2 of the ECHR applied not just to agents of the state such as police officers but also to members of the public. Collins J suggested that the test of reasonableness in the English law of self-defence was the same as that found in Article 2 but as stated is (g), this dictum is questionable.

(i) The Court of Appeal held in Jones v Gloucestershire Crown Prosecution Service [2005] QB 259 that ‘crime’ in s 3 meant an act, omission or state of affairs and the mental element which constituted a crime in English domestic law. Therefore, the term did not include something which was a crime elsewhere or in international law but was not a crime in England and Wales. The international crime of aggression against a foreign country is not an offence in English law. Accordingly, aggression was not a ‘crime’ for the purposes of s 3, and the appellants could not use the
defence against charges arising out of attempts to stop UK and US attacks on Iraq. The House of Lords dismissed the appeal on the same grounds [2006] UKHL 16. Obiter it was suggested that even if the crime of aggression existed in English domestic law, the defendants would not have been able to rely on the defence of prevention of crime because using force to obstruct military vehicles would not prevent the crime of aggression.

(j) In Australia a person, it seems, may defend himself, others and property against a lawful attack: Zecevic (1987) 71 ALR 641 (HCA). A similar rule exists in provocation. English law remains to be made. In Re A [2001] Fam 147 Ward LJ held that it was lawful to kill one of conjoined twins when her existence was dragging the other twin towards death: obviously the other twin’s ‘attack’ was lawful. Ward LJ compared her with killing a six-year-old boy who was shooting people in the school playground. If English law were to demand an unlawful attack, one would not have a defence of self-defence against the type of persons mentioned earlier, the insane, automatons and those under 10. However, DPP v Bayer is to contrary effect. The defendants’ claim of defence of property failed because they were not defending against unlawful behaviour. There was nothing criminal or tortious about drilling seeds of genetically modified maize.

(k) Zecevic also provided Australian authority for the proposition that an accused ‘may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim . . . the right to defend himself against that attack’. The law is different in provocation. Northern Irish law is the same as that stated in Zecevic: Browne [1983] NI 96. However, if the accused kills the victim in the course of a violent quarrel he (the accused) may rely on the defence if the victim’s reaction was disproportionate to the accused’s conduct: Rashford [2006] Crim LR 528 (CA). It is not certain whether Rashford has settled English law on this point but it seems to have done.

(l) The fact that an accused has a defence of self-defence does not prevent his losing a civil claim for damages in respect of the same act. See Revill v Newbery [1996] 2 WLR 239.

(m) The defendant’s defence terminates when his victim is no longer threatening him. If there is a road rage incident, both drivers get out of their cars and one threatens the other with violence, the accused is entitled to use self-defence. If the first then drives off, the accused is not acting in self-defence if he follows him in order to drive him off the road.

(n) It does not matter whether the accused was acting calmly or in abject terror. The issue remains one of whether his action was reasonable.

(o) Section 3(1) affected both civil and criminal law. However, civil law is different not just as to the standard of proof but also the burden of proof. The defendant in civil law must prove that he has the defence: Ashley v Chief Constable of Sussex Police (2006) The Times, 30 August. The Court of Appeal also held, in distinction to criminal law, that a mistake as to whether the defendant had to act in prevention of crime had to be made on reasonable grounds. It is suggested that the civil law of mistake in self-defence is closer to the European Convention on Human Rights as interpreted in McCann than is the criminal law!

The present law and proposed reform of mistake of fact and intoxication are discussed under those headings.
As in necessity statutory words may conceal self-defence. By s 16 of the Firearms Act 1968 ‘[i]t is an offence for a person to have in his possession any firearm . . . with intent . . . to endanger life . . .’. While there is no express mention, counsel for the prosecution conceded in Georgiades [1989] 1 WLR 759 (CA) that it would be a defence for the accused to act to endanger life for a lawful purpose as when the accused raised a shortened shotgun to waist level thinking he was about to be attacked. Note that force which causes the simple offence of criminal damage falls within the defence noted in Chapter 18, that of lawful excuse, whereas force causing the aggravated offence falls within self-defence.

The draft Criminal Code (Law Com. No. 177, 1989)

The Law Commission proposed to restate self-defence in the following fashion.

Clause 44(1)
A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable –
(a) to prevent or terminate crime, or to effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;
(b) to prevent or terminate a breach of the peace;
(c) to protect himself or another from unlawful force or unlawful personal harm;
(d) to prevent or terminate the unlawful detention of himself or another;
(e) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage; or
(f) to prevent or terminate a trespass to his person or property.

Law Commission Report No. 218, Legislating the Criminal Code – Offences against the Person and General Principles, 1993, on which see below, rejects a separate requirement that force is immediately necessary. If the requirement of imminence were abolished, battered persons who kill their sleeping or drunken partners might be afforded this defence. The 1993 Report also removed the reference in the opening words of cl 44(1) to ‘circumstances which exist’, thereby restoring the principle in Dadson (1850) 4 Cox CC 358.

Clause 44(2)
In this section, except where the context otherwise requires, ‘force’ includes, in addition to force against a person –
(a) force against property;
(b) a threat of force against person or property; and
(c) the detention of a person without the use of force.

Clause 44(3)
For the purposes of this section, an act is ‘unlawful’ although a person charged with an offence in respect of it would be acquitted on the ground only that –
(a) he was under ten years of age; or
(b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or
(c) he acted in pursuance of a reasonable suspicion; or
(d) he acted under duress, whether by threats or of circumstances; or
(e) he was in a state of automatism or suffering from severe mental illness or severe mental handicap.

Clause 44(4)
Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if –
(a) he knows that the force is used against a constable or a person assisting a constable; and
(b) the constable is acting in the execution of his duty, unless he believes the force to be
immediately necessary to prevent personal harm to himself or another.

(This is in accord with present law, the most recent authority being Ball (1990) 90 Cr
App R 378 (CA). By putting the law into statutory form the Law Commission will give
guidance to people on how to behave in a situation of potential or actual force.)

Clause 44(5)
A person does not commit an offence by doing an act immediately preparatory to the use
of such force as is referred to in subsection (1).

Clause 44(6)
Subsection (1) does not apply where a person causes unlawful conduct or an unlawful state
of affairs with a view to using force to resist or terminate it; but subsection (1) may apply
although the occasion for the use of force arises only because he does anything he may
lawfully do, knowing that such an occasion may arise.

Clause 44(7)
The fact that a person had an opportunity to retreat before using force shall be taken into
account, in conjunction with other relevant evidence, in determining whether the use of
force was immediately necessary and reasonable.

Clause 44(8)
A threat of force may be reasonable although the use of the force would not be.

Clause 44(9)
This section is without prejudice to the generality of section 185 (criminal damage: protec-
tion of person or property) or any other defence.

These provisions largely restate the law. However, one difference is found in cl 55 and
59. If the accused kills by using excessive force, the crime will no longer be murder but a
new form of manslaughter. This was the position in Australia until the doctrine was
abolished in 1987. The Australian direction was thought to be too complicated for juries.
The English proposals, however, are not complex. This reform was also proposed by the
Criminal Law Revision Committee in its Fourteenth Report, Offences Against the Person,
Cmnd 7844, 1980, as well as the (Nathan) Select Committee on Murder and Life
Imprisonment (HL Paper 78–1, 1989) para 89. The principal argument in favour of
manslaughter is that the person who kills using excessive force is not as morally blame-
worthy as someone who kills and really intends to do so. Because of the stigma attached
to murderers, those who have killed using unreasonable force should not be classified as
murderers. The House of Lords in Clegg considered that this reform should not be
achieved by the judiciary. Lord Lloyd said that the issue was one concerned with the
mandatory life sentence for murder, which was one which only Parliament could resolve.
There is certainly public concern that too many people who injure while acting in
defence of property are prosecuted.

The Law Commission’s 1993 proposals

In its Report No. 218, Legislating the Criminal Code – Offences Against the Person and General
Principles, 1993, the Law Commission recommended a statutory restatement as to when
the use of force is justified. Clause 27(1) of the Criminal Law Bill attached to the Report
is in these terms.
The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence:

(a) to protect himself or another from injury, assault or detention caused by a criminal act;
(b) to protect himself or (with the authority of that other) another from trespass to the person;
(c) to protect his property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement;
(d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of the other) from trespass or infringement; or
(e) to prevent crime or a breach of the peace.

This clause incorporates the law in *Williams* [1987] 3 All ER 411, states expressly for the first time that force may be used against the property to protect the person, and revises s 5 of the Criminal Damage Act 1971 to bring it into line with the present s 3 of the Criminal Law Act 1967 with the effect that the force must be objectively reasonable and not merely reasonable from the accused’s viewpoint. Clause 27(1)(a)–(e) lists the purposes for which the use of force is justifiable. It restates cl 44(1)(a)–(f) of the draft Criminal Code in slightly different words. It should be noted that the same act may fall within more than one of the categories, e.g. an accused who defends himself is preventing the commission of an offence and protecting against an assault. Clause 27(1)(e) is worth mentioning. The example given by the Law Commission is one where ‘D restrains P, who is clearly dangerously intoxicated, from driving P’s motor vehicle’. Here D is not protecting the person or property of himself or another but is preventing crime. There is special provision permitting defence against non-criminal acts done by persons under 10, acting under duress (of both kinds), acting involuntarily or in a state of intoxication and who are insane (cl 27(3)). This provision is needed only where the accused knows of the condition, for otherwise he is judged on the facts he believes to exist. There is another special provision dealing with the situation where the accused knows of the facts which make the other’s acts non-criminal where the other has made a mistake. For example, the accused is making a lawful citizen’s arrest; the other does not know this and thinks that the accused is attacking the victim; he intervenes; the accused uses force to resist the other; however, the accused knows that the other has made an error. By cl 27(6) the accused’s reaction is lawful. The Law Commission argued that: ‘P’s act is lawful only because of a mistake or suspicion on the part of P that is in fact incorrect. D is nonetheless put in a position of potential peril that is not in any way lessened by P’s error, and the fact that D knows of the error should not shut him out from the defence.’

There is no (separate) requirement that the accused is subject to or fears an immediate attack. The effect will be that more battered women who kill their sleeping or drunken abusers will have this defence. Clause 29(2) exempts from liability acts done immediately preparatory to the use of force such as the possession of firearms. Clause 27(7) takes away the defence from one who deliberately provokes an attack; however, an accused does have the defence where he is going about his lawful business as illustrated by *Beatty v Gillbanks* (1882) 9 QBD 308, the case of the Skeleton Army. As at present there is no rule that the accused is under a duty to retreat: cl 29(4). The *Dadson* (1850) 169 ER 407 principle is preserved by the Bill. In the words of the Law Commission:

It follows from the requirement that the defendant be judged according to circumstances as he believes them to be that he cannot rely on circumstances unknown to him that would in fact have justified acts on his part that were unreasonable on the facts as he perceived
them. . . . Citizens who react unreasonably to circumstances should not be exculpated by the accident of facts of which they were unaware.

Force to effect or assist in a lawful arrest receives separate treatment (cl 28). ‘Force’ in cl 27–29 is not defined. The restatement of the law of the justifiable use of force does not affect the defences of duress of circumstances or necessity. Therefore injury to a dog who is attacking one’s children, and making a firebreak, will remain lawful.

Just as the defence of provocation has come in for criticism for being based on the male psyche with the result that few women are afforded it because they do not react in the same way as men, so too has the defence of self-defence been criticised. The Australian Law Reform Commission in its Report No. 69, Equality before the Law: Justice for Women, 1994, paras 12.2–3 put it this way.

What is ‘reasonable’ has traditionally been assessed on men’s experiences of a reasonable response to the circumstances. For example, in establishing self-defence, there must be an immediate threat and a proportionate response. The typical scenario is that of an isolated incident in a public place between two strangers of relatively equal size, strength and fighting ability, that is, a ‘bar-room brawl’ model . . . The ‘bar-room brawl’ model bears little relation to the situation of a woman who has been subjected to prolonged physical, mental and emotional abuse within her home by her male partner. In her terrorised state and usually inferior physical size and strength, her only reasonable option may be to take action some time later when it is safe for her to do so. This may be during a lull in the violence, for example, when the aggressor is asleep or incapacitated by alcohol. However, the law may construct her act as a premeditated one arising out of a long held grudge rather than as a defensive response triggered by a particular incident. For this reason it is argued that defences should be revised to reflect women’s experiences of violence and acts of self-preservation.

. . . Where juries and judges lack an understanding of the dynamics and effect of violence in the home, they may not see the woman’s response as ‘reasonable’. They may see her use of a gun or knife as excessive force in relation to the physical assaults inflicted on her by her unarmed partner . . . They may ask why she did not simply leave. This approach ignores the disempowering effect of the violence on the woman, her practical difficulties, such as where to go and how to support herself and her children, and her fear of retaliation if she were to leave, particularly where police assistance has not been adequate in the past.


The Law Commission in its Report No. 290, Partial Defences to Murder, 2004, considered whether excessive force should reduce murder to manslaughter in the same way as diminished responsibility and provocation do. Currently self-defence operates as an ‘all-or-nothing’ defence; this is, either the accused succeeds in his defence, in which case he is acquitted, or he fails, in which case he is convicted of murder. Excessive force when some force would be reasonable in the context of the Report means that the accused is convicted of murder. This conclusion is to some degree mitigated by trial judges directing juries that they are to take all circumstances into account, including, for example, the size of the accused and victim, that they are not to use hindsight, and that where there is evidence of provocation, they should consider whether or not that defence succeeds with the effect that a verdict of voluntary manslaughter is reached.
The Commission rejected the provision of a defence of excessive force. In respect of households who kill intruders, it considered that they could have a defence of provocation under the revised formula if these conditions were satisfied: if a person of ordinary tolerance and self-restraint acting in fear of serious physical violence to himself or another might have killed and the accused does kill, he will have a defence. In respect of battered adults or children who kill, fearing further abuse and not perceiving any route of escape and being aware of the mismatch in physique so that ‘to respond directly and proportionately to an attack or an imminent attack will be futile and dangerous’ (para 4.18), should they have a defence of self-defence if they use excessive force when, for example, their abuser is drunk or asleep? Again the Law Commission thought that such facts could fall within the revised definition of provocation: was the accused genuinely in fear of serious violence and might a person of ordinary tolerance and self-restraint have acted in the same or a similar way? In para 4.29 the Commission said that the revised definition of provocation will work ‘through the acknowledgement that even a person of ordinary tolerance and self-restraint might, on occasion, respond in fear by using an excessive amount of force.’

In conclusion the Law Commission was strongly of the view that there should not be a defence of excessive self-defence because in situations where that defence might arise, householders and the abused, the reformulated defence of provocation would be available.

Conclusion

The Home Secretary announced in 1995 that, after the unsuccessful appeal of Private Lee Clegg, a Home Office group would review the law on excessive self-defence by members of the armed forces and the police. The Interdepartmental Steering Group on the Law on the Use of Lethal Force in Self-Defence or the Prevention of Crime did not come down firmly for any change in the law, including the creation of a partial defence available on a charge of murder of excessive self-defence and amendment to s 3 of the Criminal Law Act 1967 to flesh out the meaning of reasonable force, when it reported in 1996 because it favoured finer distinctions than murder or manslaughter and manslaughter or acquittal, but it rejected any difference between the armed forces and the police on the one hand and other citizens on the other. There is, however, an argument to the contrary. Experienced police marksmen should be judged against a higher standard than ordinary citizens because they are experts. Such an argument might lead to the law that members of the police force and the armed forces should have a defence only when they have made a reasonable mistake as to the amount of force. Furthermore, the use of force is a matter of political controversy, which it rarely is when force is used by private individuals. Since Parliament shows no inclination to define murder or to change the sentence for murder, any change to bring in a defence of excessive self-defence is just not going to happen.

The outcome in Martin, above, where a Norfolk farmer shot a burglar in the back, killing him, led to outcry in favour of the accused; listeners to the Today programme on Radio 4 voted the reform of self-defence as their top priority for a bill, and in 2005 the Conservatives pushed for a change to the law whereby force would be lawful unless it was ‘grossly disproportionate’, a higher threshold than ‘unreasonable’ or ‘excessive’. Such strong feelings culminated in a bland (in the writer’s view) and short Joint Statement from the Crown Prosecution Service and the Association of Chief Police Officers
'Householders and the Use of Force against Intruders', in February 2005. Among the statements are: 'So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in self-defence [sic!]. This is still the case if you use something to hand as a weapon. As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence' and '... if, for example: having knocked someone unconscious, you then decided to further hurt or kill them to punish them ... you would be acting with very excessive and gratuitous force and could be prosecuted.' Interestingly, there is no mention of defence of property.

The European Convention on Human Rights does not permit the use of force to prevent harm to property. Therefore, a householder who killed a burglar in defence of property would not be able to rely on self-defence and the prevention of crime. However, the Convention provides an exception to the right to life only when 'the use of force ... is no more than absolutely necessary'. See the decision of the European Court of Human Rights in *Andronicou v Cyprus* (1998) 25 EHRR 491 where it was held that force had to be strictly proportionate to the threat posed by the victim. On the facts police officers were justified in using sub-machine guns in an attempt to rescue a hostage. This is a more stringent test than current English law, which speaks of 'reasonable' force. Both statute and common law will have to be restricted to situations where only necessary force is used. The jurisprudence of the European Court of Human Rights may also lead to change. Present English law permits a defence based on mistaken belief. However, the European Court of Human Rights seems to look for an honest belief that is well founded ('good reason'), as it did in *McCann, Andronicou, Gul and Bubbins*. The reduction in scope of self-defence may lead to calls for the introduction of the defence of excessive self-defence. Another distinction is that the Convention, Article 2, applies only when the victim was using 'unlawful violence'. English law applies whether the victim was using unlawful or lawful violence. One would hope that two sets of rules would not emerge depending on whether the force was lawful or not. Finally, English law permits the use of force to prevent crime but no such purpose exists in Article 2(2), and Article 2(1) is restricted to the use of force to kill whereas English law is not: it includes situations where the victim is not killed.

### Summary

The second chapter on defences considers three defences: mistake, intoxication and self-defence (which is nowadays sometimes called private defence). Mistakes of law and of fact are dealt with, as are mistakes as to an ‘irrelevant’ element of the offence definition. Intoxication, whether by alcohol or drugs, is a defence to certain offences only, the so-called crimes of specific intent, whereas it is not a defence to offences of basic intent. The various attempts by the judiciary to divide crimes into specific and basic intent ones are criticised. A helpful diagram of offences and their placing into the category of basic or specific intent is provided. The final defence examined in this chapter is here called self-defence, but the defence extends beyond defence of self to defence of others and even of property. It also covers the defence of prevention of crime found in s. 3 of the Criminal Law Act 1967. The relationship between this defence and the common law one of self-defence is considered. There is discussion of whether current Anglo-Welsh law falls short of the standard demanded by the European Convention on Human Rights. Proposals for reform are discussed including those in the report *Partial Defences to Murder*, 2004.
Mistake: The basic rule is that mistake as to law is no defence but that Parliament may create such a defence. Mistakes of fact may provide a defence but not if they are to the strict element (one to which no mens rea is attached) of an offence. The mistake of fact need usually only be one honestly made but bigamy provides the exception: the mistake must be one made on reasonable grounds. For mistakes caused by intoxication, see below.

Intoxication: Involuntary intoxication is a defence to all offences but is no defence where the accused nevertheless had the mens rea for the offence; voluntary intoxication is a defence only to offences of specific intent (e.g. murder) but not to crimes of basic intent (e.g. manslaughter); and drunken mistake is no defence to all offences including ones of specific intent. Debate rages as to the definition of ‘specific intent’ and the position of soporific drugs is not crystal-clear. In relation to specific intent any suggested definition has a counterfactual argument, e.g. if a specific intent offence is one which involves a ‘purposive element’, why is rape a basic intent offence?; if specific intent means crimes which can be committed only intentionally (and not either intentionally or recklessly), why when malice aforethought in murder was defined wider than it is now because it included foresight of a highly probable consequence, was murder still a specific intent offence? While the law is not pellucid, it seems to be that a person does not have a defence of intoxication if she or he knew that soporific drugs would make her or him aggressive or violent: the law is not whether she or he ought to have known of the drugs' effects on him or her.

Self-defence and the prevention of crime: Section 3 of the Criminal Law Act 1967 provides a defence to any offence where the accused uses reasonable force to prevent a crime; where that defence is not available, the common law provides a defence, self-defence, to all offences subject again to the force being reasonable. For example, if a child under 10 is proposing to kill the accused’s child, and the accused kills the threatener, there is no crime to prevent because a child under 10 cannot be guilty of any offence; however, the common law steps in to provide a defence. For both defences the force used must be reasonable; that is, it must be necessary and proportionate. Excessive force does not provide a defence. If the accused honestly believes that he or she is under attack or others are, the defences apply on the facts as the accused believes exists. If the accused’s mistake is, however, occasioned by alcohol, there is no defence. It should be noted that ‘self-defence’ is something of a misnomer because it applies to the defence of self, others and property.

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PART 2 GENERAL PRINCIPLES


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Harrow, C. (1974) ‘Self-defence: public right or private privilege’ Crim LR 528
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For Commonwealth reform proposals, see Tasmania Law Reform Institute, Intoxication and Criminal Responsibility, Issues Paper no. 7 (2005) and the Final Report no. 7 of the same name (2006), the principal recommendation being that intoxication should be relevant to all mental elements.

For a recent Irish approach, see Law Reform Commission, Commission Paper 41, Legitimate Defence, 2006.

For US law, which in general is similar to the law of intoxication in England and Wales, see M. Keiter, ‘Just say no excuse’ (1997) 87 JCL & Crim 482.

Visit www.mylawchamber.co.uk/jefferson to access exam-style questions with answer guidance, multiple choice quizzes, live weblinks, an online glossary, and regular updates to the law.

Use Case Navigator to read in full some of the key cases referenced in this chapter:

DPP v Majewski [1977] AC 443
Morgan [1976] AC 182
R v Cunningham [1957] 2 All ER 412
R v G [2003] UKHL 50; [2004] 1 AC 1034
R v Pagett [1983] 76 Cr App R 279