Asif Tufal

INTOXICATION 2

1. THE REASONING BEHIND THE INTOXICATION RULES

In *DPP v Majewski* [1977] AC 142, Lord Elwyn-Jones LC said:

"Self-induced intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause has added a new dimension to the old problem with which the courts have had to deal in their endeavour to maintain order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law … the judges have evolved for the purpose of protecting the community a substantive rule of law that, in crimes of basic intent as distinct from crimes of specific intent, self-induced intoxication provides no defence and is irrelevant to offences of basic intent, such as assault."

His Lordship referred to the case of *DPP v Beard* [1920] AC 479, where Lord Birkenhead LC stated:

"Under the law of England as it prevailed until early in the 19th century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man."

Lord Birkenhead LC made an historical survey of the way the common law from the 16th century on dealt with the effect of self-induced intoxication upon criminal responsibility. This indicates how, from 1819 on, the judges began to mitigate the severity of the attitude of the common law in such cases as murder and serious violent crime when the penalties of death or transportation applied or where there was likely to be sympathy for the accused, as in attempted suicide. Lord Birkenhead LC concluded that the decisions he cited:

"establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved …"

Lord Elwyn-Jones LC then said that judges before and since *Beard's* case, have taken the view that self-induced intoxication, however gross and even if it has produced a condition akin to automatism, cannot excuse crimes of basic intent. In no case had the general principle of English law been overruled and the question to be determined was whether it should be. His Lordship stated:

"If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by

drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases … The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness."

Thus Lord Elwyn-Jones LC did not regard the general principle as either unethical or contrary to the principles of natural justice.

COMMENTARY

Dugdale, *"A" Level Law*, 1992, p323:

Such an approach could be regarded as illogical. If it is recognised that drunkenness can negate a specific intent surely it should also be capable of negating a basic intent. The issue in all crimes is: did the accused have the required mental state to constitute the *mens rea* of the offence? If the accused was so drunk that he did not know, or foresee or intend, then he should strictly be acquitted as lacking the required *mens rea* whether that mental state is brought about by insanity, drunkenness or simply stupidity. But such an approach would permit too general a defence of drunkenness and the criminal law has firmly resisted any such general defence. As Lord Edmund-Davies commented in *Majewski*:

"Illogical though the present law may be, it represents a compromise between the imposition of liability on inebriates in complete disregard of their condition (on the alleged ground that it was brought on voluntarily) and the total exculpation required by the defendant's actual state of mind at the time he committed the harm in issue."

Thus the justification of the present position rests on policy, common sense and regard for the accumulated wisdom underlying the precedents.

2. REFORM OF THE LAW

(A) THE LAW COMMISSION'S CONSULTATION PAPER (1993)

The Law Commission's Consultation Paper No. 127 (1993) was critical of the existing law, based upon the House of Lords' decision in *DPP v Majewski* [1977], on the ground that the examination of the intoxicated defendant's culpability should centre around the issue of whether or not he had *mens rea*. By contrast, under *Majewski*, the law tries to ensure that the jury does not take into account the defendant's voluntary intoxication when assessing fault for basic intent crimes, despite the fact that most defendants who have taken intoxicants are still capable of performing acts requiring a degree of cognition, usually enough to satisfy the minimum requirements for subjective forms of *mens rea*. More specific criticisms of the *Majewski* approach were:

i) The decision purports to promote a policy of protecting the innocent citizen against the drunkard, but is patchy in its coverage of offences, because the split between specific and basic intent offences

is not based on a coherent policy, and not all specific intent offences have a lesser included offence so as to ensure a conviction of a defendant.

ii) There is inconsistency in the treatment of offences and defences. It was seen as illogical that a jury should consider intoxication in determining whether or not the defendant had the mens rea for murder, but not in relation to whether or not he thought himself to be acting in self-defence. Similarly, in relation to criminal damage there is a difference in the approach taken by the law to a drunken mistake as to the owner's consent regarding the destruction of the property, and a drunken mistake as to ownership.

iii) An impossible task is handed to the jury in relation to basic intent crimes if it is required to assess whether or not the defendant had *mens rea* **disregarding** evidence relating to his intoxicated state.

The Law Commission recommended one of two options:

i) *Majewski* should be abolished with no further alteration to the law. This would mean that a defendant who lacked *mens rea* because of intoxication would escape all criminal liability. This is the position in parts of Australia and New Zealand and research revealed that only a tiny percentage of criminal defendants escape all liability because of their drunkenness.

ii) *Majewski* should be abolished and replaced by a new special offence of causing harm whilst deliberately intoxicated, that could be charged on its own or as an alternative to an existing offence.

(B) THE LAW COMMISSION'S REPORT (1995)

The Law Commission's Report (No 229, 1995) expresses the view that the *Majewski* approach operates fairly and without undue difficulty, and the main thrust of the report is that the principles in *Majewski* should be codified, subject to some minor clarifications.

The Law Commission proposed that voluntary intoxication could be relied upon to rebut allegations of specific types of fault, namely: intent, purpose, knowledge, belief, fraud and dishonesty. Otherwise, a person will be treated as having been aware of anything he would have been aware of had he not been voluntarily intoxicated.

Voluntary intoxication is defined in the report as an impairment of awareness, understanding or control resulting from the use of a drug or any other substance which has a capacity, when taken into the body, to impair awareness, understanding or control.

The intoxication is to be regarded as voluntary unless: D is unaware of the properties of the substance, or its effects upon him in particular; D takes the substance under duress; or D takes the substance as prescribed by a GP.

COMMENTARY

Smith and Hogan, *Criminal Law*, Eighth edition 1996, p237:

The Law Commission reached a provisional conclusion that *Majewski* should be abolished in a consultation paper; but the consultation persuaded the Commission to change its mind and they now recommend the codification of the rule with minor amendment and attempted clarification, but in a draft Bill so complex and clumsy that it is impossible to recommend it.

Proposals for a *via media* [compromise; middle course] have been made but have not attracted support and are not pursued here. The choice seems to be between complete abolition of the *Majewski* principle and its retention. So far as English law is concerned, it is here to stay for the indefinite future.