Alcohol, Drugs and Criminal Responsibility

By Ian D. Elliott

INTRODUCTION

The High Court decision in *O'Connor*[1] has had a bad press. Cartoonists have lampooned it. Citizens have written outraged letters to the daily papers. The High Court's affirmation of the principle that evidence of intoxication can be used to defeat the imputation of criminal guilt has met with general incomprehension and incredulity. Lawyers have tended to reply to the criticism by relying on precedent.[2] It is said that there is nothing new about *O'Connor:* earlier Australian cases are consistent with the general principle of the High Court decision. If anything, this appeal to precedent may be expected to deepen the public sense of incomprehension and incredulity.

This paper argues that a sense of disquiet is justified. It is true that intoxication at the time of the alleged offence may sometimes affect the issue of guilt. Evidence of intoxication is always potentially relevant. But the approach developed in the Australian cases tends to give obscure and unsatisfactory answers to the questions of *how* intoxication is relevant and *why* it is relevant.

The context in which *O'Connor* was decided is important. There was a body of Australian case law, Victorian case law in particular, in support of the decision. In 1976, however, England adopted a far more restrictive approach. In *D.P.P. v Majewski*[3] the House of Lords distinguished between two categories of criminal offence. In the first category were crimes of "specific intent". These include a number of the most serious offences against the person, such as murder and wounding with intent to inflict grievous bodily harm. But other, lesser, offences such as theft and the preparatory crimes of attempt, incitement and conspiracy are also crimes of specific intent. The other category is crimes of "basic intent". In general this group covers the minor offences, though it also includes so serious an offence as manslaughter and may, perhaps, include rape.[4] The appellant in *Majewski* had been convicted at first instance of assault occasioning bodily harm and assaulting police constables in the execution of their duty. There was evidence that he was under the influence of drugs and alcohol at the time. The offences were classified by the House of Lords as crimes of basic intent. The House of Lords upheld his conviction and concluded that:

"In the case of these offences it is no excuse in law that, because of drugs which the accused himself had taken knowingly and willingly he had deprived himself of the ability to exercise self control, to realise the possible consequences of what he was doing, or even to be conscious of it. As in the instant case the jury may be properly instructed that they can "ignore the topic of drink or drugs as being in any way a defence" to charges of this character."[5]

That conclusion implies, of course, that the rule is different in cases where the defendant is charged with an offence of specific intent. It implies too that there is a general defence available to those who do not become intoxicated "knowingly and willingly". There is, however, no discussion of the scope or operation of these exceptions.

The distinction between crimes of basic intent and crimes of specific intent is logically unsatisfactory.[6] There is no principle or criterion for distinguishing them which will withstand analysis. It is unclear, for example, whether rape is a crime of specific intent in England. The issue can only be settled by authoritative stipulation.

If the nature of the distinction is unclear, it is also unclear why intoxication should be treated differently according to whether the defendant's crime was one of specific or basic intent. As a practical matter an application of the English approach will often have the result that the defendant escapes conviction for a major offence of specific intent (where evidence of intoxication is relevant) and is convicted of a lesser offence of basic intent (where intoxication is irrelevant). It is a rough and ready way of achieving a result of dubious social value. For the House of Lords the issue tended to resolve itself into one of "logic" against "common sense" or "policy". When conflicts of principle are described in this fashion by English Courts, logic is generally the loser. In *Majewski* Lord Edmund Davies approved the decision with the remark that "Illogicality has long reigned and the prospect of its dethronement must be regarded as alarming" in this context.[7]

The decision attracted immediate criticism in England from eminent authorities on the criminal law.[8] Since then apologists have sought to rebut the argument that the decision was inconsistent with principle and to illustrate that it was not really illogical at all.[9] There is, perhaps, a slight hardening of attitudes among English criminal law theorists.

In Australia, and in New Zealand, the courts avoided the question whether to accept *Majewski* whilst they could.[10] So long as the defendant was charged with an offence which has

I.D. Elliott LL.B. (Melb.) J.D. (Chic.) is a Senior Lecturer in Law at the University of Melbourne Law School. His particular interests are criminal law and the development of legal controls over illicit drug use and trade.

been authoritatively identified as one of specific intent, *Majewski* allowed evidence of intoxication to be introduced in support of the case for acquittal. In 1978, however, the South Australian Supreme Court considered two cases involving the offences of unlawful wounding and assault occasioning actual bodily harm. These had been identified in *Majewski* as offences of basic intent. In *Fahey and Lindsay*[11] the South Australian Court purported to follow *Majewski*. I say "purported to follow" because the decision involves a restructuring, and in places an outright rejection, of the reasoning in the House of Lords decision. In Victoria, on the other hand, the Full Court rejected *Majewski in O'Connor* and was upheld in that decision by the High Court. Reports of the South Australian decision were not available at the time *O'Connor* was argued before the Full Court. They were available, however, before the judgements were delivered. The South Australian approach was rejected without discussion.[12]

Supporters of the House of Lords on this issue have emphasised the value of their decision as a piece of social engineering. Wells J., in *Fahey and Lindsay*, provides a defence of *Majewski* along these lines. The prevalence of alcohol or drug related offences certainly poses a major social problem. Both *Majewski and O'Connor* make reference to an alternative method of dealing with the intoxicated offender. In 1975, in England, the Committee on Mentally Abnormal Offencers had recommended the creation of a new crime for the voluntarily intoxicated offender. The Report of the Committee (The Butler Report) proposed that "it should be an offence for a person while voluntarily intoxicated to do an act (or make an omission) that would to a dangerous offence if it were done with the requisite state of mind for such an offence".[13] The proposed offence would be an available alternative whenever the intoxicated offender gained an acquittal on the major offence charged against him. For a first conviction the proposed penalty was a maximum of one year's imprisonment. For a subsequent conviction the maximum penalty rose to three years.

In *Majewski* several of the Law Lords expressed approval of this proposal.[14] In *O'Connor* Barwick C.J., Stephen and Murphy J. referred to it.[15] The Chief Justice thought that "good sense" and justice favoured the proposal. For the majority in *O.Connor* however, the task of neutralising the dangerous intoxicated offender was for the legislature, not the courts. The essence of the recommendation in the Butler Report is that intoxication, when followed by dangerous conduct, should provide the basis of a new offence. The alternative, which was adopted in *Majewski*, and by the dissenters in *O.Connor* is to enlarge the definition of existing offences by judicial fiat so that intoxication will provide an alternative basis for guilt where criminal intention cannot be proved.[16]

The defendant in *O'Connor* was tried at first instance for the offences of theft and wounding with intent to resist arrest. Both are offences of specific intent. He was aquitted of these and convicted of unlawful wounding, which is an offence of basic intent. The trial judge had followed *Majewski* and directed the jury that they were to ignore the evidence that O'Connor was under the influence of alcohol and Avil car sickness tablets when they came to consider the last of these offences. The Victorian Full Court upheld his appeal against conviction on the ground that this amounted to a misdirection. Moreover the Court declined to order a retrial on the unlawful wounding charge The Crown appealed against the Full Court decision and a bare majority of the High Court dismissed that appeal.

The facts were simple. O'Connor was observed as he was examining the contents of the glove compartment of a parked car. The car belonged to a policeman who was off duty at the time. The observer summoned the policeman who went to the car park. When questioned O'Connor ran away. He was pursued and arrested. He stabbed the policeman with a knife taken from the glove compartment. There was a struggle during which he attempted to stab the policeman again. He was then subdued and taken to the police station. At his trial O'Connor gave evidence of his consumption of the tablets and alcohol. He called medical evidence in his defence. The only account of that evidence in the report of the High Court judgements is in the judgement of Barwick C.J. In its entirety it is as follows:

"According to medical evidence called on behalf of the respondent, the drug he claimed to have been taking was hallucinatory and in association with alcohol could have rendered the respondent incapable of reasoning and of forming an intent to steal or wound. The acts attributed to the respondent were consistent with the effects of the hallucinogenic drug".[17]

In the absence of anything further one's first impulse must surely be to reject this attempt to deny liability as palpable nonsense. There is more to it than that of course. The arguments which led the Victorian Supreme Court to the conclusion that O'Connor's conviction could not stand are complex and require analysis. But the first reaction of scepticism is important. Glanville Williams had much the same response to the very similar facts of *Majewski:*

"The assaults were committed under the influence of drink and drugs, but the circumstances clearly showed that the defendant knew what he was about. He was able to respond to a request for assistance by his companion; he was able to direct his violence not towards brick walls but the people's bodies; and he was able to utter abuse and threats before he attacked. The trial judge could, therefore, have left the case to the jury with a strong encouragement to find that the assaults were intentional; and it is impossible to imagine the jury acquitting."[18]

The majority decision in *O'Connor* that evidence of intoxication is potentially relevant to criminal responsibility in all offences and not merely in some arbitrarily defined group of offences is preferable to the approach taken in *Majewski.* The House of Lords decision has a look of unacceptable expediency and compromise. But if we ask *how* intoxication is relevant *O'Connor* provides very little in the way of enlightenment. The way in which the evidence of intoxication is supposed to have affected the defendant's liability remains mysterious. The logic to which the Victorian Court, and the majority in the High Court, appealed leads to a conclusion at variance with common sense scepticism. The following section of this paper examines some of the ways in which intoxication may affect responsibility for actions. Some of them will provide the basis for an acceptable denial of legal responsibility; others will not. It is, in other words, an attempt to articulate the reasons for the scepticism one feels in the fact of claims to exculpation in cases like *Majewski and O'Connor.*

INTOXICATION AND EXCUSES

It has been said often and authoritatively that intoxication, of itself, is not a defence to criminal liability. Barwick C.J. makes the point carefully and explicitly in *O'Connor*.[19] But evidence of intoxication may, on occasion, support a version of the facts which is inconsistent with guilt of the offence charged. (It may also, on occasion, support the hypothesis that the defendant is guilty). The fact that the defendant was intoxicated may make his account of what happened more credible. Or it may serve to explain how he came to act in the way he did.

a) *Impairment of Muscular Control:* The appearance of human actions is sometimes deceptive. Take the example of a man who has apparently kicked a dog. The owner of the dog accuses him, indignantly. He denies it. He says that he tried to step over the dog, misjudged and stumbled over it. "I'm a bit drunk", he says, apologetically.[20] Drunks are perfectly capable of kicking dogs intentionally, but here the fact of drunkenness lends credibility to the man's account because intoxication

also impairs muscular co-ordination. So also in cases where an individual asserts that an apparently intentional blow was only meant to threaten or frighten and not to strike its target. It may be, of course, that the man can be blamed for being negligent. In rare cases it may be possible to argue that he was reckless because he realised that there was a risk of his actions misfiring. Insofar as the imputation of blame depends on proof that he *intended* harm, however, he has presented an alternative account which gains some support from evidence of intoxication.

b) *Failures of Perception:* Perhaps the man denies having seen the dog. He says that he simply walked over it. Again the fact of intoxication tends to support his account. The observer may now be inclined to retract his accusation of intentional kicking.

c) *Mistakes and Misinterpretations:* The dog was in the hallway, sleeping in semi darkness. "I thought it was a big cushion", the man says. "I was a bit drunk and I thought I'd give it a good boot". We can credit that story too: the kick was intentional but the intended target was a cushion rather than a dog. In legal contexts denials of guilt based on mistakes or misinterpretations are frequent. A defendant charged with rape asserted that he made a drunken mistake and thought he was in his own bed with his wife.[21] It was held that the mistake was inconsistant with guilt of the defence. Where guilt depends on proof of intention to do a particular thing, or knowledge of a particular circumstance or consequence, mistakes may prevent the imputation of those states of mind. Again, evidence of intoxication may tend to make the actor's account of his mistake more credible. We will not always accept his story of course.

d) *Hallucinations and Delusions:* The exculpatory effect of mistakes and mininterpretations depends on the actor's claim to be judged as if his mistaken belief had been true. We may blame him for carelessness in making the mistake, but that is a different matter. Hallucinations and delusions may also provide the basis for an exculpatory argument. It is not clear that these operate in the same way as mistakes and misinterpretations, however.

A hunter may mistake a farmer for a deer if the farmer is far away, the light is poor and visibility obscured by undergrowth. Poor eyesight, intoxication and other factors personal to the hunter may increase the risk of mistake. If the farmer stood just six feet from the hunter in broad daylight, however, the hunter can hardly be said to *mistake* the farmer for a deer. Either he is telling a particularly unconvincing lie, or he is claiming an hallucination. The distinction between mistakes and hallucinations is not clear cut. The perhaps apocryphal case of the drunken nurse who mistook the baby for a log of wood and put in on the fire is a borderline case.[22] The difference between mistakes and misinterpretations on the one hand, and hallucinations and delusions on the other, lies in the fact that the first kind of error is corrigible whilst the second is not.[23] The problem with delusions and hallucinations arise from our doubt whether the actor *could have* perceived differently. We may suspect too that the content of his hallucination or delusion serves his unconscious motives. He presents a distorted copy of reality to himself.

It may be that the exculpatory rationale in cases of hallucination and delusion is the same as mistake. The actor's conduct is to be judged as if the content of his hallucination or delusion had been true. We shall ask what *he* intended to do; what *he* believed the circumstances of his action to be. The problem with this approach is that the content of the hallucination or delusion may not be exculpatory.[24] As an alternative we may choose to stress the actor's apparent inability to correct his false perception of reality. This is to make his claim to exculpation depend on a denial of voluntariness.

In these cases evidence of intoxication, particularly intoxication involving drugs, does more than merely lend credibility to the actor's claim that he was hallucinated or deluced. Everyone is clumsy, unobservant or mistaken some of the time. Hallucinations and delusions require a more specific causal explanation precisely because they are abnormal. Intoxication provides one such explanatory context.

e) *Dissociation and Disorientation:* Most of the excuses described so far take the form of a denial of intention, or a denial of realisation of the consequences or circumstances; attending intentional action. Excuses based on hallucination or delusion suggested another mode of exculpation: incapacity to exercise normal controls over the apprehensions of reality. Far more frequent, however, are cases where the actor seeks to be excused on the ground that he could not control his actions. Legal contexts aside, this tactic is as familiar as the morning after hangover. It is also a very effective device for avoiding or mitigating blame. In his Inquiry into Criminal Guuilt Professor Brett suggests that the actor:

"is saying, in effect . . . that this crime was not committed by him, but by a "different person temporarily occupying his body". His plea is of the same order as that made by a person who commits a crime while in, say, a state of hysterical fugue or of amnesia; or by a person in his sleep; or by a perrson under hypnotic influence".[25]

Brett's account is colloquially familiar. Phillip Roche provides a translation into the terms of another disciplinne:

"The psychiatrist views behaviour in terms of thee measure that it can be determined by conscious and unconscious forces and he attempts to do this viewing with a minimum of evaluative bias. The same behaviour can stem from both conscious and unconscious forces but there is a formidable difference. Consciously determined behaviour is correctablee through communication with others and by simple common sense devices such as punishment for wrongdoing. Iff the same behaviour is determined predominantly by unconscious forces, it is not correctable by such means. Unconsciously determined behaviour tends to be repeating and unmodifiied and the individual is correspondingly less free in making decissionss. He is less an agent of free will".[26]

In more elaborated terminology this in turn suuggests the possibility that in some idividuals one can discceern a split between a primary and secondary personality. The second personality is made up of those repressed ellemennts of the actor's being which he cannot allow to find expiresssion in the primary personality.[27] What is done by the seccondiaryy personality is beyond the control, and sometimes tthee awareness of the primary personality.

Intoxication, among other causes, may trriggerr off such states of dissociation. Or it may simply prodducce thhat state of confusion and disorientation in which thhe actoor "can not effectively mediate between his drives and thhe ddemaands of the external world".[28] In either case the actor clairms thhat he is unable to control his actions.

It is worth noticing something about thhe formm of the excuses. Professor Brett describes the actor who cclaims that the crime was not committed by him but byy aa tteemporary habitant of his body. As a variant the actor mmay clldaim thaat was not really him but the alcohol which ddid tthee ddeed. Or less figures language, he may simply claim tthaat hhe could not control himself. Even the last of these exppressionns imply some sort of distinction between the "he" who wass suppoosed to control the uncontrollable "him" that ddid tthee act. One element of this claim is the implication that thhe wrrongful act was uncharacteristic behaviour. He asks for tthiss epiisode to be excused because it is not congruent with his nnormaal perssonality. If the actor was always vicious or dishonesst wee might be less willing to speak of him as one who could nnot ccontrol his actions. Or if we did so we would mean sometthiing diifferent by that expression. And we would be less inclinned tto excuse

typically vicious or dishonest behaviour. Excuses based on intoxication characteristically enable the actor to blame the drink or drug as the cause of wrongdoing and to disown personal responsibility. Legal contexts apart, it is a tactic which can be pursued with success for years or decades. The actor relies on the credit balance established by his periods of nonoffensive behaviour as the true expression of his being.

It is not at all clear that this form of exculpatory reasoning, can, or should be, imported into legal contexts. The criminal trial does not provide an appropriate context for investigating the question whether the defendant's conduct was congruent with his normal personality. If we merely ask the question whether his conduct was voluntary, the distinction between those cases where he is usually in control and those where he is rarely in control of his actions is blurred.

It is apparent that claims to exculpation on the ground that conduct was not voluntary are complex. Apart from the foregoing distinction between characteristic and uncharacteristic behaviour it is necessary to take into account some other aspects of voluntariness.

(i) Just as one can be more or less free, so also can one's actions be more or less voluntary. Voluntariness, unlike intention, is a matter of degree. It makes sense to ask how great the impediments to freedom of action must be if the actor is to be excused. Setting the standards for the excuse will involve taking into account the actor's subjective feelings, the circumstances in which he acted and the nature of his conduct.

(ii) The last point is sometimes obscured by failure to distinguish between actions which are not voluntary and involuntary movements.[29] Twitches, spasms and fits are involuntary movements of the body. Some "reflex" actions will also be capable of being described as involuntary movements. Stumbles, slips, lurches and falls are also characteristically involuntary and this is so even though the actor might have avoided them by an effort of inhibition or by simply exercising more care. These are not things which we do: rather they are things which happen to us. So also in cases where the actor is pushed so that he cannons into his victim or where his hand is seized and used as a weapon to strike the victim. In these cases of involuntary movement there is no room for ascribing intention to the actor. The claim is often made that he has not really "acted" at all.[30] No are there degrees of involuntariness.

These are to be distinguished from actions which are not voluntary. Money given to a blackmailer is not given voluntarily, but it is given intentionally. The fact that I am not free to act as I will, that my action is coerced, does not preclude intention.[31]

(iii) Claims that an action was not voluntary must meet certain standards of moral, and im appropriate contexts, legal, standards of evaluation and judgement.

" 'I lost control – I couldn't prevent myself'. Was it because I had found his ideas so unpalatably snobbish and racist that at last I had become annoyed enough to respond with a personal insult that provoked a fight? It is then, perfectly proper English, and quite apt, to say that I lost my self-control. But what I did was plainly voluntary in law in the context of assessing criminal responsibility". [32]

And, one might add, in non legal contexts such claims may also be rejected when they are proffered as excuses. In this sense voluntariness is unlike intention where the actor's account of his state of mind is peculiarly authoritative. The answer to the question whether action was voluntary depends on a variety of rules and standards which vary with the context of application. If we ask whether a confession was made voluntarily, the answer will depend on our judgement of permissible interrogation procedures. If we ask whether the assailant in the foregoing example acted voluntarily the answer will depend on our assessment of the permissible limits on responses to racist remarks. The question whether action was voluntary involves a moral or evaluative judgement in a way that the imputation of intentionality does not. Moral condemnation may follow the imputation of intention: it is not a condition of making that imputation.

In ordinary life we seldom need to distinguish between the processes of imputing blame and the imposition of a sanction for blameworthy conduct. Strong excuses avoid blame, weak excuses mitigate blame. The criminal law, on the other hand, provides a structured system of specific wrongs and a strongly marked distinction between the ascription of guilt and the imposition of an appropriate sanction. In legal contexts there is a variety of defences based on the denial of voluntariness. The comparative rigidity of the system requires limiting rules to govern the scope of these defences. In duress and necessity, for example, only threats of death or serious bodily harm will provide a basis for exculpation. Even where the threat reaches a sufficient degree of seriousness, there will be no defence to murder where the actor intentionally kills another.[33] Provocation is available in some, but not all, cases where the defendant lost his self control in response to external stress. Here again the defence is hedged about with rules restricting its availability and, if successful, it only reduces what would otherwise be murder to manslaughter. Insanity provides a defence for some whose actions were not voluntary. Here the limit is imposed by the requirement of proof that the actor suffered from a disease of the mind. In all of these instances something more than mere loss of self control or evidence that the defendant's actions were not voluntary is required before the defendant can avoid the imputation of guilt. An exculpatory claim which does not satisfy the formal requirements of a defence may still be relevant to the imposition of an appropriate sentence however.

With the exception of insanity, which is less a defence than a diversion to an alternative form of custodial disposition, the examples given so far involve defences for the normal actor faced with stress originating in his environment. There are dangers in generalising too readily from these defences to those where the actor is driven by internal stresses activated by the consumption of intoxicants. If we put insanity to one side, however, it is by no means clear why claims that action was not voluntary should be treated more sympathetically in these cases. Seymour Halleck, dealing with a related problem, makes the point:

"Another way of looking at the psychoanalytic viewpoint is that an individual should not be held responsible for his action if he is responding to internalised conflicts or misperceived oppression. Whilst this at first glance appears to be a humanitarian notion, it could in practice grossly discriminate against the offender who is responding to more readily observable stress." [34]

f) *Amnesia and Unconsciousness:* Consciousness is also a matter of degree. Intoxicants impair consciousness and they "alter" consciousness. That is, after all, their chief cirtue and attraction. Taken in sufficient quantities many of them will produce unconsciousness. It is necessary to distinguish, however, unconsciousness from being unconscious of what one is doing. The latter phenomenon is familiar. Told to prune the apple tree, the actor set to work on the pear tree. He was unconscious of the fact that he was pruning the wrong tree. But he was not in a state of unconsiousness and his actions were not merely involuntary movements. Each movement he made with the pruning shears was intentional. We may say that his mind, or his will, did not go with the act of mutilating the pear tree, but that is generally true in cases where action is undertaken on mistaken premises.[35] Mistakes and errors by an intoxicated actor may be more frequent and may be more bizarre in content, but they are not different in kind. Impairment or alteration of consciousness will often help to explain how the actor came to make the mistake.

There is a different kind of claim occasionally made by the intoxicated actor however. He may say that he was not merely unconscious of what he was doing but that he was in a state of drink or drug induced unconsciousness. In law this has been recognised, though rarely, as a basis for the defence of automatism. Yet it rests on an obvious fiction. There are of course, cases of involuntary *movement* during unconsciousness. The stuporous drunk may roll out of bed, or overlay a child. Here one cannot ascribe intention to the actor.[36] The defence of automatism has been allowed a wider scope then this however.[37] It has been made available to some defendants who performed complex sequences of behaviour in an "apparently" purposeful or intentional manner. The tendency is to say the purpose or intention is only apparent and not real *because* the actor was unconscious. But, as Irving Thalberg put it in a reply to H.L.A. Hart, "if a person's 'outward movements' are really 'co-ordinated' in the sense that they result from some type of perceptual contact with his surroundings, then the person is not unconscious".[38] Consciousness may be impaired to a greater or lesser degree, but that is not to say that the actor was unconscious.

The tendency to ascribe unconsciousness to the actor and to excuse his conduct as a consequence of that ascription is related to some problems about amnesia. Inability to remember is a frequent consequence of severe intoxication. We speak of "blacking out" when we reached the point of no recall. Amnesia is also a frequent response to periods of overwhelming stress.[39] Blaming the actor, or ascribing responsibility to him, characteristically depends on establishing propositions about his intention, knowledge and beliefs when he acted. There is a metaphysical problem about blame and responsibility in the case of the amnestic actor. Professor Silving suggested that:

"Since . . . 'intent' exists today only as a recollection, it is hardly possible to separate the intent from the recollection. That 'intent', phenomenologically, is a recollection."[40]

One might ask, rhetorically, how the amnesic actor can be held responsible for non-existent states of mind. In a sense, he is not response-able.[41] In law, however, amnesia has never been accepted as an excuse and the metaphysical problem has been brushed aside.[42] Nor is the fact of amnesia a ground for holding that the actor is unfit to stand trial. There is an element of strictness, perhaps even of unfairness, in this rule. The amnesic defendant may be considerably disadvantages in his attempts to present a defence. He cannot say what he intended, believed or realised at the relevant time. He is less able to counter the version of events presented by the prosecution. Amnesia will sometimes amount to no more than a subconsciously motivated attempt to evade responsibility. Sometimes, as in cases of brain damage suffered after the event, it cannot be explained in that way.[43] In either case, however, the legal polict of holding the amnesic actor fit to stand trial is probably unavoidable.

Amnesia has been though relevant, however in cases where the defendant pleads automatism. The claim that he cannot remember has been used to support the further claim that he was unconscious at the time of the alleged offence. Quite apart from the misuse of the concept of unconsciousness remarked earlier, the argument involves a non sequitur. Present inability to remember provides no basis for conclusions about past states of consciousness.[44]

If we except the cases of involuntary movements of the body, claims to exculpation bases on unconsciousness and amnesia are merely a variant of the form of excuse described by Professor Brett. The actor is "saying, in effect, that this crime was not committed by him, but by a 'different person temporarily occupying his body'." But that is not to say that the conduct was without intention, or that the movements were involuntary. The question is whether the "him" who now awaits our judgement can disown responsibility for the conduct of the uncontrollable "other".

It should be apparent that "voluntariness" is a problematic concept. To say that an act was not done voluntarily has something to do with the actor's state of mind at the time. If he was willing, it is not easy to see how one could say that it was not done voluntarily. If he did not want to do it, if he was not willing, it does not follow, however, that it was not voluntary. It is a term used to express a judgement of her conduct. How it is used will depend on the nature of her conduct, the nature of the stress to which she was subjected and the purposes for which the judgement is made.. It is not simply the ascription of a state of mind. In legal contexts it is always possible for concepts adopted from our everyday discourse to be given specialised and limited meanings. The concept of "recklessness" in criminal law, for example, bears more or less precise meaning from which elements of its ordinary meaning have been excised. The question is accordingly whether the courts have been able to assign a meaning to voluntariness and non voluntariness which will allow these concepts to function as determinate elements in the analysis of criminal liability. It is worth mentioning at the outset Professor Brett's opinion:

"that our first step in discussing [the problem of the intoxicated offender] must be to put aside any temptation to resolve it by talking of involuntary activity. The phrase is so vague and imprecise as to cause confusion rather than enlightenment."[45]

THE RHETORIC OF RESPONSIBILITY IN THE HIGH COURT

The foregoing section dealt with some of the ways in which individuals may attempt to deny responsibility for their actions, or to mitigate blame which might otherwise attach to them. None is necessarily linked with intoxication: the excusing conditions may arise from a variety of causes. Evidence of intoxication is merely one way of supporting the actor's claim to his excuse. It is not to be expected that the law will recognise all of these excuses as effective denials of legal responsibility. Some are very weak indeed and may be taken into account adequately in the sentencing process. What follows is a brief account of *O'Connor* and an attempt to discover the legal criteria for the acceptability of claims to exculpation in the case of the intoxicated offender.

O'Connor is a surprisingly difficult case to assess from the point of view. There is very little information in the High Court judgements to indicate how intoxication was supposed to have affected the defendant's conduct or state of mind. The unreported judgements of the Victorian Supreme Court are no more informative. Much of the argument is taken up with the question whether the High Court should follow the House of Lords decision in *Majewski.* The dissenters' viewpoint was put succinctly by Gibbs J.:

"The criminal responsibility of persons who act in a state of self-induced intoxication is governed by a distinct principle – namely, that such intoxication in itself provides no ground for saying that the act done was involuntary or that the mind of the actor was not guilty . . . If the law were as the respondent submits, the duty of the jury, in a case in which evidence of intoxication was given, would be to acquit unless it had been satisfied beyond reasonable doubt that the accused, despite of his intoxication, knew what he was doing and was able consciously to control his actions. Juries, doing their duty, might well give the benefit of the doubt to offenders who had committed serious crimes while in a state of intoxication."[46]

As in the House of Lords, there is a tendency by the dissentients to regard this approach as one which is supported by common sense and experience rather than logic.[47] In the dissenter

iew there were two exceptions to the "distinct principle": it was ot to apply to offences of specific intent and it was not to apply t all in cases where intoxication was not voluntarily self induced. his was simply to adopt *Majewski.*

The majority, of course, rejected this approach. In their views he same principles were applicable to all offences.[48] They doubted the possibility of distinguishing between intoxication which was and intoxication which was not voluntarily self induced. Barwick C.J. began, however, by distinguishing between degrees of intoxication. In moderate states of intoxication:[49]

"So long as will and intent are related at least to the physical act involved in the crime charged, and saving for the moment the case of a crime of so-called specific intent, the fact that the state of intoxication has prevented the accused from knowing or appreciating the nature and quality of the act which he is doing will not be relevant to the determination of guilt or innocence."[50]

Here there is no question of the defendant's *capacity* to act voluntarily and intentionally. It is a case where he has acted with "will and intent". That he may have impaired his capacity to evaluate his actions, or realise their consequences, will not excuse him. The saving reference to specific intent indicates that evidence of moderate intoxication will still be relevant where the prosecution must prove that he acted with a particular intention however. Moderate states of intoxication are to be distinguished from those rare instances where intoxication is so severe as to:

"divorce the will from the movements of the body so that they are truly involuntary. Or again, and perhaps more frequently, the state of intoxication, whilst not being so complete as to preclude the exercise of the will, is sufficient to prevent the formation of an intent to do the physical act involved in the crime charged."[51]

In these cases the evidence of intoxication must be submitted to the jury which will be bound to acquit if they are left in a state of reasonable doubt as to "voluntariness or the existence of an actual intent". Stephen J. agreed that the evidence of severe intoxication was relevant to the questions whether the defendant had acted voluntarily and whether the particular mental element required for the offence had been proved. Though Aickin J. tended to lay more emphasis on the requirement that the prosecution prove the defendant's conduct to have been voluntary, his judgement is consistent with that of Barwick C.J. Murphy J., the remaining member of the majority, put the matter a little differently:

"The expression 'mens rea', refers to the central idea of criminal common law that a mental element is present in all crime except in offences of strict liability. Apart from crimes of specific intent, the theory requires the existence of a generalised element described as a guilty mind, criminal intent, or something similar. For convenience I will use the expression, 'criminal intent'... The vagueness of the doctrine has served to conceal numerous contradictions."[52]

In his view evidence of intoxication "which tends to prove or disprove mens rea is admissible and available for the jury's consideration."[53] If mens rea, or criminal intent, is absent, whether by reason of intoxication or otherwise, the defendant must be acquitted.

The majority did not suggest that severe intoxication at the time of the offence would always provide the basis for an acquittal. If the offender drank or drugged himself into a state of incapacity with the intention of committing an offence whilst in that state he would not thereby avoid criminal responsibility.[54] So also where he realised that he would be likely to commit the offence whilst in that state. Aickin J. suggests that "statutory offences and offences of negligence" may be an exception to the general rule that D will escape liability if he was incapable of voluntary action by reason of intoxication.[55] Barwick C.J. and Murphy J. appear to suggest that one who kills whilst in a state of severe intoxication will nevertheless be guilty of manslaughter.[56] Apart from the first exception, which is well established in the case law, these suggestions are not elaborated.

The majority judgements are expressed in terms of extreme generality. This was unavoidable in view of the absence of any detailed account of how intoxication was supposed to have affected O'Connor's state of mind. There is an additional problem. O'Connor was acquitted at first instance of theft and wounding with intent to inflict grievous bodily harm. In lieu of the second of these offences he was convicted of unlawful and malicious wounding. The mental element required for the latter offence is uncertain. The most that can be said is that the prosecution must at least prove that the defendant realised that "some physical harm . . . might result to some person". It is not necessary to prove an intention to wound and probably not even necessary to prove that he realised that he might *wound* anyone.[57] The Victorian Supreme Court quashed O'Connor's conviction on appeal and declined to order a retrial. There was, however, no attempt to specify the mental element required for the offence. When, in the High Court, Barwick C.J. referred to intoxication which would "prevent the formation of an intent to do the physical act involved in the crime", the generality of that statement may be partly a result of this obscurity.[58]

Apart from this factor, the medical evidence given on behalf of O'Connor is described in highly abstract terms. It was said that the defendant might have been "incapable of . . . forming an intent to . . . wound". There is no explanation as to how this phenomenon might have resulted from intoxication. If it was clear that *Majewski* had to be rejected, it was by no means clear why O'Connor should benefit from that rejection. Barwick C.J. remarks that the Victorian Supreme Court was "justified" in their rejection of *Majewski.* He also remarks that they undertook no "detailed analysis of the evidence as to voluntariness or actual intent."[59] Murphy J. flatly disagreed with the order made by the Victorian Court. Though *Majewski* was rightly rejected, he considered that the Court should have ordered a new trial where a properly directed jury might well have convicted O'Connor.[60]

As in some earlier High Court decisions on matters of great theoretical importance in criminal responsibility, the facts of the case should not be taken as an illustration of the principles enunciated. *Majewski* was decisively rejected by the majority. It is not at all clear what is the alternative. For this it is necessary to turn to the case law before *O'Connor.* The problem with the decision is that the superstructure of theoretical argument — the posited dichotomy between logic and policy — is not related to any adequate account of the ways in which intoxication might provide evidence in support of a defence. Concepts of will, intention and voluntariness are deployed without any clear indication of their meaning. To some extent at least this failure reflects our present inability to provide any satisfactory translation of the evidence of expert witnesses, such as doctors, psychiatrists and psychologists into the language of criminal responsiblity. More important, perhaps, is the general failure to consider the ways in which such evidence might be relevant or irrelevant to the ascription of these mental states. To some extent this linguistic confusion may be more a product of unwillingness to formulate answers rather than inability to do so. In the very vagueness and confusion of present legal analysis there is scope for the presentation of a "mental state defence" in particular cases and scope for the development of the general doctrines of criminal responsibility. Some of these questions, and in particular those concerning the role of expert evidence, have been considered by the Victorian Supreme Court in another case involving an intoxicated offender, *Darrington & McGauley.* This was decided after the Full Court decision in *O'Connor* but before the High Court had delivered judgement. Neither case makes any reference to the other. As *Darrington & McGauley* amounts, in effect, to a development subsequent to *O'Connor* it is treated in the conclusion to this paper.

TOXICATION AND THE DENIAL OF CRIMINAL ESPONSIBILITY

The House of Lords decision in *D.P.P.* v. *Beard*[63] in 1920 provided a summation and a starting point for the development of ustralian law on intoxicated offenders. When he came to formulate his conclusions in that case Lord Birkenhead L.C. said:

"(E)vidence of drunkeness which renders the accused incapable for forming the specific intent essential to constitute the ime should be taken into consideration withthe other facts proved in order to determine whether or not he had this intent."[64]

His next proposition sits uneasily with the preceding one:

"(E)vidence of drunkeness falling short of a proved incapacity the accused to form the intent necessary to constitute the crime, nd merely establishing that his mind was affected by drink so hat he more readily gave way to some violent passion, does not ebut the presumption that a man intends the natural consequences of his acts."

He said too that in some cases evidence of drunkenness, or lcoholism, might support a plea of insanity. But those are extreme cases, where alcoholism has caused major brain damage, r the offender was in the throes of delirium.

With the benefit of sixty years hindsight it is necessary to eject or modify some of Lord Birkenhead's statements. It is uite clear, for example, that the defendant is no longer equired to "prove" incapacity: it is for the prosecution to rove guilt, not for the defendant to prove innocence. The presumption that a man intends the natural consequences of is acts" is held in general disfavour by Australian courts.[65] here is, too, an appearance of illogicality in the statement hat incapacity to form an intention is merely evidence that ntention was absent.[66] But the notion of a defendant "incapble" of forming an intention has survived. The descrition of he medical evidence adduced in *O'Connor* is cast in this form: t was said that the defendant's consumption of drugs and lcohol made him "incapable of reasoning and of forming an ntent to steal or would". Barwick C.J. referred to Lord Birenhead's propositions and added a gloss which has become amiliar in recent cases:

"The emphasis in *Beard's* case on the capacity to form an ntent must be displaced by the need to find an actual intent; hough, of course an incapacity to form an intent must deny he existence of the intent."[67]

Aickin J. makes the same point in his judgement.[68] What is eing suggested, apparently, is that there are two different ays in which evidence of intoxication may be used in order o support an argument that the defendant's actions were not ntentional. Elsewhere in the majority judgements in *O'Connor* hese are coalesced in the expression that intoxication may prevent", or "preclude", the exercise of will or the formation f intention.

References to incapacity to form an intention in English ases were meant to impose a limit on the extent to which evidence of intoxication could be used to support a denial of uilt.[69] It was presumed that a man intended the natural consequences of his acts. That presumption would be displaced, owever, if the defendant was "incapable of forming an intent". t is not clear what was meant in these references to capacity. Not infrequently it was taken to mean that nothing short of xtreme states of intoxication would displace the presumption. This is evident in the direction given by the trial judge in the New Zealand case of *Kamipeli* in 1975. He directed the jury:

"that the degree of intoxication must be very marked indeed; For the person concerned to lack the necessary intent he must be so drunk that he is not responsible for his actions, hat he is acting as a sort of automaton without his mind functioning. Blind drunk is a good colloquial way of putting it . . . o be not guilty . . . he must be so drunk that his mind has eased to function."[70]

There was support for this direction in the English authorities. Nevertheless the New Zealand Court of Appeal quashed the defendant's conviction for murder on the ground that the jury had been misdirected. It was "the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry".[71] The effect of this statement, which is endorsed in *O'Connor*, is that account must be taken of the defendant's state of sobriety in determining what he knew, realised, or intended at the relevant time. The *Kamipeli* Court did not explain why intoxication might be relevant to this inquiry. It is easy enough to perceive the relevance of such evidence however. It will often lend support to the hypothesis that the defendant was mistaken or failed to realise the consequences of his actions. Or that he was mistaken as to the circumstances; or that his co-ordination was impaired. It may lend support to an account of the defendant's action which would be less than credible if he was sober at that time. Dangerous practical jokes which misfire, for example, may look like the deliberate infliction of harm to an observer who is unaware of the actor's drunkenness. All of these forms of denial of intention, realisation or knowledge, tend to be excluded if nothing short of incapacity to form intentions is taken into account.

There is also a line of cases in which the defendant sought to escape liability by pleading intoxication in conformity with *Beard*. In these the defendant denied that he had the *capacity* to form any intentions at all by arguing that his state of intoxication amounted to automatism. In the Victorian case of *Keogh* in 1964 Monahan J. accepted the argument that intoxication might provide an evidential basis for a plea of automatism. In his view "a state of automatism, even that which has been brought about by drunkenness precludes the forming of the guilty intent which is the fundamental concept in criminal wrongdoing."[72]

In cases where the intoxicated offender can rely on it, automatism will provide him with a far more powerful defence than a simple denial of intention to do a prohibited act. It is not limited in its application to offences which require proof of intention, realisation or knowledge: it is available as a defence to crimes of negligence or strict liability. It may, though this is uncertain, provide some intoxicated offenders with a defence to a charge of manslaughter.[73]

Automatism has always been a problematic defence. Even in those cases which do not involve intoxicants the defence has prompted fears that its use will result in the release of defendants who are technically without guilt but liable to engage in prohibited conduct in the future. The courts have imposed limitations on automatism. It requires a "proper foundation" in the evidence before it can be submitted to the jury. English cases suggest that, as a practical matter, medical or other expert evidence must be called in order to establish that foundation. Where the defendant bases a plea of automatism on evidence of epilepsy, cerebral arteriosclerosis, or other conditions which can be classified as diseases or illnesses of the brain or mind, he runs the risk that his intended plea of automatism will be transmuted by the court into a plea of insanity.[74] These limitations are less effective in the case of the intoxicated offender however. Even if expert evidence is necessary in order to provide a foundation for the defence it will not normally reveal a disease of the mind or brain no matter how severe the state of intoxication.[75]

Automatism was subject to a further limitation. There is much authority to the effect that the defence is only available to a defendant who was unconscious at the time he acted.[76] The decision of the New Zealand Court of Appeal in *Burr*,[77] provides an illustration. The case involved a plea of automatism based on dissociation, or divided consciousness, rather than intoxication. There is a passage in the judgement of Turner J., however, which indicates both the potential and a possible limita-

ion on attempts to base a defence of automatism on evidence f intoxication:

"I can understand the defence of automatism to a charge involving intention, where the evidence demonstrates in the appellant a state such as somnambulism, for example, in which, back in his normal state of consciousness, he has no recollection of what he did when sleepwalking; he can fairly claim that what was done by his body in a state of sleep was not done by any act of choice of his in his normal waking state. So, too, in the case of drunkenness, he can claim that his drunkenness precluded the formation of any conscious intention such as is necessary for a verdict of guilty. But in such cases the accused in his normal state does not recall what he has done in the somnambulistic or dream state . . . "[78]

He instances as well the "post-concussion rugby player" who may continue to play though afterwards he has no memory of the game.[79] As all members of the Court recognised, consciousness is a matter of degree.[80] North P. said that automatism does not require evidence of absolute unconsciousness, "because you cannot move a muscle without a direction given by the mind". He suggested that the defence will not be available unless "all the deliberative functions of the mind" are absent "so that the accused person acts automatically".[81] This recourse to tautology indicates the presence of an intractable definitional problem. On the facts of the case all members of the Court were able to hold that the medical evidence of dissociation or divided consciousness such that the defendant was not "in a state of full consciousness"[82] did not provide a foundation for the defence. It is difficult to see how one could formulate a criterion for the necessary degree of consciousness required for guilt. How conscious, or how unconscious, is the somnambulist, or the post-concussion rugby player? It is hard to make sense of these questions and impossible to derive from possible answers a standard which might be applied to someone who is very drunk.

Most of the automatism cases involve defendants who were capable of walking, talking, uttering threats and attacking other people. Their actions demonstrate quite clearly that they did act intentionally and with manifest awareness of some (if not all) the circumstances of their actions and some (if not all) the consequences of their actions. To suggest, as does Turner J., that these actions are not done with "conscious intention" is merely to beg the question. To suggest that these actors were unconscious, or incapable of forming intentions, makes it impossible to formulate any logically coherent theory of exculpation.

However logically unsatisfactory it might be, the unconsciousness criterion did appear to provide a practically effective limit to reliance on automatism by intoxicated offenders. It was accepted that the defendant could not assert that he was unconscious when he acted if it appeared that he remembered the events after they occurred. The amnesic defendant is hampered at his trial as he cannot present an alternative account of events based on his own perceptions at the time. That is, in itself, something of a deterrent to false claims. Nor is amnesia at all easy to fake when, as in many of the cases, the defendant gave an account of what had happened to the police or to others shortly after the event. Even in cases where the defendant did make a convincing claim that he was amnesic, that was not necessarily sufficient to support the further claim that he was unconscious at the time. Though the cases never achieved any coherent tests for unconsciousness, indications that the defendant's actions were considered in advance, or that skill or application was required for their performance, were also taken to be inconsistent with "unconscious" action on occasion.[83]

Even if one regards the unconsciousness criterion as a practical, if inelegant, limit to the intoxicated offender's reliance on automatism there are difficulties. As a limiting device it is inconsistent with other principles governing criminal responsibility. If it is accepted that there is such a phenomenon as action performed whilst in a state of unconsciousness there are two possible justifications for acquitting the unconscious offender. It may be said that unconsciousness is inconsistent with the ascription of intention, realisation, knowledge or belief. The defendant goes free on this approach simply because the prosecution cannot prove one or more of the particular mental states required for guilt of the offence charged. But this analysis is incomplete. For unconscious action, in the guise of automatism, will also provide a defence in cases where the defendant is tried for offences of negligence or strict liability which do not require proof of those states of mind. The second reason for acquittal in cases of so-called unconscious action is that the defendant's actions are said to have been involuntary. If this is the true basis, however, there is no apparent reason why automatism should be limited to cases of unconscious action. Unconsciousness is merely one of a number of ways of showing that action was involuntary.[84]

In the High Court decision in *Ryan*,[84] in 1967, the question of liability for sudden reflex action fell to be decided. The defendant shot a garage proprietor in the course of an armed robbery and was charged with murder. It was argued that his act of pressing the trigger, in the particular circumstances of the case, was a reflex action and accordingly involuntary. He was quite conscious at the time. Barwick C.J. advanced the following propositions in the course of his judgement. They have come to be regarded as fundamental and form the basis for the majority judgements in *O'Connor*:

"It is basic, in my opinion, that the "act" of the accused, of which one or more of the various elements of the crime of murder as defined must be predicated must be a "willed", a voluntary act . . . It is the act which must be willed, though its consequences may not be intended . . . "

"It is of course the absence of the will to act, or, perhaps more precisely of its exercise rather than lack of knowledge or consciousness which . . . decides criminal liability . . . "

"An accused is not guilty of a crime if the deed which would constitute it was not done in the exercise of his will to act. The lack of that exercise which precludes culpability is not, in my opinion, limited to occasions when the will is overborne by another, or by physical force, or the capacity to exercise it is withdrawn by some condition of the body or mind of the accused . . . If voluntariness is not conceded and the material to be submitted to the jury wheresoever derived provides a substantial basis for doubting whether the deed in question was a voluntary or willed act of the accused, the jury's attention must be specifically drawn to the necessity of deciding beyond all reasonable doubt that the deed charged as a crime was the voluntary or willed act of the accused."[85]

These propositions are expressed quite generally. They provided a basis for the conclusion in *Ryan* that (some) forms of reflex action will not give rise to criminal liability. But they also suggest that other forms of conscious behaviour might also be excused on the ground that the defendant acted without voluntariness or will. Barwick C.J. drew no distinction between cases of involuntary movement, of which *Ryan* arguably provides an example,[86] and cases of action which is not voluntary. The reliance on an unexplained concept of the "will" tends to obliterate that distinction. Involuntary movements cannot be intentional. But it is perfectly possible in law, as in ordinary language, to describe the defendant's actions as intentional though they were not done voluntarily or were done in circumstances where his will was overborne.

If these propositions are taken literally they open up the possibility of a third line of defence for the intoxicated offender, apart from the simple denial of intention, or the assertion or unconscious automatism. They suggest the possibility of finding a basis for exculpation in the mysteries of voluntariness

and the will. There is an obvious objection to this suggestion. It appears to be inconsistent with what Lord Birkenhead L.C. had to say in *Beard*. The House of Lords sought to make it clear that the accused could not escape liability if the evidence merely established "that his mind was affected by drink so that he more readily gave way to some violent passion". If the plea of insanity is put to one side, there is ample authority against any attempt to deny voluntariness on the ground that the accused was the victim of an "irresistible impulse" brought on by intoxication or otherwise.[87]

If the objection is obvious, its strength is uncertain. The very antiquity of the notion of irresistible impulse works in the defendant's favour. Since no one is clear what makes an impulse irresistible, or how to identify one, or what the concept really means, courts may be unwilling to rule out a proposed defence on the ground that it is, in reality, an attempt to escape liability on untenable grounds. This is particularly likely to happen when the defendant's plea is supported by medical evidence couched in more modern terminology. There are signs in the case law, particularly in Victorian case law,[88] that courts have begun to accept the existence of a "Jekyll and Hyde" defence based on medical evidence of dissociation or splitting of the actor's personality.

Two contrasting cases, *Haywood*,[89] which is reported as ruling made by Crockett J. in the course of trial and *Joyce*,[90] a decision of the South Australian Supreme Court, illustrate the tendency to accept such defences and a reaction against them.

Joyce was not a case which raised the intoxication issue directly, though the Court had a good deal to say about it. The defendant, who had been convicted of murder, sought to overturn that conviction on the ground that the jury should have been directed on automatism. The Court held that the evidence provided no foundation for that defence and the appeal failed.

Joyce had stabbed his victim seven times. Apparently he also attempted to take his own life. In what sense could any evidence lead one to doubt that these acts were done consciously? The Supreme Court asked whether an act,

"which is not merely a self propelled movement of the limbs or a spasm without any direction of the muscles by the will or the mind [can] . . . amount to an act of automatism so as to entitle the accused to an acquittal? Or may there be acts which though in some sense directed or purposive are yet in the eyes of the law involuntary or unconscious or both? . . . We find it hard to see how an act can be committed with a purpose and still be committed unconsciously . . . We share, with respect, the difficulties expressed so energetically by Windeyer J. in *Ryan v. The Queen*".[91]

Turning to a hypothetical example the Court doubted that even the actions of a somnambulist who "turns a key in a lock, picks up a knife and uses it" could be said to be "involuntary or unconscious".

The Court did not deny that the somnambulist might avoid criminal liability for his actions. The concussed rugby player mentioned in *Burr* would also have a defence if, for example, he assaulted the referee whilst in that state. What is apparent in *Joyce* is an underlying scepticism towards attempts to rationalise these cases where the defendant is not responsible in terms of unconsciousness. "Involuntariness", in the sense given the word by the Court, is restricted to cases of involuntary movement. It is not that the Court doubts the reality of disturbed or distorted states of mind. It is rather that it refused to describe these states in language which will provide an automatic defence for the accused. It is neither accurate nor sufficient to explain the somnambulist's defence in terms of unconsciousness or involuntariness. The Court pointed very clearly to what it took to be the undesirable consequences of doing so. If those were the grounds for acquitting the somnambulist it would follow that one who killed whilst intoxicated might also be entitled to acquittal "on the ground that the act was invo untary, or not his act, because the higher part of his persona ity was put to sleep".[92]

More generally, the Court set its face against acceptance o the Jekyll and Hyde form of defence:

"If the personality is divided and one of the divided par was conscious of the act and wills it, the actor is responsib for it and the defence of automatism is not open."[93]

Joyce does not provide a settled explanatory basis fo acquitting the somnambulist or concussed rugby player. touched upon the difficult problems posed in cases where th defendant was the victim of hallucinations again without pr viding a final resolution. These difficulties will be taken u towards the end of this paper. The radical step in the Court argument, however, is the demystification of unconsciousne and involuntariness. If movement is not random it is controlle Whether or not it is controlled can be recognised by observ tion and by reference to what the actor said he was doing. it is controlled he must have been conscious of his actions ar their intended effects. It is irrelevant that he may no longer b able to remember. He may challenge the prosecution to pro that he intended or realised all of the consequences or circur stances of his actions. But he cannot simply assert that he w unconscious. If the evidence indicates that he acted with th intention or knowledge required for the offence charged he reduced to asserting that he could not control the impulse t act. But even if he could not control himself it does not follo that he is entitled to an acquittal. Voluntariness, in that sens is not a necessary element in criminal liability.[94]

Haywood,[95] which was decided in the same year as *Joyc* but without apparent reference to that case, provides a part the basis for the majority judgements in *O'Connor*. The reaso ing is heavily dependent on the propositions advanced b Barwick C.J. in *Ryan's* case. Like Monahan J. in *Keog* Crockett J. accepted that intoxication may provide an evide tial basis for automatism and that the defence was of gener application whether the state was self induced or not. It mar the beginning of a series of Victorian cases in which "conscio and voluntary" action is said to be a necessary element of gui By contrast with *Joyce*, little consideration is given to th analysis of these concepts.

The defendant Haywood, who was fifteen at the time, h taken valium tablets in conjunction with alcohol. Thereaft he broke into a house and stole various articles, including rifle. He fired a number of shots to test his marksmanshi Then he shot and killed a passer-by. He was charged with mu der and convicted of manslaughter.[96] The verdict indicates th the jury were satisfied that he fired the shot voluntarily a intentionally but without intending to kill or inflict serio harm on anyone. That is to say, the jury rejected Haywoo defence of automatism.

The important point is that the defence was allowed to to the jury. Two psychiatrists had given evidence that the d fendant's actions had been performed in a state of "aut matism", "involuntarily", so that it could not be said "th the mind of the accused went with those acts".[97] In *Joyce* t South Australian Supreme Court had simply refused to acce that activities such as those in which Haywood engaged cou be done in a state of unconsciousness or involuntarily. T odd thing about *Haywood* is that Crockett J. appears to ha agreed with that analysis. Four years later, in an extra-judic address in which he discussed the case, he characterised t medical evidence as "palpably untenable". He went on to s that Haywood,

"certainly knew that the rifle was a firearm. He knew wh ammunition was. He could identify it for the purpose of loa ing the rifle. He must have known that pulling the trigger d charged the rifle. He did all this in a prolonged exercise marksmanship using objects that had obviously been select

as targets. It had, in my opinion, to be nonsense to suggest that the act of firing the rifle was not conscious, voluntary and deliberate."[99]

It is the sceptical response again. It is clear enough that the South Australian Supreme Court would have held that there was no proper foundation for automatism and that the defence should not have been allowed to go to the jury. In *Haywood*, and in succeeding Victorian cases, however, the trial judge has taken the view that he was bound to do so.[100] In the end the difference between the South Australian and the Victorian cases depends on the rules which regulate the relationship between the judge and jury.

It is desirable to eliminate one red herring at least before treating this issue. In the same extra-judicial address Crockett J. remarked that there are "no grounds for thinking that juries will allow a defence of mind destruction by voluntary drug induction as an easy passport to acquittal".[101] The fact that Haywood was convicted of manslaughter lends support to the point. In *O'Connor* Barwick C.J. supported his rejection of *Majewski* with the reflection that the English approach involved an unwarranted degree of mistrust for juries.[102] It may be that the majority of acquittals resulting from *O'Connor* will occur in cases where an appellate court reverses convictions on the ground that the trial judge has failed to instruct the jury correctly. The real issue, however, concerns the nature of the task which is being entrusted to the jury: whether, in cases like *Haywood* or *O'Connor*, the jury should be given the opportunity to acquit on the ground that the defendant's actions were not conscious and voluntary.

The defendant is entitled to have his version of events considered by the jury. The assertion that a consequence occurred by accident rather than design, for example, will normally involve a version of events which is different from that presented by the prosecution. So also where he disputes an allegation of intention or knowledge made by the prosecution. The fact that his story is incredible is not a ground for withholding the issue. The defendant on trial for rape who said that he made a drunken mistake and thought that he was in his own bed with his wife was entitled to have the jury consider that as a possible version of what happened. But there is a distinction between those cases and those where the defendant seeks to escape liability by disputing the voluntariness of his actions. The distinction is a logical consequence of the conceptual structure of voluntariness. Confusion and uncertainty in analysis has tended to obscure it. Unlike intention, realisation or knowledge, voluntariness is not, or not simply, a state of mind. The defendant who denies voluntariness asserts that he was constrained to act as he did. Leaving aside those cases where his movements were involuntary, the denial of voluntariness does not entail a denial of intention, knowledge or belief. This is familiar in contexts where he relies on duress, necessity or provocation. Those defences will not be allowed to go to the jury unless the evidence of the constraints which induced him to act satisfy certain criteria. It is not enough merely to adduce evidence, however credible, that he could not help acting as he did, or that he lost control of himself. The criteria controlling the question whether the issue will go to the jury will vary according to the nature of the alleged constraint. But there is no difference in principle between those cases and cases where the defendant alleges that his actions were not voluntary because he was dissociated, or because he was extremely drunk. These constraints are "internal" rather than "external". But they are consistent with intentional action and they are consistent with the presence of knowledge or realisation of the circumstances and consequences of action. It is a question of judicial policy whether these internal constraints should be recognised as bases for exculpation. The fact that it is a question of policy has been obscured by the analysis of automatism in terms of "consciousness", and the supposition that individuals lose the capacity to form intentions as a result of intoxication or during episodes of dissociation. Exculpation has been based on a false analogy with denials of intention. If that error is avoided, one is forced to return to the question posed by Seymour Halleck: What reason do we have for distinguishing in our exculpatory policies between those who responded to internalised stress and those who responded to stress from external constraints? Consider, for example, the defences of provocation and duress. Neither will be allowed to go to the jury unless the evidence of external events said to amount to provocation or duress accords with the legal criteria governing those defences. Can the defendant avoid those criteria by laying emphasis on his inner turmoil and asserting simply that his actions were not conscious and voluntary? A tendency to allow this as a tactic is apparent in Victorian cases. It was condemned by Windeyer J. in the High Court in *Parker*.[104] The error lies in the assumption that a denial that action was conscious and voluntary is also, and necessarily, a denial of intentionality.

In *O'Connor* Barwick C.J. emphasised that the trial judge is to withdraw the issues of "voluntariness or actual intent" from the jury if the evidence provides no proper foundation for them.[105] Apart from an indication that the evidence must show an extreme state of intoxication,[106] no other criteria are stated. It is merely stated that a state of intoxication may, "perhaps only rarely . . . preclude the exercise of the will", or "prevent the formation of an intent to do the physical act involved in the crime charged".[107] The evidence before the Court was, of course, cast in those terms.

I suggest that no evidence, whether or not cast in medical terminology, is capable of casting doubt on the proposition that a defendant who was capable of walking, talking or attacking other people or their property, was also incapable of forming intentions. It may be that his actions were not "fully voluntary". They may be "out of character" and they may be deeply regretted or the memory of them suppressed afterwards. But that is not enough, of itself, to provide him with an excuse in law or otherwise. The requirement that a proper foundation be laid in the evidence has two functions. It is necessary to ensure that there is some factual material for the jury to consider. In this sense the evidential burden cast on the defendant avoids an unnecessary proliferation of issues at trial. It is also the means by which the court controls the application and the meaning of exculpatory concepts. It is open to the defendant to deny intention and the question of what his intentions were is appropriate for the jury's consideration. It is not open to him to deny the capacity to form an intention, however, unless there is some evidence to demonstrate how that phenomenon is supposed to occur. Nor is it open to him to alter the meaning of intention, or allied terms. Denials of voluntariness are in a similar position. The assertion that the defendant could not help doing what he did, or could not control himself, is not in itself a sufficient ground for a defence. Some exceptional state of facts must be evidenced before the foundation is laid. There is no apparent reason why the law should accept that evidence of even extreme intoxication, or of dissociation, should bring the defendant within the exceptional class of voluntariness defences. The vice inherent in *Haywood's* case, and those Victorian cases which followed it, is that it leaves to the jury the task of settling a conceptual issue which ought to be determined by the court in accordance with legal criteria.

If this analysis is correct it will be open to courts to allow the development of a defence for those whose intoxication was not self induced. One of the virtues of *O'Connor* is the healthy realism with which members of the majority discussed the distinction between intoxication which was, and intoxication which was not, self induced. It is not easy to draw and the occasions for its use will presumably be rare.[108] It is, however,

well established in authoritative dicta and provides a coherent ground for recognising a voluntariness defence arising from intoxication. This possibility is relevant to the difficult problem posed by the defendant who suffers a drug or alcohol induced hallucination.

DRUGS AND HALLUCINATIONS — A DILEMMA

The contrast between the South Australian and Victorian cases tends to blur in those rare situations where the defendant claims that his perceptions were distorted by an hallucination or a delusion. In the English case of *Lipman*[109] the defendant took LSD in company with a friend. Under the influence of the drug he had the illusion of descending to the centre of the earth where he struggled with snakes. During this episode he attacked and killed his friend. He was charged with murder and convicted of manslaughter. The reasoning in support of the decision has been universally attacked and may be disregarded. The interest of the case lies in its facts. In *Haywood* Crockett J. saw *Lipman* as a case in which the defendant's acts could not be described as "conscious, voluntary and deliberate"[110]. In *Joyce* there was a discussion of the analogous case where the defendant kills whilst dreaming. The Court doubted that the acts of the dreamer could be described as "involuntary or unconscious in the eyes of the law".[111] It was suggested instead, somewhat tentatively, that these cases might be dealt with in the same way as those where the defendant was simply mistaken. That is to say, he should be judged as if the content of his dream or hallucination had been true. Lipman, who meant to kill snakes, could not be found guilty of any offence which requires proof of an intention to kill or harm a human being. It is consistent with this analysis, however, that he might be found guilty of an offence of negligence.[112]

Cases involving such a systematic distortion of visual reality are rare. The so-called hallucinatory drugs are more likely to induce distortions of perception of which the drug-taker is aware, paranoid episodes and distortions of emotional response. One is entitled to a certain measure of scepticism when faced with an account of a systematic and pervasive distortion of reality which the actor was unable to perceive to be false. Quite apart from the possibility that the defendant is simply lying, it is possible that the claimed hallucination amounts to no more than a subconscious reconstruction of mental states after the event. False memories may be close cousins to psychogenic amnesia. Even so, *Lipman* gives rise to a dilemma. If we take the South Australian suggestion that the defendant be judged on the content of his hallucination and apply it to hypothetical cases derived from *Lipman* the results can appear very odd indeed. Suppose the drugtaker in that case had not hallucinated snakes but his hated mother, or father? If he is judged on the content of his hallucination he is guilty of murder since a mistake as to the identity of one's victim provides no excuse in law. But what if, in reality, mother or father had been dead for twenty years? Is the "mistake" as to the identity of the victim still irrelevant? There is an element of artificiality in the suggestion that criminal guilt depends on some beguiling substitute for reality thrown up by the defendant's subconscious. It was remarked earlier that the defining characteristic of delusions is that the sufferer is unable to correct his perceptions by reference to the cues presented by reality. It may be that in some of these cases at least, one is driven to adopt a defence based on lack of voluntariness. In *Joyce* the Court also left this possibility open:

"In such cases it may be that whatever directs the acts so subordinates the conscious will that the act can fairly be said to be involuntary."

The Court added a rider which may serve to distinguish between the dreamer and the drugtaker:

"It may be relevant . . . that in such cases the condition is produced by well known causes or in well known states for which the subject is not responsible. Everyone must sleep and a man does not choose to be knocked on the head . . . It is not clear that the same principle applies to a man who works himself up into an emotional frenzy."[113]

Nor, as the Court indicated, is the person who chooses to get intoxicated to be given the benefit of an ameliorative exception.

The dilemma over hallucinations and delusions is not new. It is inherent in the statement of the McNaghten Rules which govern the defence of insanity. So long as the presence of delusions or hallucinations were treated as indicia of mental illness the dilemma could be avoided by classifying the defendant's plea as one of insanity. In cases involving intoxication this is usually not possible. If intoxication was self induced the first solution suggested by *Joyce* has at least the merit of consistency with principles the defendant is to be judged according to the content of the delusion or hallucination. This is to ignore the differences between delusions and mistakes. If intoxication was not self induced, the defendant's position is more nearly analogous to that of the dreamer. In these cases, which will be exceedingly rare,

"it may be that whatever directs the acts so subordinate the conscious will that the act can fairly be said to be involuntary."[114]

Where the defendant is forced, or tricked, into intoxication it is perhaps more likely that he will suffer hallucinations or delusions. If he is ignorant of their source he may be so much the less able to correct his erroneous perceptions. If he is robbed of his faculties by another it is arguable that he should not be liable for his actions no matter what the content of his hallucination or delusion. Tentative as the remarkss of the Court in *Joyce* are, they illustrate the ineluctable element of policy involved in structuring voluntariness defences.

CONCLUSIONS

One factor has not been mentioned so far. The Victorian cases on intoxication and allied defences involving the denial of voluntariness are, for the most part, cases in which the defendant was charged with murder. Some of them, such as *Tait*,[115] might be considered sympathetic. *Haywood* was very young. To some extent an expanded defence of automatism or a willingness to allow the jury to consider the issue of voluntariness, may result from a growing sense of dissatisfaction with the definition of murder.[116] In the absence of a defence of diminished responsibility, and given that the limits on the defence of provocation in particular have been the subject of criticism and agitation for reform,[117] it is not surprising that there have been attempts to formulate a voluntariness defence. From this point of view, the danger represented by *O'Connor* is that principles shaped by the need to ameliorate the definition of murder may be given application to the generality of offences.

That is of course speculation. The most recent of the Victorian cases appears to run against the trend. *Darrington v McGauley*[118] provides an instructive contrast with *O'Connor*. Unlike that case it contains no invocation of the proposition from *Ryan*. Instead it offers a detailed analysis of the expert evidence given on behalf of the defendant and a vigorous statement of the limits to which such evidence is subject. In spirit it is far closer to *Joyce* than its predecessors.

The defendant McGauley was convicted of murder. At his trial he gave evidence of intoxication resulting from a combination of LSD, marijuana and alcohol. He admitted shooting the victim and, though he claimed partial loss of memory, gave an account of what had happened at the time. He appealed on the ground that the trial judge had erred in excluding expert psychological evidence from the consideration of the jury.

The trial judge heard the evidence on *voir dires*. Asked whether the combination of drugs, taken in the dosages claime

by the defendant, would affect his capacity to form an intention to kill or inflict grievous bodily harm, the expert witness replied that he "would have grave doubts that such a capacity would exist".[119] The trial judge rejected this evidence on the ground,

"that the question whether a man held a particular intention, or had the capacity to form it, is, in this context, not yet a question for an expert witness but for the jury . . ."[120]

The Full Court upheld this conclusion. Though the witness was qualified to give evidence of the effects which LSD might have in disturbing sensory perception, or inducing misinterpretation of the environment, there was no ground for supposing that he had expertise in diving intention or capacity to form intention.[121] Had the defendant claimed alcoholic intoxication alone it would have been inappropriate to allow expert evidence at all.

Jenkinson J. with whom the Chief Justice expressed agreement, remarked that:

"Common human experience of alcoholic intoxication strongly suggests that the will to kill and grievously hurt others is not substantially inhibited by alcohol, at least whilst the intoxicated person remains ambulant and capable of conversation."[122]

If he is not ambulant and capable of conversation, it is also unlikely that he will constitute any danger to anyone. Jenkinson J. suggested that the case might have been different if the evidence had suggested that the defendant might have perceived the victim "at the time of the killing as something other than a human being".[123] That is to invoke the shade of *Lipman*. The statement of doctrine which follows is clear in its intention, if not so clear in meaning:

"The intention to kill or to do grievous bodily harm required as an element in the crime of murder requires both understanding and the will . . . At one extreme the act which causes death may be done with full understanding of the high probability that the act will kill and in the passionate hope that the act will not kill. The political terrorist who destroys a building in which he knows his beloved is confined wills not to kill her, but only to do the act which causes the destruction of the building, yet he is guilty of her murder. At the other extreme a man whose mind is so grossly disordered by emotion or by intoxicants that he has no understanding of the degree of physical harm to the victim which his act entails, nor any capacity to govern his will by means of the exercise of his understanding, is guilty of murder if the act which causes death is done in the exercise of a will to kill or grievously to harm the victim, unless a defence such as provocation or insanity is available. No more understanding is required than may serve to conceive the will to kill or grievously harm one whom the accused recognises as a human being."[124]

This sounds very like a resurgence of the sceptical response. The references to the "will" remain as a cause for puzzlement. If it is accepted, however, that an act may be willed though the actor lacks the capacity to govern his will there is very little left of the positive requirement of voluntariness as a necessary element of guilt. This is closely analogous to the view of Bray C.J. in *Harm*[125] that the actor may be criminally responsbile for acts which are "voluntary but uncontrollable".[126] It is in accordance too with that Windeyer J. had to say in *Parker's* case.[127]

It may be helpful if conclusions are summarised.

(1) To ask what the defendant intended, knew, realised or believed at the relevant time is to ask an intelligible question about his state of mind. The ways in which alcoholic intoxication can impair perception, co-ordination and the interpretation of reality are familiar and evidence of intoxication is always relevant to the ascription of these mental states. Where intoxication is the result of consuming more exotic drugs it may be necessary to adduce expert evidence to provide an informational basis for the trier of fact. It is for the prosecution to establish intention, knowledge or whatever other mental element may be required for guilt of the offence charged. The basis for exculpation lies in the possibility that the defendant's actions may have been affected by mistakes, failures of realisation or of co-ordination. His own account of what he thought he was doing, or a hypothetical account of what he might have thought he was doing, is relevant to the extent that it is inconsistent with the prosecution version of his mental states.

(2) To speak of "capacity to form an intention" is the beginning of confusion. Intoxication certainly impairs many of the actor's capacities or abilities. Unless he is in a state of immobile stupor it does not impair his capacity to form intentions however. It may impair his capacity to execute them without unwanted consequences, to realise those consequences, or to appreciate the circumstances in which they are carried out. But that merely takes us back to the need to determine what his intentions were.

(3) References to capacity to form intentions leads inevitably to talk of voluntariness. And that leads in turn to the will and the question whether the defendant performed, or was capable of performing, a willed act. What these expressions conceal is that voluntariness and the will are conceptually different from intention, realisation, knowledge and belief. To say that a person did not act voluntarily is to evaluate his conduct in the light of the pressures and strains to which he was subject. It is not simply to make a statement about his state of mind. We evaluate by reference to our conception of what strains and pressures he should have been able to resist.

(4) The fact that an act was not done voluntarily will always mitigate the degree of blameworthiness. The actor who wanted to cause harm is certainly deserving of more severe punishment than one who did not. It does not follow, however, that one who did not act voluntarily has a complete excuse. In law defences involving a denial of voluntariness are restricted by rules which limit their availability to extreme cases. They represent particular exceptions to the general rule that the defendant cannot escape liability by asserting, however sincerely, that he could not help himself. There is no apparent reason why extreme intoxication should amount, of itself, to an exculpatory denial of voluntariness. It is not enough simply to shew that the physiological state of a defendant who was extremely drunk resembles that of a sleepwalker. Some further principled ground for extending a defence to him must be found. It may be possible to define a class of cases where the defendant is not responsible for his state of intoxication and, in these cases at least, the analogy with the sleepwalker would be more compelling. Otherwise his loss of self control is relevant only to exercise of the sentencing discretion.

(5) Legal defences involving the denial of voluntariness may be limited in their application to particular offences, or groups of offences. Provocation, duress, necessity and, in those jurisdictions which recognise the plea, diminished reponsibility, exhibit this characteristic. It may be that we should recognise that an extreme state of intoxication could be relevent to an offence such as murder in ways that it is not relevant to lesser offences. The suggestion that a defendant might lack capacity to intend death or grievous bodily harm, but possess the capacity to intend some lesser kind of harm, is implicit in the language used in some of the cases. These references to capacity may mask the judgement that one who was extremely intoxicated should, in some circumstances at least, escape conviction for an offence which carries a mandatory penalty.

(6) The defendant is entitled to rely on his account, however incredible, of his intentions and beliefs. It is for the jury to determine whether that account might possibly be true. But he is not entitled to redefine what is meant by intention or

other words designating the mental element in an offence. Nor is he entitled to rely on misuse of those words or concepts by expert witnesses seeking to find a translation from the terminology of their own field of expertise.

(7) Nothing said so far mitigates against defences or denials of liability wich rest on the assertion that the defendant's movements were involuntary. Twitches, convulsions, some "reflex" movements, or the wild flailing of a man stung by a bee are not actions done intentionally. In some circumstances it will be possible to deny that he "acted" at all.

(8) *O'Connor* is more consistent with the foregoing suggestions than might be apparent at first. The case involved a highly abstract disquisition on principles which are inherently flexible. Barwick C.J., in particular, emphasised that evidencd of the "state of the body and mind of an accused" may be withdrawn from the jury if it is irrelevant to the determination of "either of the basic elements, voluntariness or actual intent". The nature of the evidence in *O'Connor*, and the formulation of the issue for decision by the Court, did not require any close examination of the criteria which that evidence must satisfy in order to lay a proper foundation for the denial of guilt. The main task was the demolition of *Majewski*. What remains is the need to formulate a set of coherent principles linking intoxication and exculpation. Here the process of explication begun by the South Australian Supreme Court in *Joyce* provides a better guide than the Victorian cases. It is better simply because it avoids the confusion of terminology and distortion of concepts inherited from the speech of Lord Birkenhead in *Beard's* case.

(9) Proposals for legislation creating a specific offence for the intoxicated defendant, on the lines suggested by the Butler Committee, are premature. The proposed offence is designed for those defendants who escape liability where the defence or denial of guilt is founded on evidence of intoxication. Further confusion and obfuscation is likely if legislative amelioration of the present situation is attempted before an acceptable analysis of exculpation is achieved. The penalties for the new offence which were suggested by the Committee are comparatively small. If intoxication is to have the far reaching exculpatory effects suggested in some of the cases those penalties will be inadequate. If the penalties are increased we will end with the unedifying spectacle of the legislature introducing a new and serious offence in circumstances where the courts have declared that principle requires an acquittal. The preferable course is for the courts to return to an examination of those principles which are said to require legislative intervention.