THE PLEA OF INTOXICATION IN CRIMINAL LAW

A Case of Rendering a Drug / Alcohol Abuser a Privileged Offender ?

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Some criminal law issues are fascinating to the student and challenging to the professional. The defence of intoxication is one of them. The intoxicated offender presents a serious dilemma to every legislator: on one hand such a person may lack the requisites for criminal liability, and on the other, society at large must be protected from his harmful conduct. The inevitable questions arise: should principles of public policy prevail over those of criminal liability?; can a balance be attained between the two?; should a voluntarily-intoxicated person be punished even if he lacks the *mens rea* for the offence?; should one distinguish between the voluntarily-intoxicated, the negligently-intoxicated, and the so-called accidentally-intoxicated offender?

This work does not attempt to formulate miraculous solutions for a dilemma which has existed for centuries, but is intended to constitute a modest contribution to the ongoing debate. It is also contributory towards a clarification of the controversial question of whether the intoxicated offender is in fact a 'privileged offender' or not.

Chapter I traces the development of the notion in Britain from its earliest origins till the time when the then Governor of Malta, on recommendation of the British Colonial Office, introduced in Malta provisions on intoxication similar to those in Britain.

Chapter II commences with an overview of criminal liability, in particular, of the 'guilty mind' requirement, which fuels much of the debate surrounding the intoxication defence. An analysis of Maltese law on the subject follows, consisting, *inter alia*, of an appraisal of Section 34 of the *Criminal Code* and an evaluation of the relevant court judgments. This will hopefully clarify the Maltese position with regards to the above questions.

How some foreign legislations respond to these questions is discussed in Chapter III. The UK position is considered first, to see whether the British have departed from the principles which were law at the time when the notion was introduced in Malta. Common Law countries which normally follow British tradition, such as various Australian states, Canada, and New Zealand, are considered next, to see whether these have retained the British model of intoxication or whether they have departed therefrom. The position in some of the so-called 'civil law jurisdictions', such as Germany, Switzerland, and the Netherlands has also been considered, just as has been the position in Italy, which essentially follows Continental tradition.

Chapter IV attempts an inquiry into the actual subject-matter of this defence - i.e. intoxicants. Without venturing into complex medical and psychological issues, a task for which I definitely lack competence, I have considered some of the basic properties of alcohol and common drugs of abuse. In particular, I have inquired into whether and in what manner these substances may affect human behaviour and the human brain.

Chapter V assumes comparative, evaluative, and reformative aspects. I have, *inter alia*, identified aspects from the foreign counterparts discussed in Chapter III, evaluated them, and considered whether it would be appropriate to introduce in Malta provisions on similar lines. My personal proposals for reform are also included.

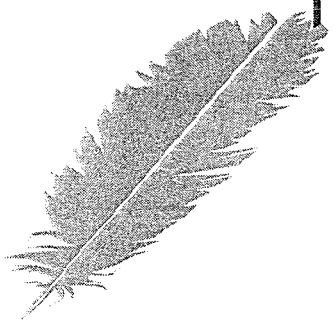
Ph. G. F.

Birguma,
Malta

9th June, 2001

To

Mum & Dad



The debt I owe them
can never be repaid

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Table of Abbreviations

The following abbreviations are used in footnotes:

art. = Article.

BAC = Blood-Alcohol Concentration.

Bk. = Book.

chp. = Chapter.

Ed. = Edition *or* Editor (depending on the context).

Fn. = Footnote.

KDQI = Kollezzjoni ta' Decizjonijiet tal-Qrati Inferjuri ta' Malta.

KDQS = Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta.

Note : Judgments from the above collections are labelled as follows: first the *type* of volume (i.e. whether it is from the Superior or Inferior Court decision volumes), followed by the *volume number* (in Roman numerals), the *volume part* (also in Roman numerals), and finally the *page number*. This is followed by the *date* of the judgment.

Hence, KDQS XXXI.IV.415 (23/08/1941) means: Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volume 31, Part 4, Page 415; judgment delivered on the 23rd August, 1941.

MGG = Malta Government Gazette.

no. = Number.

p. = Page.

para. = Paragraph.

pt. = Part.

QAK = Qorti ta' l-Appell Kriminali.

QK = Qorti Kriminali.

sec. = Section.

suppl. = Supplement.

vol. = Volume.

Frequently-quoted texts :

The following are the abbreviations used for the principal text-books cited in this thesis. The particulars of other works referred to in the text are set out in the relevant footnotes and in the Bibliography at the end.

Antolisei, ***Manuale*** = Antolisei, F., ***Manuale di Diritto Penale*** (Tredicesima edizione), Dott. A. Giuffrè Editore, Milano; (1994).

Carrara, ***Programma*** = Carrara, F., ***Programma del Corso di Diritto Criminale***, (Quinta Edizione con Aggiunte), Lucca, Tipografia Giusti; (1877).

Halsbury = Halsbury's ***Laws of England***, Butterworths, London.

Mamo, ***Notes*** = Mamo, Sir. A.J., ***Lectures in Criminal Law*** (1986 Edition); University of Malta.

Manzini, ***Trattato*** = Manzini, V., ***Trattato di Diritto Penale Italiano***, Unione Tipografico-Editrice Torinese, Torino; (1950).

Smith & Hogan = Smith, J.C., Hogan, B., ***Criminal Law***, (7th Ed.), Butterworths, London; (1992).

Translations :

(i) ***Texts.***
In various parts of this thesis, I have quoted relevant excerpts from foreign text-books. Such excerpts are accompanied by a translation into English in the relevant footnote. These translations are entirely mine and should hence not be regarded as official translations.

(ii) ***Law.***
On other occasions, especially in Chapter III, I have quoted relevant provisions from foreign penal codes. Where an official translation was available, I have used that, and acknowledged it accordingly in the relevant footnote. Where such a translation was not available, I have translated myself. The latter unofficial translations in the relevant footnotes are identifiable because they commence with the words: *'A rough translation would read: ...'.*

Gender-terms and names :

Throughout this thesis, gender-terms such as: 'he', 'she', 'him', 'her', and 'his' are used interchangeably. Reference to the masculine must hence be construed to include the feminine, and vice-versa, unless the context explicitly or impliedly requires otherwise.

The names Anthony, Brian, and Charles represent hypothetical characters which I have used to illustrate a variety of concepts and situations.

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Acknowledgments

Although it is *my* name that appears on the cover of this work, a number of people have, in many different ways, contributed towards its realization. Contributions were diverse and valuable.

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Acknowledgment should also go to Ms. Padma Raman, Director of Research and Executive Officer of the Victorian Law Reform Committee, Australia, for providing me with access to Australian materials on the

subject of this thesis. Similarly, my appreciation goes to Dr. Bernhard Böhm, from the German Federal Ministry of Justice; H. Ph. Mayer, from the Dutch Ministry of Justice, and John Wagstaff, legal adviser to the British Criminal Cases Review Commission, for their interest in my research and tangible feedback, and for supplying me with relevant materials and information. In this respect I cannot not acknowledge the individual contributions of people from foreign Courts, Ministries of Justice, and Law Commissions, who were kind enough to answer numerous queries via e-mail.

Particular appreciation goes to Charmaine Zammit, a colleague and a friend, for giving me access to certain materials which she compiled for her own dissertation on insanity, and which proved fruitful for parts of my study.

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Last, but undoubtedly not the least, I wish to thank my parents, to whom this thesis is in fact dedicated. If it were not for their constant encouragement and support in all its forms, my greatest aspiration would have remained merely a dream... .

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Introductory

In both Continental and Anglo-American traditions of criminal justice, the state cannot convict and punish a criminal offender merely because he indulges in unlawful conduct. In accordance with age-old principles of criminal liability, for such an offender to be criminally responsible for his unlawful conduct, this conduct must necessarily be accompanied by a 'guilty mind'. The state of mind of the offender at the moment of committing the offence, forms the crux of the entire notion of criminal liability. Factors which seriously disrupt the normal functioning of a person's mental faculties will consequently also affect the extent of criminal liability.

Hence we encounter what I would refer to as the 'mental condition defences' (more-widely known as 'general defences') in criminal law. Intoxication, introduced in the *Criminal Code* in 1935, is

the most recent of these defences to be introduced in Maltese law, with the other 'mental condition defences' of young age and insanity dating back to 1899 and 1900 respectively. Unlike these defences, however, intoxication is still subject to rigorous debate among legislators, judicial authorities, and coteries of legal commentators world-wide. The reason is that while the legal incapacity arising from young age and insanity is the result of natural factors independent of the will of the person in question, that arising from intoxication is, in many cases, the result of that person's own actions. More concretely, with the exception of cases where a person is intoxicated involuntarily, the incapacity resulting from intoxication is attributable to that person's own *fault* in consuming intoxicants in the first place. Whether such a person ought to be excused for criminal offences committed while in a state of 'self-induced incapacity', characterizes most of the intoxication debate.

Legal systems worldwide have adopted different approaches to this dilemma, but, I dare say, none of them is free from debate and legal controversy. On one hand there are legal systems which advocate, in a rigid manner, the *actus non facit reum nisi mens sit rea* principle; and on the other are the systems which advocate the principle of *fault liability*. In the first type of system, if, by reason of intoxication, an offender is incapable of understanding and volition at the moment of

committing an offence, such person is exempt from criminal responsibility irrespective of whether the incapacity is self-induced or otherwise. This would however not apply to the so-called *Dutch courage* cases – i.e. where a person deliberately becomes intoxicated to facilitate the commission of a crime. Subject to certain exceptions and limitations, which are examined in this work, in essence, the Maltese notion of intoxication assumes this kind of approach.

In the other type of system, based on *fault liability*, if a person commits an offence while in a state of self-induced intoxication, even if it is proven that at the time of committing the said offence, such person was completely incapable of understanding and volition, he would still be fully liable on account of the fact that the incapacity is attributable to that person's *own fault*. Certain systems, such as the Dutch and the Italian, advocate this principle with regards to all offences, while others, such as the British and Canadian, apply this principle only to offences requiring a generic / basic intent.

The first type of system, justified on strict legal principles, is often criticized on account of the fact that it almost renders a drug/alcohol abuser a 'privileged offender', at the expense of the general well-being of the law-abiding citizens; while the latter type of system is often

criticized on account of the fact that it is based on principles of policy which go counter to the basic principles of criminal liability. In view of this fact, some other legal systems, such as the German and the Swiss, have opted to enact specific legislation rendering the act of committing a criminal offence while in a state of intoxication, a 'special offence' in itself, which is governed by 'special' principles of liability. These issues and the legal controversy surrounding them are all dealt with in this work.

To my knowledge, this dissertation is the first Maltese work dedicated exclusively to the criminal law notion of intoxication. When choosing a title for this work, I have deliberately opted to refer to intoxication as a 'plea', rather than a 'defence'. Although, in essence, the two terms may be used interchangeably, in my view, it could be a little misleading to bluntly refer to intoxication as a 'defence'. Proof of this is the fact that the relevant Section 34 of the Criminal Code commences by laying down the rule that 'save as provided in this section, intoxication shall *not* constitute a defence to a criminal charge'. It is in fact the *exceptions* to this rule that constitute defences in the criminal law, not intoxication in the wide sense. Moreover, when one examines each of these exceptions, one will further confirm that it is not intoxication *per se* which may exempt an offender from criminal

liability, but particular *states of mind* induced by intoxication. For the sake of accuracy, therefore, I have avoided referring to intoxication as a 'defence' at such a preliminary stage as the title itself!

Interestingly enough, throughout the sixty-six years of the provision's existence in our Criminal Code, this plea has, relatively speaking, seldom been raised before our courts. This suggests that throughout these years very few offenders were intoxicated *in the manner required by law* when they committed an offence. Moreover, it results from my research that out of the relatively-few cases in which an accused pleaded intoxication in his defence, *not on a single occasion* have our courts, after examining the relevant evidence, come to the conclusion that the intoxication satisfied the requirements of the law so as to exclude liability. To my knowledge, therefore, not a single offender has yet 'escaped' criminal responsibility in Malta on account of his state of intoxication.

For reasons such as the above, Section 34 of the Criminal Code seems to have remained immune to recent developments in foreign counterparts. Not only have the Maltese provisions on intoxication been 'neglected' by criminal lawyers and Maltese legal commentators, but the legislator himself has failed to provoke constructive debate as to how

these provisions may be developed and amended to meet the requirements of today's society. I am saying this because although alcoholism in Malta is an old phenomenon, just as it is everywhere else, until a few years ago, drug abuse in Malta was almost unheard of. It can be stated as a fact that the number of people who consume intoxicating substances has risen tremendously from the 1930's – i.e. when the provisions on intoxication were introduced in Maltese criminal law. Although there are no official statistics as to the estimated amount of people who consume excessive amounts of alcohol and/or abuse drugs in Malta, statistics supplied to me by *Caritas Malta* (a foundation for the rehabilitation of drug abusers), and *Sedqa* (the national agency against drug and alcohol abuse), are, to say the least, alarming. For example, figures supplied to me at the end of the year 2000 show that on average, 158.7 drug abusers are offered a service within *New Hope* (a *Caritas* programme) every month[1]. Clients attending the Government's *Detox Outpatients Centre* has more than doubled in the last five years – i.e. from 350 clients in the year 1994 to 797 clients in the year 1999[2]. Some likewise alarming facts emerge from the ***European School Survey Project on Alcohol and Other Drugs***[3]. By way of some

[1] Figures courtesy of Ms. Roberta Farrugia Randon, Research and Development Officer, Caritas, Malta.

[2] Figures courtesy of Ms. Vivienne Mallia, Research Executive, Sedqa, Malta.

[3] ***European School Survey Project on Alcohol and Other Drugs*** *– Students survey in secondary schools, Malta, 1995*, Sedqa, Malta, (1997).

examples, no less than 91.9% of Maltese 16-year-olds consume alcohol[4], and 2.4% of the same abuse drugs[5]. Considering these figures, I would say that it is inevitable that in the near future, the rate of intoxicated offenders will also be on the increase, and my prediction would be that the Code provisions on intoxication will be resorted to much more frequently than they have been in the past sixty-six years!

In this scenario I think it would be appropriate to re-examine the existing law on the subject, inquire into recent developments in foreign counterparts, and consider whether it would be desirable to reform the law to keep it up-to-date with the needs of today's society. This dissertation indulges in such an exercise.

[4] *European School Survey Project on Alcohol and Other Drugs – Students survey in secondary schools, Malta, 1995*, para. 4.2.1, 13.

[5] *European School Survey Project on Alcohol and Other Drugs – Students survey in secondary schools, Malta, 1995*, para. 4.4.1, 20.

CHAPTER I

Intoxication : A Historical Perspective

Although the *Criminal Code* of Malta (1854, amended several times later) is based on the Neapolitan Code (1819) and is thus Continental in origin, the notion of intoxication (one of the later amendments), is modelled on English Common Law. If one looks at the relevant **section 34** of the Code[1], one will observe that its marginal note reads: *'Intoxication. Added by: XIII.1935.2. Amended by: V. 1956.8'.* Prior to the enactment of Ordinance XIII of 1935, the Code was silent on the issue of intoxication, considering 'drunkenness' a criminal offence (a contravention). Ordinance XIII (1935) was the result of a British Colonial Office policy to harmonize colonial legislation on intoxication with that of the Empire.

[1] Hereinafter, unless expressly stated otherwise, the word 'Code' means the ***Criminal Code of Malta***, (Chapter IX of the Laws of Malta), enacted by Order-In-Council dated 30th January 1854, and duly amended till the date of the writing of this thesis.

Paradoxically, British courts themselves were inconsistent on the exact application of the notion of intoxication: the 400-year period spanning from the second half of the sixteenth century till the first half of the twentieth, illustrates a continuous debate in England, within the Courts and coterie of legal commentators, as to how the notion of intoxication ought to be applied in criminal cases. This being essentially a chapter dedicated to the historical development of the notion, I shall first give a look at how the notion of intoxication developed in England from its recorded origins till the time when Ordinance XIII (1935) was enacted in Malta[2]; and subsequently I shall tackle the historical issue from the Maltese point-of-view.

I.1 THE ORIGINS.

Prior to the early nineteenth century, if a person committed an offence while under the influence of alcohol, not only was he in no better position before the law than a sober person, but English courts treated drunkenness as an aggravation of an offence. Although prior to

[2] Since 1935 (i.e. when the notion was introduced in our Code), extensive developments have taken place in England regarding the notion of intoxication. These recent developments are discussed in Chapter III.

the nineteenth century nobody considered drunkenness as a defence to a criminal charge, the very first reported case containing an early statement of the law in this respect dates back to the time of Edward VI, and was decided by the Exchequer Chamber in the year 1551. The decision, in the names ***Reniger v. Feogossa***[3], made it clear that:

> *'If a person that is drunk kills another this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, he shall not be privileged thereby'.*

In conformity with this judgment we find sixteenth and seventeenth-century writings by English legal commentators, which illustrate that the prevailing principle at the time was that a person who committed a criminal offence was not to be excused on account of any condition brought about by his own fault.

In the ***Beverly's case***[4] in 1603, the court not only confirmed the principle that drunkenness was no excuse, but went further and considered it as an offence in itself, with the consequence of aggravating the criminal offence committed. Various writers of the time supported

[3] (1551) 1 Plowd. 1, 75 Eng. Rep. 1.

[4] (1603) 4 Co Rep 125.

the court's decision. For example the eminent English jurist Sir Edward Coke, writing in 1628, held that :

> *'As for a drunkard who is voluntarius daemon, he hath no privilege thereby, but what hurt or ill soever doth, his drunkenness doth aggravate it'.*[5]

How the concept of drunkenness as an aggravation was applied in practice remains unclear. English authors and historians seem to suggest that it was taken into account by Judges when it came to sentencing offenders. Alternatively it may have been used by the prosecution to picture defendants as people of bad moral character.[6]

A person who, in my view, began to adopt a progressive approach to the issue of intoxication was Sir Matthew Hale. In 1778 he wrote that a drunken person:

> *'shall have no privilege by his voluntarily contracted madness, but shall have the same judgement as if he were in his right senses'.*[7]

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[5] Coke, E, ***Institutes of the Laws of England***, London, (1628), Bk I. Notwithstanding the fact that many writers supported the *Beverley's* decision, other leading authorities, such as Sir Francis Bacon, Sir Matthew Hale, and William Hawkins never commented on drunkenness as being an 'aggravation', despite arguing that it was not a defence to a criminal offence.

[6] At the time, drunkenness was considered to be a repulsive vice associated with people of a bad moral character. In his book: ***History of the Defence of Drunkenness in English Criminal Law***, published in 1933, R. Singh cites the Preamble of ***An Act for Repressing the Odious and Loathsome Sin of Drunkenness*** (1606; 4 James I, C.5), in which drunkenness is described as a *'loathsome and odious sin being the root and foundations of many other enormous sins'.*

[7] Hale, M., ***Historia Placitorum Coronae – The History of the Pleas of the Crown***, London, (1778).

Hale's conception of *madness* associated with severely intoxicated people is said to be the very first one to be recorded in history. Thus, although drunkenness was no excuse for a criminal offence, as early as 1778 Sir Matthew Hale was acknowledging that a severely-intoxicated person could very well be in a state of *madness*. And on this theory of 'madness' or 'frenzy', Hale departed from the traditional rigid position and started to conceive of drunkenness as a possible excuse in particular cases:

> *'That although the simple phrenzy occasioned immediately by drunkenness excuse not in criminals, yet if by one or more such practices a habitual or fixed phrenzy be caused though his madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first'.*[8]

Hale was therefore suggesting that although drunkenness which produced a *temporary* insanity did not constitute an excuse to a criminal charge, if the drunkenness was such that it rendered a defendant *permanently* insane, that drunkenness could constitute an excuse. Hale's exposition, however, remained merely a theoretical one, as for many years it did not receive support from the courts and was hence not applied in practice.

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[8] Hale, M., ***Historia Placitorum Coronae – The History of the Pleas of the Crown***, 32.

It was only in the early nineteenth century that English Judges began to show more disposition to inquire into this intoxication dilemma. Although Common Law still refused to recognise any form of self-induced drunkenness as a defence for criminal conduct, the courts started to adopt a more lenient approach. For example, in the 1819 case: ***R. v. Grindley***[9], the Judge held that while intoxication did not excuse the commission of a crime, when considering whether a murder was premeditated or committed in the heat of the moment, evidence of intoxication should be taken into account. In ***R. v. Marshall*** [10], involving a charge of stabbing, the Judge directed to the jury that they may take into consideration defendant's drunkenness when considering whether he acted under a *bona fide* apprehension that his person or property was going to be attacked. In line with *Grindley*, above, in ***R. v. Pearson***[11], where defendant was charged with murdering his wife, the Judge, after reiterating that drunkenness was no excuse for a criminal offence, pointed out that it :

> *'may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation'.*

[9] Quoted at length in the case ***R. v. Carroll*** (1835) 7 C&P 145; 173 ER 64.

[10] (1830) 1 Lewin 144.

[11] (1835) 2 Lewin 144.

That same year, however, came a decision which contrasted the earlier *Grindley* decision. In this case, ***R. v. Carroll*** [12], the Judge referred specifically to the *Grindley* case and overruled that decision claiming that it was too wide in its application, with the potential for risk to human safety if it were to be 'considered as law'. Consequently the Judge held that drunkenness could not be taken into consideration where premeditation was at issue. Less than two years later, however, came yet another contrasting decision: ***R. v. Thomas***[13]. In line with the earlier *Grindley* judgment (overruled by the *Carroll* decision), the Judge once again held that when it came to considering whether an offence was premeditated or committed in the heat of the moment, intoxication should be taken into account since the passion of an intoxicated person is more easily excitable than that of a sober one.

These cases demonstrate that well into the nineteenth century, the English courts were far from certain as to whether, and in what circumstances intoxication could constitute an excuse to a criminal offence. Until 1836, however, the courts were only considering the issue of intoxication vis-à-vis the external behaviour of a drunken person;

[12] (1835) 7 C&P 145.
[13] (1837) 7 C&P 817.

there was hardly any serious debate on the effect of alcohol on the human brain, and how this may affect an offender's mental faculties.

I.2 EARLY PERCEPTIONS OF THE EFFECT OF DRUNKENNESS ON CRIMINAL INTENT.

The very first case in which we encounter a reference to the relationship between drunkenness and intent is ***R. v. Meakin***[14], decided in 1836. In this case defendant was accused of stabbing the deceased with a fork with the intent to murder. The issue of whether a fork amounted to a dangerous instrument or not was of fundamental importance because the Judge directed that when examining intent, drunkenness may be taken into account only if one were to consider the fork as *not* amounting to a dangerous type of instrument. The Judge pointed out that:

> *'where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party'.*

[14] (1836) 7 C&P 297.

According to the Judge, therefore, if the fork amounted to a dangerous instrument, there was malicious intent on the part of defendant, which intent could *not* have been affected by his drunkenness. The Judge himself declared that the fork *did* in fact constitute a dangerous weapon, which indicated a malicious intent on the part of defendant. In view of this the jury returned a 'guilty' verdict.

The relationship between drunkenness and intent was again dealt with two years later in ***R. v. Cruse***[15], where defendant was charged with assault with intent to murder. The Judge directed the jury that drunkenness was an important factor when considering the issue of intent, especially since drunkenness might have rendered defendant unable to form any intent.

This judgment was thoroughly evaluated eleven years later in: ***R. v. Monkhouse***[16], where defendant was charged with wounding with intent to murder. The Judge, in principle, agreed with the *Cruse* judgment, but made a number of clarifications. Whilst affirming that drunkenness was no defence, the Judge instructed the jury to consider

[15] (1838) 8 C&P 541.
[16] (1849) 4 Cox CC 55.

whether defendant was so intoxicated that he was unable to form the intent required for the offence that he was being charged with[17]. The Judge held that it was irrelevant if defendant was rendered more irritable or excitable by his drunkenness, and the jury could only take into account such drunkenness if this:

> *'was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention'.*

This judgment is important from the historical point of view because it is the very first one to suggest that evidence of intoxication is relevant to negative *specific* intent. As we shall be seeing in Chapter III, when it comes to admitting or refusing intoxication as a defence, British courts to this day still distinguish between offences requiring a *basic* intent and those requiring a *specific* intent.

In the 1887 decision ***R. v. Doherty***[18], the Judge, on the basis of the earlier *Monkhouse* reasoning[19], made a thorough examination of the relationship between drunkenness and homicidal intention. On the

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[17] This may be contrasted with the ***Cruse*** judgement (above, 36), in which the Judge had directed the jury to determine whether drunkenness could have rendered defendant unable to form any intent. The Judge in ***Monkhouse***, however, directed the jury to inquire whether drunkenness could have rendered defendant unable to form the *intent charged*, and not just *any* intent.

[18] 16 Cox CC 306.

[19] (above), 36.

question of whether the verdict should be murder or manslaughter, the Judge said that where intention:

> *'is one of its* (i.e. the offence's) *constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime'.*

Notwithstanding this, the Judge further explained that if a drunken person formed an intention to kill or to cause grievous bodily harm to another person, and carried out that intention, that person was guilty of murder as if he had been sober. In simple terms, the Judge, in line with the *Monkhouse* judgment, held that where an offence requires a specific intent, evidence of drunkenness may be taken into consideration to determine whether defendant could have formed the necessary intention. This decision contrasts with the earlier *R. v. Meakin* judgment[20]. As we have seen, in *Meakin* the Judge held that since the fork amounted to a dangerous instrument, there was malicious intent on the part of defendant which could not have been affected by defendant's drunkenness. The lack of uniformity in the British Courts' decisions demonstrates that throughout the nineteenth century, the Courts' perception of the effect of drunkenness on criminal intent was far from being a settled principle and was still in a state of flux.

[20] (above), 35-36.

I.3 EARLY PERCEPTIONS OF DRUNKENNESS AS A 'DISEASE OF THE MIND'.

As we have seen, the first legal commentator to have reportedly associated 'madness' with severely intoxicated people was Sir Matthew Hale way back in 1778[21]. Notwithstanding this, almost half a century had to pass before cases dealing with the issue of insanity induced by alcohol began to reach the courts. The first of such cases was ***R. v. Burrows***[22], decided in 1823, followed by ***R. v. Rennie***[23] two years later. Although in both cases it was pleaded that defendant was in a state of madness owing to his drunkenness, the Judge (who, incidentally, happened to be the same one in both cases) outrightly refused to recognize *temporary* madness caused by alcohol as a possible excuse for a criminal offence. Notwithstanding this, he seemed to suggest that a *permanent* condition of such madness (i.e. 'madness' caused by alcohol) could constitute an excuse for an offence.

[21] (above), 31-32.
[22] (1823) 1 Lewin 75.
[23] (1825) 1 Lewin 76.

A decision which outrightly contrasts these two is ***R. v. Davis***[24], delivered in 1881. The case involved a charge of wounding with intent to murder. Evidence showed that defendant was suffering from *delirium tremens* caused by heavy alcohol consumption, and the Judge was clear in arguing that drunkenness amounting to insanity, even if a temporary one, could constitute a defence to a criminal charge:

> *'if a man by his drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible'*

This proposition was re-affirmed in numerous subsequent judgments, such as: ***R. v. Meade***[25] , and the case much quoted in criminal law textbooks, ***D.P.P. v. Beard***[26]. In *Meade,* defendant struck the victim with a broomstick and punched her, causing the rupture of her intestine and her death. Defendant was found guilty of murder and appealed on the basis that the Judge had led the jury to believe that a verdict of manslaughter required evidence that the defendant was insane or in a condition similar to insanity. The Court of Appeal, however, turned down the appeal declaring that a person is presumed

[24] (1881) 14 Cox CC 563.
[25] (1909) 1 KB 895.
[26] (1920) AC 479.

to intend the natural consequences of his act, which presumption could however be rebutted by evidence of drunkenness of such an extent that it renders defendant:

> *'incapable of knowing that what he was doing was dangerous, i.e. likely to inflict injury'.*

What is particularly interesting about this judgment is that unlike *R. v. Doherty* discussed earlier[27], this judgment is of a 'general' character in the sense that it does not distinguish between offences requiring a generic intent and others requiring a specific intent.

In 1909, an updated version of the ***Laws of England*** was published by the Earl of Halsbury. In Volume IV of this great commentary on English law, the Earl of Halsbury, *inter alia*, comments on the issue of drunkenness. In doing so, the author refers to most of the case-law discussed in this chapter[28]. I am hereby reproducing Halsbury's commentary on the issue because in my view it provides a concise yet clear picture of the state of the issue of drunkenness under English law at the beginning of the Twentieth Century:

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[27] (above), 37-38.

[28] The cases which Harlsbury mentions are the following (names in bold type-print represent the cases discussed in this Chapter): ***R. v. Meade*** (1909), ***R. v. Grindley*** (1819), ***R. v. Burrows*** (1823), ***R. v. Rennie*** (1825), ***R. v. Marshall*** (1830), *Goodier's case* (1831), ***R. v. Pearson*** (1835), ***R. v. Carroll*** (1835), ***R. v. Meakin*** (1836), ***R. v. Thomas*** (1837), ***R. v. Cruse*** (1838), ***R. v. Monkhouse*** (1849), ***R. v. Doherty*** (1887), *R. v. Moore* (1852), and *R. v. Doody* (1854).

> *'A person who becomes drunk as the result of his own voluntary act, and while drunk commits a crime, is not excused for the crime by reason of his drunkenness alone; for a person, although drunk, may be capable of forming an intention and therefore of committing an act. But a person may by drunkenness be rendered entirely incapable of forming an intention, and drunkenness may therefore, even though voluntary, sometimes be used as a defence for the purpose of rebutting the presumption of a criminal intention which would otherwise arise from an act; such presumption is deemed to be rebutted, where it is shown that the accused's mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous or wrongful.'* [29]

In 1920, however, the House of Lords delivered its landmark judgment in ***D.P.P. v. Beard***[30]. In this case defendant raped a 13-year old girl, and, to prevent her from screaming, placed his hand across her mouth, causing the girl's suffocation and death. Beard's defence counsel argued that defendant was drunk at the time of committing the offence and did not intend to kill the girl. The Judge directed the jury that drunkenness could constitute a defence only if it produced in defendant a state of insanity. The jury found Beard guilty of murder but on appeal, the Court quashed the conviction and substituted a verdict of manslaughter. The case ended up before the House of Lords, which, in turn, reinstated Beard's murder conviction and made some important pronouncements regarding intoxication and criminal responsibility.

[29] Halsbury, Earl of., ***The Laws of England***, Butterworth & Co, London, (1909), vol. IV, pt I, sec. 2(3), 242-243.

[30] (1920) AC 479.

Professor Sir Anthony J. Mamo[31], commenting on this judgement, outlines three of such pronouncements :

i. If actual insanity, even though temporary, supervenes, such insanity furnishes a 'complete answer' to a criminal charge just as if it was induced by any other cause;

ii. evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime, should be taken into account when considering whether the accused had the required intent or not;

iii. evidence of drunkenness falling short of this – i.e. drunkenness which merely affects the mind of the accused in such a manner that he gives way more readily to some violent passion – does not rebut the presumption that a man intends the natural consequences of his acts.

Point (ii) above apparently suggests that drunkenness may constitute a defence only where the offence charged-with requires a *specific* intent on the part of the agent. As a matter of fact, in line with the earlier-discussed judgments: *R. v. Monkhouse*, and *R. v. Doherty*[32], at one point in the *Beard* judgment, the Lord Chancellor claims that :

[31] Mamo, ***Notes***, 90.

[32] (above), 36-37, 37-38.

> *'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'.*

Notwithstanding this, further on in the same judgment we encounter the same Lord Chancellor, who makes it clear that the defence is *not* solely limited to offences requiring a specific intent :

> *'I do not think that the proposition... is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea '.*

I have referred to the *D.P.P. v. Beard* judgment as a landmark judgment because it authoritatively consolidates principles emanating from almost four centuries of British case-law on the subject, and lays the foundations for the notion of intoxication for the twentieth century. Besides confirming the principle that self-induced intoxication can constitute a defence only when it renders defendant incapable of forming *mens rea*, be the intent specific or merely generic, this judgment also acknowledges a defence of insanity even where such insanity is caused by alcohol consumption.

Although since the *Beard* judgment extensive developments on the issue have taken place in England, these will be discussed in Chapter III, as the aim of this Chapter is to trace the sources upon which the notion of intoxication in the Maltese Criminal Code is founded. When Ordinance XIII was enacted in 1935, the leading authority in England was precisely *D.P.P. v. Beard*, with some other 385 years of English case-law in the background.

I.4 THE INTRODUCTION OF THE NOTION OF INTOXICATION IN MALTESE CRIMINAL LAW.

As mentioned in the opening paragraph of this Chapter, prior to Ordinance XIII (1935), our criminal laws contained no provisions on intoxication, save those instances where drunkenness was considered to be an offence[33]. The promulgation of the Criminal Code in 1854,

[33] Section 339 (35) of vol. I, Bk. Third of the ***Laws of Malta and its Dependencies*** (Malta Government Printing Office, 1927), *inter alia*, provided that :- *'The following persons are guilty of contravention against public order... whosoever is found drunk and incapable of taking care of himself in any public place or place open to the public; or whosoever is manifestly in a state of intoxication in a public place or place open to the public...'*. This provision still exists in the ***Criminal Code*** – it has been slightly amended and renumbered [section 338 (ff)], but being drunk and incapable of taking care of oneself in a public place or place open to the public is, to date, still a contravention.

together with numerous amendments thereto throughout the years, did not bring about any developments as far as the issue of intoxication was concerned. Hence, well into the twentieth century, an offender could not plead intoxication as a defence to a criminal charge.

In 1933, however, the Colonial Office in London adopted a policy of harmonization of Colonial legislation, especially criminal legislation. It consequently despatched a communication to several Colonies, including Malta, directing that these bring various aspects of their criminal legislation in line with those of the Empire. One of the reforms which London directed to be implemented by the Colonies was precisely the law governing intoxication. In the case of Malta, it was thus not a question of *updating* the Criminal Code provisions on intoxication, but of *introducing* them.

In a Circular Despatch dated 7th September 1934[34], the Colonial Office legal advisors supplied the Colonies with a model provision upon which the latter were expected to base their respective provisions on intoxication. This model provision was accompanied by a list of Common Law judgments of the nineteenth century and the first quarter

[34] A photostatic copy of the original despatch is annexed to this thesis – See **Appendix** on Page 231.

of the twentieth, which judgments constituted the basis for the model provision supplied. The 'model' read as follows:

> *'Intoxication, at the time of the commission of a crime, shall not constitute a defence to any criminal charge.*
>
> *Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.*
>
> *Where a specific intent is an essential element in an offence, intoxication, whether complete or partial, and whether voluntary or involuntary, shall be taken into account for the purpose of ascertaining whether such intention in fact existed. The rule, however, is not applicable only to cases in which it is necessary to prove a specific intent, for generally speaking, a person cannot be convicted of a crime unless the mens was rea.*
>
> *In cases where a certain degree of provocation has existed, the drunkenness of the accused may be taken into consideration upon the question whether the prisoner was excited by passion, or feared an attack upon himself or his property, or whether he acted from malice.*
>
> *If actual insanity if (in) fact supervenes as the result of alcoholic excess the criminal law as to insanity shall apply.'*

The judgments which the Colonial Office legal advisors used as a basis for the above are the following:

- ***R. v. Marshall*** [35];
- ***R. v. Goodier*** [36];

[35] (above), 33, fn.10.

[36] Cited in ***R. v. Marshall***, (above).

- ***R. v. Carroll*** [37];
- ***R. v. Pearson*** [38];
- ***R. v. Meakin*** [39];
- ***R. v. Thomas*** [40];
- ***R. v. Cruse*** [41];
- ***R. v. Gamlen*** [42];
- ***R. v. Doherty*** [43];
- ***R. v. Meade*** [44];
- ***R. v. Letenock*** [45]; and
- ***D.P.P. v. Beard*** [46];

Reference was also made by the Colonial Office advisors to Halsbury's ***Laws of England***, also referred-to earlier on in this Chapter[47].

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[37] (above), 34, fn.12.
[38] (above), 33, fn. 11.
[39] (above), 35-36, fn. 14.
[40] (above), 34, fn. 13.
[41] (above), 36, fn. 15.
[42] (1858) 1F. and F.90.
[43] (above), 37-38, fn.18.
[44] (above), 40-41, fn.25.
[45] (1917) 12 Cr. App. Rep.221.
[46] (above), 40, 42-44, fn.26, 30.
[47] (above), 41-42.

Once the despatch containing the model provision reached Sir David Campbell, the Governor of Malta, his then Legal Advisor Sir Alison Russell and the Treasury Counsel Dr. Philip Pullicino undertook the drafting of a similar provision to be inserted in the Criminal Code. On the 8th February 1935, **Ordinance XIII** was promulgated *'to amend the Criminal Laws'*. This Ordinance introduced **article 35A** in the Code which provided the following notion of intoxication:

> *' (1) Save as provided in this article, intoxication shall not constitute a defence to any criminal charge.*
>
> *(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-*
>
> *(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
> *(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*
>
> *(3) Where the defence under paragraph (2) of this article is established then, in a case falling under sub-paragraph (a) thereof, the person charged shall be discharged, and, in a case falling under sub-paragraph (b), the provisions of articles 595 to 601 shall apply.*
>
> *(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*
>
> *(5) For the purposes of this article "intoxication" shall be deemed to include a state produced by narcotics or drugs.'* [48]

[48] MGG (1935), suppl. no. XV (8th February 1935), 92.

Notwithstanding the substantial similarities of this article with the model supplied by the Colonial Office, one may observe a number of differences. One of the most evident of such differences is the re-moulding by the drafters of the Maltese provision, of the model provision's third and fourth paragraphs into a single more generic paragraph. The third paragraph of the model provision is somewhat anomalous in the sense that it first claims that intoxication shall be taken into account in cases where a *specific* intent is an essential element in an offence; and subsequently it claims that this rule is not exclusive to offences requiring a specific intent! Consequently intoxication can be taken into account in all offences, irrespective of the nature of the intent required – be it specific or generic.

The same may be said with regards to the fourth paragraph of the model provision which claims that intoxication may be taken into consideration in cases involving provocation, so as to determine whether defendant was *'excited by passion, or feared an attack upon himself or his property, or whether he acted from malice'.* These provisions were all absorbed by the Maltese drafters in a simple but more wide-reaching provision :

> *'Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence'*[49]

As shall be considered in Chapter II, intention plays a fundamental role when it comes to determining whether an offender is criminally liable for his actions or not, as well as to the degree of liability. According to the Maltese provision, if a person is so intoxicated so as to have his faculties of understanding and volition affected in such a way that he cannot form the intention required for the offence committed by him, that intoxication may be taken into account, provided obviously that the other criteria laid down in the law are satisfied.

Another difference between the two provisions is that the British model speaks of intoxication in terms of 'drunkenness', whilst the Maltese drafters specified that *'intoxication shall be deemed to include a state produced by narcotics or drugs'*[50]. As we shall be seeing in Chapter IV, both alcohol and drugs may affect a person's capacities of understanding and volition, and consequently the degree of criminal liability.

[49] Art. 35A (4).
[50] Art. 35A (5).

I.5 EARLY MALTESE CASES.

One of the earliest cases in which the 'new defence' of intoxication was raised before a Maltese court was: ***Il-Pulizija v. Gunner Antonio Cordina, R.M.A, et*** [51]. In this case the accused were charged with assaulting, resisting, and insulting a Police officer while in the execution of his duties, with disobeying his lawful orders, and with disturbing public peace. Defence counsel of one of the accused – Carmelo Cordina – raised the plea of intoxication in defence of his client. The Court was however very clear in rejecting the plea on the grounds that despite having consumed alcohol, it did not result that Cordina did not know what he was doing or that what he was doing was wrong; or that he was not in a state of mind capable of forming the required specific intent :

> *'...Iżda għad li Carmelo Cordina kien daqsxejn xurban, ma jirriżulta bl-ebda mod illi huwa kien fi stat li ma jafx x'inhu qiegħed jagħmel, jew li ma kienx jaf li dak li qiegħed jagħmel kien ħaġa ħażina, jew illi ma kienx fi stat li jista' jifforma ntenzjoni doluża speċifika: u għalhekk ma jistgħux jgħoddu favur tiegħu d-dispożizzjonijiet imdaħħlin fil-Kodiċi Kriminali bl-emendi ta' Ordinanza XIII ta' l-1935'.*

[51] KDQS XXXI.IV.415 (23/08/1941).

The Court was hence clearly hinting that for intoxication to constitute a defence to a criminal charge, *at least* one of three elements had to be proved:

(i) that the accused was not in a state to know what he was doing; *or*

(ii) that the accused was not in a state to know that what he was doing was wrong; *or*

(iii) that the accused was not in a state to form the specific intent for the offence charged with.

These elements were highlighted again two years later by the Criminal Court in ***His Majesty the King v. Cyril Gillham*** [52]. Mr. Gillham was charged with theft aggravated by violence, means, value, and time. The Court rejected the plea of intoxication :

> *'The evidence does not disclose anything on the strength of which the Court could reasonably come to the conclusion that the accused did not know what he was going* (doing), *or that he was unable to form any specific intention. Moreover, the accused himself... admitted that the drinks which he alleges having taken were so taken by him of his own accord, and not through the malicious or negligent act of another person. The plea of intoxication, therefore, falls to be disallowed.'*

[52] KDQS XXXI.IV.352 (11/05/1943).

Unlike the previously-discussed *Cordina* judgment, the Criminal Court here made reference to the fact that the state of intoxication of the accused (if one were to accept that he was somewhat intoxicated), was not caused by the malicious or negligent act of another person. This observation reflected the wording of article 35A, which admitted intoxication as a defence only in *two* instances:

(i) where the accused was intoxicated without his consent by the malicious or negligent act of another person; *or*

(ii) where the accused was *insane* (even if temporarily) at the time of committing the offence, by reason of intoxication.

It is fundamental to note that the law did not require an occurrence of both these situations, but an occurrence of either one of them. In *both* these situations, however, either of two factors had to subsist:

(i) either that the offender did not know what he was doing; *or*

(ii) that he did not know that what he was doing was wrong.

In the *Cordina* judgment, the accused failed to prove that he was not in a state to know what he was doing (or that what he was doing was wrong), so the Court had no option but to reject his plea of

intoxication. In the *Gillham* judgment, the Court was not only satisfied that the accused failed to prove that he was not in a state to know what he was doing or that what he was doing was wrong (which would have been enough for the Court to reject the plea), but it went further to discover that the accused was intoxicated voluntarily and not through the malicious or negligent act of another person. Consequently, even if Mr. Gillham were to prove that he did *not* know what he was doing (or that what he was doing was wrong), the plea would still be rejected on the ground that the intoxication was a voluntary one.

In a 1949 case: ***The Police (Inspector J. Bencini) v. Leslie Hewitt, James Clark, and Joseph Neill***[53] the accused were charged with causing bodily harm on the persons of four Police Officers, and with uttering obscene words in public and disturbing the public peace and good order. One of the accused – James Clark – pleaded that he *'was at the time under the influence of drink and incapable of doing anything'*. The Court was clear in pointing out that drunkenness in itself was not a defence, and that it was necessary to see whether the state of intoxication of the accused was such as to preclude him from

[53] KDQI 1948-1950, 143.

forming the necessary *mens rea*. Referring to ***Harris and Wilshere's Criminal Law*** (1943 Ed., 33) the Court explained that:

> *'The principle laid down by the English Courts is to the effect that evidence of drunkenness falling short of proved incapacity in the accused to form the "mens rea", and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of these acts'.*

After examining the evidence brought forward, the Court concluded that despite having consumed alcohol, Mr. Clark knew what he was doing when committing the offences, and consequently it rejected the plea.

The Maltese Courts were very cautious when the plea of intoxication arose, and they not only examined the provisions of article 35A in depth, but they also made constant references to its source, i.e. British law and jurisprudence.

I.6 THE 1956 AMENDMENTS.

The above comparative exercise with British law and jurisprudence led to the discovery of some incompatibility between certain parts of article 35A (based on English Common Law) and the

Code provisions on insanity (largely based on Continental doctrine). Sub-article (2) of article 35A, we recall, provided as follows :

> *'Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-*
>
> *(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.'*

This provision, as explained earlier, implied that for a person to successfully plead intoxication as a defence, he necessarily had to be in a state of not knowing what he was doing, or not knowing that what he was doing was wrong; *and* either his state of intoxication was caused without his consent by the malicious or negligent act of another person *or* he was temporarily or otherwise insane. Notwithstanding the fact that *prima facie* this provision made legal sense, an in-depth examination revealed some incongruity between this provision and the Criminal Code provisions on insanity. The reason is that the Common Law doctrine on criminal liability differs from its Continental counterpart.

Under Maltese law (in line with Continental tradition), criminal liability centers around the offender's capacity of *will (volition)* and

understanding. Consequently any factor which affects any of these two faculties is taken into account in determining if, or to what extent, an offender is criminally liable for the offence committed. Insanity, therefore, may constitute a defence under Maltese law not only when it deprives the offender of his power of distinguishing the physical and moral nature and quality of the act charged as an offence, but also when it deprives him of his faculty of choice so as to exclude *a free determination of his will* in relation to that act.[54]

Under English law, however, in accordance with the *'M'Naghten Rules'* of 1843, in order for insanity to constitute a defence :

> *'... it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.'* [55]

It is immediately evident that the Maltese law on insanity is more liberal than the English counterpart. Under Maltese law, if an offender *knew* what he was doing or knew that what he was doing was wrong, but due to his insanity (even if temporary), he was deprived of his faculty of

[54] Mamo, ***Notes***, 87.

[55] Giles, M., ***Criminal Law***, Sweet & Maxwell, London, (1996), 51-52, quoting from the ***M'Naghten Rules*** of 1843.

choice (i.e. of the free determination of his will), then that insanity *does* constitute a defence. For insanity to constitute a defence under English law, however, such insanity must have necessarily rendered the offender in a position *not* to know what he was doing or that what he was doing was wrong.

Not only was English law on insanity outdated in 1956 (the date of the amendments to article 35A), but almost from the moment of their formulation in 1843 the *'M'Naghten Rules'* have been the subject of rigorous criticism by lawyers and psychiatrists alike. According to the contemporary English criminal-law text-writers **Smith & Hogan:**

> *'The Rules* (i.e. the "M'Naghten Rules"), *being based on outdated psychological views, are too narrow, it is said, and exclude many persons who ought not to be held responsible. They are concerned only with defects of reason and take no account of emotional or volitional factors whereas modern medical science is unwilling to divide the mind into separate compartments and to consider the intellect apart from the emotions and the will'* [56].

As early as 1923, an English committee under the chairmanship of Lord Atkin recommended that a person should not be held criminally responsible for his actions:

> *'when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist'.*

[56] Smith & Hogan, 207-208.

This recommendation (just like subsequent ones on the same lines), was however not implemented. Notwithstanding the fact that many of the jurisdictions world-wide which adopted the *'M'Naghten Rules'* supplemented them with the so-called *'irresistible impulse'* test, whereby impairment of *volition* due to insanity - just like impairment of cognition - amounted to a defence, English law failed to follow suite.

The difference between the Maltese law on insanity (which admits impairment of volition) and the English counterpart (which does not), was highlighted in the Maltese Parliament in 1956. In the Second Reading of a ***Criminal Code (Amendment) Bill*** drawn up, *inter alia* to remedy the 'incongruity' between the part of article 35A which deals with insanity, and the actual Criminal Code provisions on insanity, the Honourable Minister for Justice, Dr. Joseph Cassar (MLP), held that :

> *'... kif inhija llum din il-klawsola fil-liġi tagħna rigward l-intoxication toħloq ċerta incongruity mal-konċett tagħna ta' l-insanita' għaliex l-insanita' fil-kas tagħna mihiex regolata l-istess bhal ma hi regolata fil-liġi Inglisa. Il-ligi tagħna hi aktar liberali mill-liġi Inglisa. Infatti l-liġi Ingliża għal dik li hi insanita' tħares biss lejn il-fakolta' perċettiva ta l-individwu... Fil-liġi tagħna l-prinċipju ta l-insanita' iħares lejn żewġ elementi: l-ewwelnett lejn il-fakolta' perċettiva ta l-individwu u t-tieni lejn il-fakolta' volitiva tiegħu. Jiġifieri l-ewwelnett jekk hu jkunx fi stat mentali tali li jkun jaf x'qed jagħmel, u t-tieninett jekk ikollux dak il-grad ta volonta' li jkun jista jiddeċidi jekk għandux jagħmel jew le...Għalhekk aħna biddilna l-artikolu li jirregola r-responsabilita' fir-rigward ta l-*

> *intoxication u għamilnih konformi ma l-istess prinċipju li jirregola l-insanita' skond is-sistema tagħna.'* [57 - 58]

Following the debate, the *Criminal Code (Amendment) Bill* was approved by Parliament and ***Act No. V of 1956*** was promulgated. Section 8 of this Act provided as follows:

> *'Subsection (2) of section 35 of the principal law is hereby repealed and the following is hereby substituted therefor:*
>
> *(2) Intoxication shall be a defence to any criminal charge if*
>
> *(a) by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *(b) the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission'.*[59]

Apart from a subsequent renumbering of the Criminal Code sections, whereby the provisions on intoxication of article 35A were renumbered as **section 34**, since the 1956 amendment above, there

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[57] *Parliamentary Debates – Fifth Legislature, First Session (26 Mar. 1956 – 17 Apr. 1956),* 56.

[58] A rough translation would read: '... the present article of our law on intoxication creates certain incongruity with our notion of insanity. This is because in our case, insanity is not regulated in the same manner as in English law. In fact, as far as insanity is concerned, English law considers solely the individual's perceptive faculties... In our law the notion of insanity considers two elements: first the individual's perceptive faculties and secondly his volitional faculties; which means, firstly, if the individual is in such a mental state as to know what he is doing, and secondly, if he has sufficient volition to enable him to decide whether to do the act or not... Therefore we have changed the article which governs responsibility in the case of intoxication to bring it in conformity with the one governing insanity in our system.'

[59] MGG (1956), no. 10,783 (Saturday 14th April 1956), V.

have been no further amendments to Maltese law governing intoxication. In the following Chapter the provisions on intoxication contained in section 34 are discussed in detail.

CHAPTER

II

Intoxication :

The Current Position in Maltese Criminal Law

II.1 PRELIMINARY CONSIDERATIONS.

Following the 1956 Amendments, **section 34** of the Criminal Code today reads as follows:

> *' (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*
>
> *(2) Intoxication shall be a defence to any criminal charge if –*
>
> *(a) by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *(b) the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission.*

> *(3) Where the defence under subsection (2) of this section is established, then, in a case falling under paragraph (a) thereof, the person charged shall be discharged, and, in a case falling under paragraph (b), the provisions of sections 620 to 623 and 625 to 628 shall apply.*
>
> *(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*
>
> *(5) For the purposes of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs'*

Although intoxication is sometimes referred-to as a 'general defence', I would personally not subscribe to such a title. Whilst acknowledging the fact that the term 'general' is intended to mean that the defence is not limited to particular offences but may be used in respect of most or all criminal offences, I would still consider the title inaccurate, if not misleading. The opening words of section 34 are exceptionally clear: *'Save as provided in this section, intoxication shall* ***not*** *constitute a defence to any criminal charge'.* Intoxication as a defence is an exception to the rule, and not the rule itself. A person charged with an offence *cannot* plead intoxication in his defence, unless his state of intoxication falls within the parameters laid down in the law. Consequently, to refer to intoxication as a 'general defence' is, in my view, a misnomer.

An alternative is to refer to intoxication as a 'mental condition defence'. I find this title more appropriate for the reason that it restricts the generality of the defence which the other title conveys, hinting, rightly so, that only intoxication which produces a particular mental condition constitutes a defence.

Having established the rule that intoxication does not excuse the commission of any criminal offence, section 34 goes on to list the exceptions to the rule: Intoxication may be successfully pleaded as a defence in either of these cases:

1. If, at the time of committing the offence, the accused was incapable of understanding or volition due to a state of intoxication caused without the accused's consent by the malicious or negligent act of another person [subsection (2)(a)];

   or

2. If, at the time of committing the offence, the accused was insane (even if temporarily) due to his intoxication [subsection (2)(b)].

Apart from these two specific cases, subsection (4) further provides that intoxication 'shall be taken into account' to determine whether the accused had formed any intention (specific or otherwise), in the absence of which criminal guilt would be excluded.

Although each of these exceptions is discussed in detail further on in this Chapter, from these preliminary considerations it is evident that all three exceptions to the rule that intoxication is no defence to a criminal charge, center round the accused's *state of mind* at the time of committing the offence. This explains why I prefer to refer to intoxication as a 'mental condition defence', rather than a 'general defence'. In order to conceive of intoxication as a defence, therefore, and moreover, as a mental condition defence, I feel that it is imperative to first give an overview of the notion of criminal liability, with an emphasis on the 'guilty mind' requirement.

II.2 CRIMINAL LIABILITY: AN OVERVIEW WITH PARTICULAR REFERENCE TO THE 'GUILTY MIND' REQUIREMENT.

In Malta, like most other modern penal systems, an offender cannot be held criminally liable for an act committed by him - no matter how unlawful that act is - unless such act is accompanied by *mens rea*, or, more simply, a guilty mind. For criminal liability to be constituted, two elements must essentially concur :

(1) the offender must have performed (or attempted to perform) the act prohibited by law; and

(2) such performance must have been accompanied by a guilty mind.

The former element is referred-to as the *actus reus*, or *material condition of liability*; whilst the latter is the *mens rea*, or *formal condition of liability*. For a person to be criminally liable for his wrongful conduct, *both* the *material* and the *formal* conditions must be satisfied.

The theory of criminal liability is straightforwardly but accurately put forward in the old Latin maxim: ***actus non facit reum nisi mens sit rea***, i.e. the mere act does not vest the offender with criminal guilt unless it is accompanied by a guilty mind. The contemporary Italian author Francesco Antolisei, like the myriad of penal law commentators worldwide, stresses the significance of the guilty mind requirement as an indispensable element of criminal liability, considering it 'a great achievement for human civilization' :

> *'Questa esigenza rappresenta una grande conquista della civiltà umana, giacchè nei popoli primitivi per la responsabilità penale era sufficiente un rapporto obiettivo di causalità tra l'azione dell'uomo e l'evento dannoso, rapporto che spesso era presunto in base a pregiudizi... '.*[1]

Mens rea may take either of two forms: *intention* or *negligence.* Apart from the special cases of contraventions, a person is criminally responsible only for those wrongful acts which he does either *wilfully* or *negligently.* Professor Mamo quotes Gaius: *'Impunitus est qui sine culpa et dolo malo casu quodam damnum committit'* [2].

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[1] Antolisei, ***Manuale***, Parte Generale, 291. A rough translation of the quoted passage would read : *'This requirement represents a great achievement for human civilization, since among primitive people, an objective link of causation between a person's act and the harmful consequences was enough to constitute criminal liability; notwithstanding the fact that this 'link' was often the result of prejudice rather than objectivity.'*

[2] Mamo, ***Notes***, 57, quoting Gaius, III, 211. A literal translation would read: *'unpunished is he who without negligence and intention commits harm'.*

II.2 (i) *Contraventions.*

Most contraventions constitute an exception to the general rule that *mens rea* is an indispensable requisite for criminal liability. In the case of most contraventions, the conduct/act alone will suffice to render the doer criminally liable. The requisites for liability in the case of contraventions are laid down in the law itself: where the wording of the law imposes a prohibition of a particular act without any express reference to the state of mind of the offender, *mens rea* is not required. Where the law requires some form of guilty mind, be it willfulness or negligence, it expressly states so.

II.2 (ii) *Crimes.*

In the case of crimes - the more serious criminal wrongs - there is no exception to the *mens rea* rule. For a person to incur criminal liability for a crime, such crime must necessarily be accompanied by *mens rea* in the form of a wrongful intention or culpable negligence on the part of the offender. The *mens rea* or formal badness of an act depends exclusively on the state of mind of the offender. As the English

commentator, Sir William Blackstone, points out almost two and a half Centuries ago :

> *'as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all'* [3].

Voluntariness or *willfulness* is one of the essential elements of *mens rea*, together with the other element of *understanding*. For an offender's act to be criminally sanctionable, the offender must have understood the nature of his act and performed such positive wrongful act or omission of his own free will. *Mens rea* is hence entirely based on the offender's mental faculties of understanding and volition, or, as referred-to on the Continent, *la capacità di conoscere e di volere*.

Notwithstanding the fact that wrongful intention (*dolo*) and culpable negligence (*culpa*) are both forms of *mens rea*, a distinction must be made between the two since crimes of negligence require a mental attitude which is different from that required for wilful crimes. An unlawful act accompanied by *dolo* always gives rise to criminal liability, whilst *culpa* gives rise to liability only where expressly laid down in the law.

[3] Blackstone, W, ***Commentaries on the Laws of England***, Bk. IV, Clarendon Press, Oxford, (1769), 21.

Dolo, or wrongful intention, is the product of combined operation of the intellect and the will. As Professor Mamo concisely puts it :

> *'... it is the striving of the will towards a certain end represented as desirable by the intellect'.*[4]

Dolo is composed of two main elements:

1. *Foresight* of the act constituting the offence. This essentially requires the use of the intellect – *la capacità di conoscere*; and
2. *Desire*, followed by *willfulness* to indulge in that act and bring about the (foreseen) consequences. This essentially requires use of the will – *la capacità di volere*, or, in Professor Mamo's words: 'the striving of the will towards a certain end'.

Criminal offences require either a *generic* or a *specific* intent. The intent is said to be *generic* where the offender simply intends to perform an act which he knows to be illegal. Although this type of intent is, as a rule, a sufficient psychological element for the offender to incur liability in respect of a wilful crime, in certain particular crimes the law requires a particular *specific* intent, or special purpose which the offender

[4] Mamo, *Notes*, 59.

actually had when committing the crime. By means of an example, if we look at the offence of wilful homicide under our Code, the relevant section 211(2) provides that:

> *'A person shall be guilty of wilful homicide if, maliciously, with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person'.*

In order for a person to be criminally liable for the offence of wilful homicide, the killing must be committed with the *specific intent* to kill or put the life of the other person in manifest jeopardy. It is precisely this *specific* intent which distinguishes wilful homicide from other forms of unlawful killings. Whilst the term 'maliciously' denotes the *generic* intent of doing something which the offender knows to be illegal, the words 'with intent to kill another person or to put the life of such other person in manifest jeopardy' denote precisely the special purpose, the specific intent: it does not suffice that the offender willfully performs an illegal act from which the death of Anthony ensues; he must specifically desire the death of Anthony (or the putting of his life in manifest jeopardy), and does something with the clear and specific purpose to bring about Anthony's death (or to put his life in manifest jeopardy).

Culpa, or culpable negligence, as conceived in Malta and on the Continent, is a *subjective* fact – i.e. a particular state of mind, consisting in inadvertence, or failure to be alert or vigilant.[5]

Francesco Carrara, one of the early exponents of this theory, defines culpa as:

> *'The will to do an act which is contrary to law without the consciousness of its wrongfulness, which consciousness could, however, have been had if the agent had used greater care in reflecting upon the possible consequences of his act'.*[6]

Francesco Antolisei, writing more than a century after Carrara, claims that :

> *'per l'esistenza del reato colposo occorre anzitutto un'azione commessa con coscienza e volontà, e cioè... un comportamento attribuibile al volere del soggetto. Si richiede poi la mancanza di quella volontà dell'evento (meglio, del fatto) che caratterizza il dolo. Nel reato colposo l'agente ha bensì realizzato il fatto previsto dalla legge come reato con una condotta che risale alla sua volontà... ma non lo ha voluto nè direttamente, nè indirettamente'.* [7]

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[5] In the Common Law tradition, it may be noted, *culpa* is considered as an *objective* fact – i.e. a particular conduct, with culpability arising not from the offender's failure to foresee that which is foreseeable, but in his breach of duty of taking care. Hence, if a person is physically responsible for conduct which objectively falls short of the standard of care which every person living in a civilized society is expected to use in his actions, such person is 'negligent'.

[6] Carrara, F., cited in Mamo, ***Notes,*** 66-67.

[7] Antolisei, ***Manuale***, 334. A translation of the quoted passage would read: *'for the existence of the offence of negligence, what is necessary, first of all, is an act done with understanding and volition, that is... a behaviour attributable to the agent's volition. Another requisite is the lack of desire for the consequences of the act, which is characteristic of 'dolo'. In the offence of negligence, the agent has wilfully performed an act which is considered by the law as an offence... but without having desired its consequences neither directly nor indirectly'.*

Professor Mamo distinguishes the wilful wrong-doer from the negligent one in the following manner :

> *'The wilful wrong-doer is he who knows that his act is wrong; the negligent wrong-doer is he who does not know it, but would have known it were it not for his mental indolence'.* [8]

Negligence essentially consists in a person's failure to foresee the consequences of his act, which consequences are however foreseeable to the ordinary man in the given circumstances. Despite not intending or desiring the event ensuing from his act, if only he minded, the offender *would* have foreseen it, and hence avoided it. Notwithstanding the fact that the consequences of the act are not desired by the offender, the act must be done with understanding and volition.

II.2 (iii) *Recapitulative observations on the formal conditions of criminal liability.*

Intoxication is a plea which is entirely based on the offender's mental condition at the time of committing an offence; it is a plea that seeks to negative the formal conditions of criminal liability. The

[8] Mamo, *Notes*, 66.

following recapitulative basics of criminal liability must hence be kept in mind in order to adequately conceive of intoxication as a mental condition defence :

1. With the exception of most contraventions, in terms of the age-old 'golden rule' of criminal liability: ***actus non facit reum nisi mens sit rea***, a person *cannot* be held criminally liable for a wrongful act, unless such act is accompanied by ***mens rea***, by a guilty mind.

2. ***Mens rea*** may take either of two forms: wrongful intention (*dolo*) or culpable negligence (*culpa*). An essential element of both intention and negligence, is ***voluntariness***, based on the offender's faculties of ***understanding*** and ***volition***.

It inevitably follows that any factor which seriously disrupts a person's faculties of understanding and volition also affects that person's criminal liability for wrongful conduct committed by him while in such a state. Intoxication, as we shall be seeing, *may* be one of such factors.

II.3 AN APPRAISAL OF SECTION 34 OF THE CRIMINAL CODE.

As we have seen, section 34 commences, in subsection (1), by establishing the rule that intoxication is not a defence to a criminal charge. A person who commits a criminal offence while intoxicated cannot avoid liability by claiming that 'the drink did it'; if all the elements of the offence are proven by the prosecution, such person will be convicted just as if he were sober. In simple terms, in section 34(1), the law wants to make it clear that despite the exceptions laid down in the subsequent subsections (which we shall be discussing in detail very soon), a drug/alcohol abuser is not a privileged offender, but is responsible for his actions and is fully liable for any criminal behaviour like all his fellow citizens.

Maltese law does not sanction the excessive consumption of alcohol or pharmaceutical drugs, but only the consumption and/or trafficking of the so-called 'dangerous drugs' or 'drugs of abuse'[9]. Whilst

[9] See the ***Dangerous Drugs Ordinance***, Chapter 101 of the ***Laws of Malta***. Examples of such dangerous drugs include raw opium, coca leaves, prepared opium, resin obtained from Indian hemp (*Cannabis*), cocaine, morphine, etc.

the law is liberal enough not to suppress a citizen's freedom to become intoxicated, the law must also ensure the general well-being of the Maltese society and guard against the harmful conduct of individuals who are irresponsible enough to abuse intoxicating substances and put not only their own well-being, but moreover, the well-being of others in jeopardy. It would be, I dare say, scandalous, if the law were to grant the 'privilege' to individuals who voluntarily become intoxicated, to use the product of their own irresponsibility as a defence for a criminal charge! The law, therefore, vests each and every citizen with full responsibility for his actions and with a presumption that he intends the natural consequences of his actions. It is for these reasons that section 34 starts by laying down the rule that intoxication is no defence to any criminal charge.

As the saying goes, however, for every rule there are exceptions. As we shall be seeing in the following pages, the few exceptions to the above rule are constituted by way of lack of requisites for criminal liability, rather than by way of intoxication *per se*. According to the basic principles of criminal liability considered earlier, no person may be held criminally liable for a wrongful act, unless such an act is accompanied by a guilty mind (*mens rea*). It consequently follows that certain types of intoxication which negative the constituent elements of

criminal liability for an offence, also negative the offender's liability for the offence; hence the exceptions to the above rule.

These exceptions are dealt with in subsections (2) and (4) respectively. Various types of intoxication are provided for, which I would conveniently classify under two main headings:

1. **Normal intoxication**[10] [section 34(2)(a)];
2. **Insanity induced by intoxication** [section 34(2)(b)]

Additional to this twofold classification is, what I would term as a ***blanket provision*** [section 34(4)], which covers particular situations not covered by the above classification.

II.3 (i) *Normal intoxication.*

Normal intoxication as provided-for in section 34, may, in turn, be divided into two sub-headings:

a) **Intoxication caused by another person**;

b) **Self-induced intoxication**.

[10] By 'normal intoxication' I mean a state of intoxication, caused by alcohol and/or drugs, which, despite temporarily altering a person's mental faculties, is not severe enough to be considered as having, temporarily or otherwise, diseased the person's mind.

(a) <u>Intoxication caused by another person</u>.

Section 34(2)(a) provides the following:

> *'Intoxication shall be a defence to any criminal charge if – by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person'.*

This exception to the rule that intoxication is no defence to a criminal charge is based on two grounds for justification: the involuntariness of the intoxication, coupled up with a lack of the essential requisites for liability. The wording is clear: for intoxication to constitute a defence under this subsection, not only must the intoxication **be caused by another person**, but it must also be **complete**, i.e. the offender must be incapable of understanding or volition at the time of committing the offence. If *both* these conditions concur, the offender will not be held criminally liable for the offence, provided, of course, that he raises the plea under this subsection.

Professor Mamo refers to intoxication **caused by another person** as 'accidental' intoxication:

> *'Intoxication does afford a complete defence when it is purely 'accidental', i.e., caused without the consent of the accused by the malicious or negligent act of another person'* [11].

In choosing this definition, Mamo was probably influenced by Italian authors such as Carrara and Manzini[12]. I would personally not subscribe to such a definition for the reason that it may be somewhat misleading: in both the normal and the legal sense of the word, the term 'accident' implies an event (in many cases, unfortunate) which is not foreseen and much less desired by a person, which event is also not foreseeable to the ordinary man; it does *not* denote an event caused by *another person.* In simple terms, a person may very well become accidentally-intoxicated without any intervention whatsoever from another person. Such an intoxication, despite being 'purely accidental',

[11] Mamo, ***Notes***, 91.

[12] Carrara (***Programma***, Parte Generale, vol.I, 268, para.344) talks about: *'Ubriachezza accidentale: la quale si ha in colui che non beve smoderamente, ma rimane sopraffatto o per sua condizione morbosa, o per contraffazione del liquore operata maliziosamente da altri'.* Likewise, Manzini (***Trattato***, vol.II, 147, para.362) claims that: *'ubriachezza accidentale è quella che... deriva da caso fortuito o da forza maggiore'.* Contemporary Italian authors have maintained this terminology. For example, Antolisei (***Manuale***, Parte Generale, p.583) claims that: *'ubriachezza accidentale... si ha quando lo stato di ebrietà non deriva da colpa dell'agente...'.* Interestingly enough, Italian law does not speak of accidental intoxication, but of intoxication 'derived from a fortuitous event or from circumstances beyond one's control' (*'ubriachezza derivata da caso fortuito o da forza maggiore'* – ***Codice Penale***, art. 91). Italian authors have hence opted to refer to this type of intoxication - which is not limited to intoxication caused by *another person* as in our law – as 'accidental intoxication'.

to quote Mamo's words, would *not* be a defence under section 34(2)(a). A person could be sitting at a bar and becomes intoxicated because he genuinely underestimates the amount of drinks he was consuming, or is unaware of their alcoholic content. Likewise, a person may be undergoing a medicinal treatment, and, at a social gathering, consumes a small amount alcohol, which reacts with the drug and causes the person to become severely-intoxicated. Another may drink a very moderate amount of alcohol which however produces an unexpected pathological reaction with his organism and severely intoxicates him. In all these examples, one *can* say that the person in question was *'accidentally intoxicated'*, however, if either of the persons in the above examples were to commit a criminal offence, they would not be able to plead intoxication under section 34(2)(a), for the reason that despite being accidental, their state of intoxication was not caused by another person.

The same applies to intoxication caused by a negligent act or omission of the offender himself. Such an intoxication may be the result of a wide range of acts or omissions: drinking excessive amounts of alcoholic beverages; abusing illegal drugs; failing to read the side-effects booklet supplied with a medicinal; failing to follow a physician's/psychiatrist's advice regarding treatment with strong

medicinals. These are merely indicative examples; one may think of many more. In all such cases, if the person in question commits a criminal offence, notwithstanding that such person may very well be incapable of understanding or volition, he may *not* successfully plead intoxication under section 34(2)(a) for the reason that such intoxication, despite being *complete*, is not *caused by another person.* The same applies to voluntary self-induced intoxication. Some people consume alcohol and/or drugs with the preordained purpose of becoming intoxicated or 'stoned', or of 'escaping from reality'. This form of self-induced intoxication does not excuse the commission of a criminal offence in terms of section 34(2)(a), even if the intoxication is complete.

Having established that the intoxication must necessarily be caused by another person, it makes no difference, for the purposes of this subsection, whether this 'other person' intoxicated the offender *maliciously*[13] or *negligently.* As we have seen earlier on in this Chapter[14], a negligent act in Maltese law denotes an act, done with understanding and volition by a person who fails to foresee the

[13] It may be noted that in the Maltese Criminal Code, the term 'maliciously' has a twofold meaning: depending on the context, it may mean 'with intent', or it may mean 'unlawfully'. For the purposes of this subsection, the malicious intoxication of another person denotes the *intentional* intoxication not the *unlawful* intoxication of another person.

[14] (above), 73-74.

consequences of such an act, which consequences are however foreseeable to the ordinary man. It hence follows that for a person to negligently intoxicate another person, he must supply or administer the intoxicating substance with understanding and volition, but fails to foresee that the other person would become intoxicated after consuming the substance provided. In the absence of case-law concerning this issue, one may consider a few hypothetical examples:

> Anthony is suffering from back-pain, and visits a doctor, who prescribes painkillers in the dosage of three tablets a day. Anthony goes to a pharmacy to purchase the tablets. The pharmacist gives a quick glance to the medical prescription sheet, and sells the tablets to Anthony. It so happens, however, that through his negligence of failing to properly read the prescription sheet, the pharmacist mistakes the name of the drug for a completely different drug with a somewhat similar name. Anthony is hence given the wrong tablets, which contain a very strong drug, and the dosage of which should never exceed a tablet every forty-eight hours. Anthony starts taking the tablets at the rate of three per day, as directed by the doctor. In no time this overdose seriously affects the functioning of Anthony's brain, resulting in a 'black-out' of his mental faculties. Whilst in such a state of intoxication, Anthony quarrels with his wife and, without even knowing it, pushes her down the staircase of their home, causing her numerous fractures and severe head injuries. Anthony is

subsequently charged with causing grievous bodily harm to his wife.

In such a case, Anthony would be able to raise the defence of intoxication under section 34(2)(a). If he manages to prove to the satisfaction of the Court that at the moment of pushing his wife down the staircase, he was incapable of understanding or volition due to intoxication caused by the negligent act of the pharmacist, he would be discharged.

Another hypothetical example of negligent intoxication is the following:

> Part of Anthony's job in a particular winery/distillery is to ensure that the fermentation/distillation process takes place without any prejudice to the health of the fellow workers in the factory. On a particular occasion, however, he negligently fails to secure the lids on the fermentation/distillation vats, resulting in a leak of highly-intoxicating fumes which intoxicate the workers. Brian, one of Anthony's fellow workers, commits a criminal offence while so intoxicated.

Once again, if Brian manages to prove that the intoxication was *complete* and that it could be attributed to Anthony's negligence, he

could successfully raise a defence under section 34(2)(a). If, however, instead of Brian or any other fellow-worker, Anthony himself were to become completely intoxicated and commit an offence, he would *not* be able to raise the defence under this subsection because in his case, the intoxication would not have been caused by the malicious or negligent act of another person, but by *his own* negligence!

Having considered a few hypothetical examples of negligent intoxication, we may now consider instances of *malicious* intoxication of another person. Undoubtedly, the most common manifestation of this form of intoxication takes place at parties and social gatherings, where a person's drink may be laced by his friends by way of a mischievous joke. If the drinker becomes completely intoxicated and commits a criminal offence while in that state, he would be discharged upon successfully pleading the defence under section 34(2)(a).

An interesting Canadian case concerning the malicious intoxication of another person was recently brought to my attention. Although the judgment was delivered in the year 1999, regrettably, I could not trace its exact reference. We may however consider its facts by way of an example:

> Two women invited a male friend of theirs to a social gathering at the apartment of one of them. As the party was drawing to an end, the women deliberately laced the man's drinks. Their aim, it was later revealed, was to intoxicate him, discourage him from driving home, and 'invite' him to spend the night with them. At a certain point, however, the man left the apartment. On his way home a police officer spotted him driving dangerously and stopped him. The man got out of his car and assaulted the policeman. Evidence at the trial showed that the man was incapable of understanding and volition at the moment of the assault due to extreme intoxication; so he was acquitted.

Had the case happened in Malta, and the man pleaded the defence of intoxication under section 34(2)(a), he would likewise have been discharged for the reason that the intoxication was complete and was caused without his consent by the malicious act of another person (of other people, in this case).

Another hypothetical example of malicious intoxication is the following:

> P, a psychiatrist, is treating Anthony, a patient, with a particular drug. The drug is known to members of the medical professions as having very strong medicinal agents which affect the

functioning of the brain, and that consequently the dosages indicated by the manufacturer should be strictly adhered to. Seeing that Anthony is not responding well to the treatment, P decides to increase the dosage of the medicinal, exceeding the maximum dosage indicated by the manufacturer. The drug is administered to Anthony, who, unaware of the overdose, leaves the clinic. On his way home, the drug reacts with Anthony's organism, resulting in a 'black-out' of his mental faculties. As a result, Anthony loses control of his vehicle and crashes into another car. Without even knowing it, Anthony gets out of his car, walks to the other car, and assaults the other driver.

In such a case, upon being charged with the assault, Anthony would be able to raise the defence of intoxication under section 34(2)(a). If he manages to prove to the satisfaction of the Court that at the moment of the assault he was incapable of understanding or volition due to intoxication caused by the malicious act of P, he would be discharged.

Another totally different form of malicious intoxication can take place in an attempt to harm or kill another person. We have heard of cases in Malta where people (mostly drug-abusers suspected of collaborating with the Police) were wilfully murdered by being given a drug overdose. Now let us consider an example where Anthony, maliciously, with intent to kill Brian, administers to him (without his

knowledge, obviously) an overdose of a particular drug. Shortly after having been administered the drug, however, Brian is involved in a quarrel with Charles, and ends up stabbing him. If Brian eventually survives the overdose and is charged with the stabbing, if it is proven that at the moment of the stabbing Brian was incapable of understanding or volition due to a state of intoxication caused without his consent by the malicious act of Anthony, he would be discharged in terms of section 34(2)(a)[15]

Another manifestation of the malicious intoxication of another person could be where a person intoxicates another to get him to perform some unlawful conduct. I would personally term such form of intoxication as 'Dutch courage induced by another person'. Dutch courage is where a person deliberately consumes drugs and/or alcohol to facilitate the commission of a crime. Although a number of foreign criminal codes consider Dutch courage as an aggravation of the offence committed, our Code is completely silent on the issue[16]. Notwithstanding that Dutch courage can never afford a defence under section 34(2)(a) for the reason that it is self-induced, what would be the

[15] Anthony would however face charges for administering to Brian a noxious substance with intent to kill him or put his life in manifest jeopardy.

[16] In my view, this is a shortcoming of our Code; see my proposals in Chapter V.

situation if drugs and/or alcohol are administered to another person, without his consent, to generate Dutch courage in him? Let us consider the following hypothetical example:

> Anthony owes substantial amounts of money to Brian and Charles, but does not pay up. Brian desires to intimidate Anthony into honouring his debts by giving him a good beating, but does not have the physique or the 'guts' to do it, or simply does not want to get into trouble. One evening, as Brian is at a bar with Charles – a well-built person known to Brian for his rash decisions – Brian sees their debtor Anthony sitting at a table. Brian maliciously laces Charles' drink, and, as he becomes intoxicated, instigates him to give their debtor a 'good thrashing', which Charles does.

If Charles manages to prove that at the moment of beating up Anthony he was not just 'under the influence of drink', but was incapable of understanding or volition due to his state of intoxication caused by the malicious act of Brian, he would be discharged upon successfully pleading the defence under section 34(2)(a). In my view, this form of intoxication which *is* in fact a defence under this subsection, is *de facto* Dutch courage induced by another person, which explains my earlier terminology.

An interesting question which has, as yet, never arisen before a Maltese court is: what would happen if the 'other person' is himself completely intoxicated? Section 34(2)(a) speaks of intoxication caused 'by the malicious or negligent act of another person'. If the person who intoxicates the offender is himself incapable of understanding or volition due to intoxication, can the offender plead intoxication under section 34(2)(a) in his defence? Let us once again consider a hypothetical example:

> Anthony and Brian are at a party. Anthony spends the evening drinking and becomes completely intoxicated. While in such a state and without even knowing it, Anthony pours various spirits into Brian's drink. Brian, unaware of this fact, drinks the beverage and becomes completely intoxicated too, and assaults Charles while in such a state. Can Brian plead a defence of intoxication under this subsection for charges of assault?

In my view, a strict application of the law would yield a negative reply. Although Brian's intoxication is complete and is caused without his consent by the act of another person (Anthony), Anthony's act was neither malicious nor negligent. As specified earlier[17], the term

[17] (above), 82, fn.13.

'maliciously' in this subsection denotes intention not unlawfulness. If it is proven that at the moment of tampering with Brian's drink, Anthony was incapable of understanding or volition, one cannot say that Anthony's act of intoxicating Brian was *malicious*. The same applies to negligence. As we have also seen earlier on, for criminal negligence to subsist, although the consequences of one's act are not desired by the doer, the act must still be performed with understanding and volition. To keep to our example, if Anthony was completely intoxicated (i.e. incapable of understanding or volition), one cannot speak of his having *negligently* intoxicated Brian. Hence, if Brian's intoxication, despite being complete and caused without his consent by another person, is not caused by a *malicious* or *negligent* act, that intoxication cannot afford him a defence under section 34(2)(a).

Finally, it is imperative to note that the law does not speak merely of *intoxication caused by the malicious or negligent act of another person*, but of intoxication *'caused without his* (i.e. the offender's) *consent by the malicious or negligent act of another person.* It does not suffice that the offender was completely intoxicated by another person – the offender must have been unaware that he was being intoxicated by another person. If he consents to such an intoxication, the defence under section 34(2)(a) is completely excluded. In my view, the phrase 'without

his consent' is to be interpreted widely to mean: *without his knowledge*[18]. This is because a person who *knows* that he is being intoxicated but does nothing to avoid it, despite not explicitly consenting, would still be liable for any offence committed while so intoxicated. To illustrate my view with an example, if, at a party, Anthony sees his friends Brian and Charles lacing his drink (e.g. sprinkling salt in it) but nonetheless proceeds with drinking it 'not to ruin the joke', notwithstanding the fact that Anthony did not expressly consent to the intoxication, the fact that he *knew* about it and proceeded with the drinking, in my view amounts to an implied consent, which hence excludes a defence under section 34(2)(a). Once again, there is, as yet, no case-law on this issue.

The second indispensable requisite in order for a state of intoxication caused by another person to constitute a defence under section 34(2)(a) is that the intoxication must be **complete**. For the intoxication to be complete, it must render the person incapable of understanding or volition. If a person, though intoxicated without his consent by someone else, is nonetheless still capable of understanding or volition, such person is fully liable for his actions.

[18] See also my proposals for reform in Chapter V.

Intoxication resulting from alcohol or drug consumption exists in several 'degrees'. As we shall be seeing in Chapter IV, among the many effects of such intoxication are that the affected person may become disinhibited, more talkative, more aggressive, less in control of himself, and so on. Despite being all attributable to the person's intoxication, neither of such factors, not even the *ensemble* of them, render the intoxication of a 'degree' sufficient to exclude criminal liability. If an accused intends to plead intoxication under section 34(2)(a) in his defence, he must prove to the satisfaction of the Court that at the moment of committing the offence complained of, he was not in a position to know what he was doing, or that what he was doing was wrong; or that he was incapable of controlling his conduct.

As we have seen earlier on in this Chapter, when we say that an act is done with *understanding*, we mean that the offender, at the moment of committing the offence, knows what he is doing or knows that what he is doing is wrong. This state of affairs is brought about by the person's intellect. *Volition*, on the otherhand, is the willfulness to indulge in the particular wrongful act. This essentially requires the use of the will. For *mens rea*, and hence, criminal liability to be constituted, these two elements must concur. If a person willfully performs an act,

but due to some mental derangement is not in a position to know what he is doing or to understand the nature of his act, criminal liability does not arise. Conversely, if a person fully understands the nature of the act, but nonetheless, due to some mental impairment, cannot help not indulging in that wrongful act, liability is likewise excluded. It goes without saying that an absence of *both* these elements also excludes liability.

As we shall be seeing in Chapter IV, among the short-term and long-term effects of alcohol and drugs, are that these substances disrupt the healthy interaction between the various regions of the brain, and the individual functioning of each of these regions. This results in the abnormal functioning of the entire brain, and, depending on the concentration of the intoxicant and/or the length of its use, eventually *diseases* the brain. It must be noted even at this early stage that the consumption of a substantial amount of alcohol and/or drugs on a single occasion may be enough to completely alter (even if temporarily) the normal functioning of the brain and the person's faculties of understanding and volition. Hence, contrary to popular belief, it is not only the prolonged use of drink or drugs that may affect a person's faculties of understanding and volition.

In terms of section 34(2)(a), therefore, for intoxication to constitute a defence, the intoxication (caused without the offender's consent), must render the offender incapable of understanding or volition at the moment of committing the offence. Section 34(2)(a) provides merely for *total* incapacity and does not provide for *diminished* capacity by way of intoxication, as some other legal systems do[19]. Hence, if a person is intoxicated without his consent by someone else, and this person's capacity to appreciate the wrongfulness of his acts or to act with such an appreciation is, by way of such intoxication, substantially diminished but not completely excluded, such person is still fully liable. It must be noted, however, that if, by way of this partial incapacity, such person is incapable of forming the intent required for the offence committed, then a defence under **section 34(4)** (discussed in the following pages) subsists, and the offender will not be held liable for that offence. In the countries which admit diminished capacity by way of intoxication, such a person would be liable but subject to a mitigated punishment.

[19] Examples of such countries include Germany and Switzerland (See Chp.III).

Unlike the previous requisite, this requisite of *completeness* of intoxication has been considered by Maltese Courts on various occasions. In ***Il-Pulizija v. Gunner Antonio Cordina, R.M.A, et***, discussed in Chapter I [20], the court made it clear that it is not 'drunkenness' which can constitute a defence to a criminal charge, but the *incapacity of understanding or volition* caused by intoxication:

> *'...Iżda għad li Carmelo Cordina kien daqsxejn xurban, ma jirriżulta bl-ebda mod illi huwa kien fi stat li ma jafx x'inhu qiegħed jagħmel, jew li ma kienx jaf li dak li qiegħed jagħmel kien ħaġa ħażina'.*

In ***The Police (Inspector J. Bencini) v. Leslie Hewitt, James Clark and Joseph Neill***, also discussed in Chapter I[21], the Court, referring to English judgments on the issue, held that:

> *'...evidence of drunkenness falling short of proved incapacity in the accused to form the "mens rea", and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of these acts'.*

In ***Il-Pulizija v. Thomas Sapiano*** [22], involving charges of simulating an offence and giving false information to the Police, the Court of Criminal

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[20] (above), 52-53.

[21] (above), 55-56.

[22] KDQS XLIIIE.IV.1087 (27/06/1959).

Appeal once again made it clear that intoxication, even if proven, is in itself not a defence to a criminal charge, unless at the moment of committing the offence, the offender did not know what he was doing or that what he was doing was wrong:

> *'Hu fatt, li jirriżulta mill-kumpless tal-provi, li l-appellant kien fis-sakra; Iżda dan ma hux biżżejjed; u biex l-istat tiegħu ta' sokor ikun dirimenti, jeħtieġ li l-Qorti tkun soddisfatta li fil-waqt tad-denunzja... hu ma kienx jaf x'qiegħed jagħmel jew ma kienx jaf li dak li kien qed jagħmel kien ħaġa ħażina'.*

In a more recent case: ***Il-Pulizija v. Stephen Pelham*** [23], the Court likewise found the accused capable of understanding and volition, despite being drunk; and hence, likewise, dismissed his plea of intoxication:

> *'Il-Qorti, pero', tagħmilha ċara li fil-fehma tagħha l-appellant, għalkemm kien xurban, kien jaf x'inhu jagħmel u għalhekk għandu jwieġeb għal għemilu...'.*

Our courts have invariably referred to *complete* intoxication as a state of intoxication which renders the person incapable of understanding or volition. What is done in practice when this issue arises is that the court examines all the evidence and inquires into whether, at the time of committing the offence, the accused lacked such

[23] QAK (26/01/1999).

capacities. Although in serious and doubtful cases, the courts appoint experts (psychiatrists) to inquire into what could have been the accused's mental state at the time of committing the offence[24], in most cases, especially those before the Courts of Magistrates, the offender's behaviour prior, during, and after the commission of the offence may be a sufficient indication as to whether the offender was completely intoxicated or otherwise.

One of such cases is ***Il-Pulizija v. Emanuel Tabone***[25]. The facts were as follows: A few days after the 1996 General Elections, Mr. Tabone was in a bar drinking beer and whisky with a group of friends. As Mr. Tabone rose to leave the bar, he overheard a certain Espedito Briffa – a political rival – uttering political comments which Tabone felt were offensive and directed to him. Tabone reacted by plunging a folding knife (*mus*) in Briffa's tummy. Mr. Tabone was charged, *inter alia*, with attempting to cause grievous bodily harm to the person of Espedito Briffa. Among the pleas raised by the accused was that of intoxication. This plea was rejected by the Court[26] on the grounds that

[24] It must be noted that the opinion of experts is not binding to any criminal court in Malta. A court may accept an expert's opinion, accept just part/s of it, or reject it completely. In this respect, see **Section 656** of the ***Criminal Code.***

[25] KDQS LXXXII.IV.330 (26/08/1998).

[26] Court of Magistrates (Malta) as a Court of Criminal Judicature; judgment dated 13/02/1998.

there was absolutely no evidence to the effect that anybody in the bar was so drunk that he didn't know what he was saying and/or doing:

> *'Illi ma jirriżultax mill-provi li kien hemm xi ħadd tant xurban u fis-sakra li ma kienx jaf x'kien qed jgħid u/jew x'kien qed jagħmel'.*

Tabone was convicted and on appeal, he submitted that the Court of Magistrates had incorrectly applied the law on intoxication. The Court of Criminal Appeal, however, held that Tabone's conduct after the commission of the offence, in particular, the detailed statement made to the Police, was a clear and sufficient proof that at the time the appellant was in full control of his intellectual and volitional capacities:

> *'Għalkemm l-appellant kien ilu fil-bar in kwistjoni jixrob, b'ebda mod ma jista' jingħad li hu kien fis-sakra, (f)is-sens li ma kienx jaf x'inhu jagħmel.... L-istqarrija dettaljata li l-appellant għamel lill-Pulizija dwar dak li kien ġara fil-ħanut hi prova elokwenti li hu mhux biss ried jagħmel dak li għamel iżda li f'dak il-ħin kien fil-kontroll sħiħ tas-setgħat tiegħu intellettivi u volittivi'.*

In recapitulation of our discussion so far, for intoxication to constitute a defence under section 34(2)(a), two elements must essentially concur: the intoxication must be caused by another person, *and* it must also be complete. After considering these two elements separately, the point must be stressed that *both* elements must essentially concur. It does not suffice that a person is intoxicated without his consent by someone else, if he is still capable of understanding or volition at the time of

committing the offence. Likewise, if at the moment of committing the offence, the offender is incapable of understanding or volition, but his intoxication is not caused without his consent by the malicious or negligent act of another person, a defence under section 34(2)(a) is completely excluded.

In the case ***His Majesty the King v Cyril Gillham*** [27], the accused's plea of intoxication in defence to charges of theft was rejected because *neither* of these two elements was proven:

> *'The evidence does not disclose anything on the strength of which the Court could reasonably come to the conclusion that the accused did not know what he was going (doing)... Moreover, the accused himself... admitted that the drinks which he alleges having taken were so taken by him of his own accord, and not through the malicious or negligent act of another person'.*

A very interesting case concerning the same issue is ***Il-Pulizija v. John Micallef*** [28]. Mr. Micallef was charged with assaulting and resisting two police officers while in the execution of their duties, and with uttering obscene words in public and disturbing the public peace and good order. The accused pleaded intoxication under article 35(2)(a) [i.e. today's section 34(2)(a)], and was acquitted. The reasons for the

[27] (above), 53.

[28] KDQS XLII.IV.1520 (27/11/1958).

acquittal, however, were not in accordance with the law! The Court's interpretation of the Article was correct: if the accused was, at the time of committing the offences, incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person, he should be discharged. Strangely enough, though, this correct interpretation of the law was applied incorrectly to the case: although the court was satisfied that John Micallef was incapable of understanding or volition at the moment of committing the offences, it failed to inquire into whether the state of intoxication was *caused by another person* or not. On the contrary, the court erroneously held that since Micallef had not deliberately intoxicated himself to commit the offence (i.e. Dutch courage), he should be discharged:

> *'...din il-Qorti tirritjeni li l-imputat waqt il-kommissjoni tar-reati li taħthom hu akkużat ma kienx f'sensieħ, billi kien fis-sakra, mingħajr ma ġie pruvat li sakkar lilu nnifsu biex jikkommetti r-reati li taħthom ġie akkużat; u għalhekk tilliberaħ'.*

The Attorney–General appealed from the decision on grounds of incorrect application of the law. The Court of Criminal Appeal made it clear that the two requisites under article 35(2)(a) had to concur for the defence to succeed, i.e. the offender had to be *completely* intoxicated *and* the intoxication must have been caused without his consent by the

malicious or negligent act *of another person.* According to the Court of Criminal Appeal, in applying the latter requisite in the way that it did, the Court of Magistrates had 'denaturalized' the provision of the law:

> *'Meta l-Ewwel Qorti, b'riferenza għas-subart. 2(a) u 3 tal-art. 35, iddikjarat illi l-imputat "ma huwiex f'sensieh billi kien fis-sakra, mingħajr ma ġie pruvat li hu sakkar lilu nnifsu biex jikkommetti r-reati li tahthom ġie akkużat" u lliberatu, hija żnaturat l-ipotesi tal-liġi, billi ma tgħatx każ tar-rekwiżit, illi, biex l-akkużat jiġI liberat taħt dik l-ipotesi, irid jiġi stabbilit li huwa siker bla ma ried hu, bl-għemil doluż jew negliġenti ta' ħadd ieħor... l-interpretazzjoni mogħtija fis-sentenza appellata tal-imsemmija ipotesi tal-liġi mhix korretta'.*

Another case dealing with the requisites under section 34(2)(a) is ***Il-Pulizija v Ludgardo Magri u Pierre Vella***[29]. The facts were as follows: Magri parked his car on a zebra crossing and, as he was approached by Police officers to order him to remove his car, Magri insulted and threatened them. The Police left the scene and went to the Police Station. Magri, however, appeared at the Police Station shortly afterwards, proceeded with insulting and threatening the Police Officers, damaged the furniture in the Police Station and even offended and assaulted a Police Inspector present at the Station. Magri was charged with the numerous offences, and was convicted. He appealed from the conviction, *inter alia* on the ground that at the moment of committing

[29] QAK (31/07/1997).

the offences, he was incapable of understanding and volition due to intoxication. The Court of Criminal Appeal, however, found that his state of intoxication was not caused without his consent by the malicious or negligent act of another person. On the contrary, it was Magri himself who voluntarily consumed vodka shortly before the incident. Having established that one of the two essential requisites for a defence under section 34(2)(a) was missing, the Court of Criminal Appeal did not even inquire into the other requisite (i.e. whether the intoxication was complete), but dismissed this ground of appeal.

In my view, the *modus operandi* of the Court of Criminal Appeal in the above case is both correct and efficient. Since *both* the above elements are indispensably required for a defence under section 34(2)(a) to subsist, once it is established that either one of them is missing, there is absolutely no need to indulge in the useless exercise of inquiring into the other.

A final point I wish to make about the defence under section 34(2)(a), concerns the *outcome* of a successful plea. Section 34(3), *inter alia*, provides that:

> *'Where the defence under sub–article (2) is established, then, in a case falling under paragraph (a) thereof, the person charged shall be discharged'.*

Of particular interest, in my view, is the word *'discharged'*. Under certain provisions of the ***Criminal Code***, namely those relating to proceedings before the Court of Magistrates, and to certain powers of the Attorney-General[30], the term 'discharged' is used to mean that the charges are 'dropped', or, one might say, 'suspended indefinitely', until further evidence is discovered. If no such evidence is discovered, the accused remains 'discharged', but if new evidence is discovered, proceedings may be instituted afresh. This is *not* the case of 'discharge' under section 34. If a person successfully pleads intoxication under section 34(2)(a), he will be *acquitted*; proceedings cannot start afresh. In simple terms, if, after such a successful plea, new evidence is discovered to the effect that, let's say, the accused was not really intoxicated by another person, or was in full possession of his mental faculties at the moment of committing the offence, proceedings *cannot* be instituted afresh - the case, decided on the merits, is *res judicata.* Hence, the term 'discharged' under section 34(3) must be taken to mean 'acquitted'.

[30] See in particular Sections 374(d), 404, 433 and 434.

(b) Self-induced intoxication.

This type of intoxication is undoubtedly the most debated among legislators, judges, and coteries of penal law commentators worldwide. The simple question with a not–so–simple answer is: should a person be excused on account of a condition brought about by his own fault?

Nobody seems to contest the fact that a person who is incapable of understanding or volition at the time of committing an offence should not be held criminally liable for that offence. To convict a little child for a criminal offence would be termed 'cruel', as young children are *doli incapax* – i.e. incapable of forming a guilty mind in the first place. To convict an insane person for an offence would likewise be termed 'cruel', as a diseased mind, in most cases, cannot distinguish right from wrong, cannot sustain a free determination of the will. To convict a person who is completely intoxicated by the malicious or negligent act of someone else would be termed 'unjust', as a lack of understanding or volition excludes liability, and moreover, the offender is himself a victim rather than an offender with a 'guilty mind'...

For these forms of incapacity – not resulting from the *fault* of the person concerned – the law has created exceptions to the general rule that everybody is responsible for his actions. Where the incapacity is the result of the person's own *fault*, however, such as in self-induced/voluntary intoxication, the situation is different as it creates a socio–legal dilemma: on one hand, the principles of criminal liability must be adhered to; and on the other, the interests of the law–abiding citizens must be safeguarded from the harmful and/or violent behavior of individuals who are irresponsible enough to consume excessive amounts of intoxicants. Some legal systems have attempted to solve this dilemma by trying to strike a balance between principles of criminal law and those of public policy. In many cases, this has led to the development of special rules, which rules almost invariably run counter to the basic principles of criminal liability, but which are considered by many as justifiable on grounds of policy.

This idea of 'sacrificing' certain principles of criminal liability for the interests of society, especially where an offender's incapacity is *fault–based,* is by no means recent: we recall that the very first reported judgement on intoxication in Britain, in the names *Reniger v. Feogossa,*

dealt precisely with this issue[31]. As early as the year 1551, therefore, and possibly even before, fault-based incapacity was not admissible as a defence to a criminal charge in British penal law.

Today, various legal systems have developed rules that determine if, or, in what circumstances, self-induced intoxication may constitute a defence to a criminal charge. In view of this, I have dedicated the following Chapter exclusively to the notion of self-induced intoxication in some foreign legal systems. Maltese law does not subscribe to the idea, favoured in countries such as England, Canada, the Netherlands, Italy, and certain Australian states[32], that when a person intoxicates himself, he is *already* at *fault*, and that any offence committed by such person is attributable to that fault. This idea, which I would personally term as *'pre-contracted fault'*, in my view goes counter to the fundamental principles of criminal justice. With the exception of where a person becomes intoxicated purposely to facilitate the commission of a crime ('Dutch courage'), the *nexus* between the act of consuming the intoxicant and the act which constitutes the infringement of the law, is inexistent; the acts are totally distinct. In terms of the basic principles of criminal liability, the *actus reus* must necessarily be accompanied by

[31] (above), 30.

[32] See Chp. III.

the *mens rea*. The *mens rea*, or guilty mind, has to *co-exist* with the act, and has to be directed towards the act. In this context, substituting the guilty mind requirement with the offender's *fault* in becoming intoxicated a few minutes, hours, days, weeks, months, or even years before the commission of the offence, is, in my view, a legal absurdity (despite the fact that it may be justifiable on grounds of policy). If the legislator wants to punish people who become intoxicated voluntarily, commit an offence, and escape liability under the normal circumstances, he may enact specific legislation to that effect, just as the German and Swiss legislators have plausibly done[33].

Our ***Criminal Code*** does not advocate the *pre-contracted fault* principle when it comes to self-induced intoxication. Although this type of intoxication does not expressly constitute an exception to the rule that intoxication is no defence to a criminal charge, it may still constitute a defence in two instances:

(1) Where such an intoxication diseases the mind (insanity); under section 34(2)(b); and

[33] See p. 171, 175, and my proposals on p. 209 *et. seq.*

(2) Where such an intoxication precludes the offender from forming the specific or generic intent required for the offence committed; under section 34(4).

The provisions of section 34(2)(b), and 34(4) are discussed in the following pages.

II.3 (ii) *Insanity induced by intoxication.*

Insanity induced by intoxication is the second exception to the rule that intoxication is not a defence to a criminal charge. Section 34(2)(b) of the ***Criminal Code*** provides as follows:

> *'Intoxication shall be a defence to any criminal charge if – the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission'.*

We recall from Chapter I that the first person to have reportedly associated severe intoxication with 'madness' was Sir Matthew Hale, way back in 1778. It was the same Hale who suggested that drunkenness which renders a person permanently insane should constitute a defence to a criminal charge[34]. Today, the distinction

[34] (above), 31-32.

between temporary and permanent insanity has been abandoned. The reason is simple: in accordance with the theory of criminal liability, it is the accused's state of mind *at the moment of committing the offence* that affects criminal liability. His mental state prior and subsequent to the commission of the offence are irrelevant for the purposes of liability[35]. For the purposes of this subsection, therefore, the insanity must exist *at the moment of commission* of the offence, irrespective of whether it existed before or whether it exists after the commission of the offence.

In terms of section 34(2)(b) of the Code, it is not every aberration or derangement induced by intoxicating substances that constitutes a defence to a criminal charge, but only *insanity* induced by intoxication. Insanity as conceived in the field of criminal law is a different concept from that conceived in the medical and psychological fields. Paradoxical as may seem, our Code does not define insanity. The relevant **section 33** merely reads as follows:

> *'Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person – was in a state of insanity...'*

[35] In practice, as already mentioned, an offender's conduct immediately prior and subsequent to the offence is normally considered by Maltese courts, alongside other evidence, as this may be *indicative* of the offender's mental state at the moment of commission of the offence.

When the ***Criminal Code*** was promulgated in 1854, this section (then section 32) read:

> *'No person is liable to punishment for an act done or omitted by him when he is of unsound mind or in a state of madness'* [36]

Although, once again, the terms were not defined, these were derivative from the terms *'demenza'* and *'furore'* in the ***Code of the Two Sicilies.*** According to Judge Giacomo Pantaleone Bruno, 'unsoundness of mind' may be defined as a diminuition or total deprivation of the use of reason and intelligence, which does not manifest itself externally as madness or frenzy. 'Madness' is defined by the same Judge as an aberration of the mind caused by fury or frenzy which deprives the person of the use of reason and of his free will, and which manifests itself externally. As Judge Bruno himself admits, the subtle difference between the two has led to the terms being used interchangeably by the courts[37].

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[36] Section 32, ***Criminal Code***, as enacted by Order-In-Council dated 30th January 1854.

[37] Judge Giacomo Pantaleone Bruno, Council of Government Debates, 21st February, 1850 : *'La demenza nella romana giurisprudenza si definisce privazione di mente, e difetto assoluto di discernimento non accompagnato da apparente estrinseco furore – che nella medicine forense in seguito si e` spiegato – per inerzia fisica e morale della mente, importante degradamento, od annullamento della ragione e dell'intelligenza. Il furore nella stessa giurisprudenza si descrive – una aberrazione di mente causata da rabbia e furore estrinseco ed evidente – ovvero come in detta medicina forense – uno smarrimento di ragione che toglie la libera volonta`, e per forza morbosa invincibile, strascino l'individuo ad agire disordinatamente.Tutte e due pero` queste disposizioni mentali sebbene fra loro differenti, nella giurisprudenza vengono confuse e promiscuamente usate l'una per l'altra'*

In the 1942 Edition of the ***Criminal Code***, **section 34** read:

> *'No person shall be liable to punishment if at the time of the act or omission complained of, such person – was in a state of insanity or frenzy'.*

In 1956, the words *'No person shall be liable to punishment'* were substituted by *'Every person is exempt from criminal responsibility'*[38], and in 1976, the phrase: *'or frenzy'* was deleted[39]. The former concepts of 'unsoundness of mind' and 'madness' or 'frenzy' are today incorporated in the single concept of 'insanity'.

The notion of insanity under **section 33** of the ***Criminal Code*** in fact, in line with the Continental tradition, comprises both a deprivation of the use of reason (the former *'demenza'*), and a deprivation of free will (a characteristic of the former *'furore'*). As we have seen in Chapter I[40], the English notion of insanity does not include a state of deprivation of the will, but merely a deprivation of the use of reason. English Common Law conceives of insanity as a defect of reason, from disease of the mind, which deprives the person of his mental faculty of *understanding*;

[38] Act V of 1956.

[39] Act XVIII of 1976.

[40] (above), 56-61.

while Maltese law, according to Continental tradition, conceives of insanity as a defect of reason, from disease of the mind, which deprives the person of his mental faculties of *understanding* or *volition.* Of fundamental importance is the fact that for insanity to subsist, the incapacity of understanding or volition must necessarily be the result of a ***disease of the mind.***

As was specified by the Judge in the case ***Ir-Repubblika ta' Malta v. Christopher Degiorgio*** [41], the notion of insanity must be linked to a disease of the mind and therefore something which is *recognized in medical practice* that nullifies either the capacity of will, or that of understanding. If the disease leaves the accused with sufficient will and understanding to appreciate what he is doing at the moment of commission of the offence, that disease or 'insanity' *cannot* afford him a defence. The Judge further specified that the nomenclature of the disease, be it breakdown, subnormality, paranoia, psychosis, or feeble-mindedness, is irrelevant, as long as it was a medically-recognized disease that rendered the offender incapable of understanding or volition at the moment of committing the offence.

[41] Summing up / address to the Jury by The Hon. Mr. Justice Vincent A. DeGaetano on the 11th July 1995.

Our law does not lay *a priori* tests for insanity. Experts are normally appointed to inquire into the mental state of the accused, if insanity is pleaded, and every case is treated on its own merits. The insanity provided for in **section 34(2)(b)** is the same notion of insanity provided in section 33, with the sole exception than in the case of section 34(2)(b) the 'disease of the mind' must be caused by reason of intoxication. Hence, when this section provides that *'intoxication shall be a defence to any criminal charge if – the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission'*, the law is requiring that the offender must have been incapable of understanding or volition at the time of committing the offence, owing to a disease of the mind caused by intoxication.

As we shall be seeing in Chapter IV, certain intoxicants *may* bring about diseases of the mind, such as psychosis. As long as the mind is so diseased at the moment of commission of the offence, it makes no difference for the purposes of section 34(2)(b), whether the disease is the result of 'accidental' intoxication or voluntary intoxication. Unlike the provisions of subsection (2)(a), which require a state of intoxication brought about without the consent of the offender by the malicious or negligent act of another person, insanity caused by intoxication is not

qualified in any manner. Hence, even if a person freely and voluntarily consumes alcohol and/or drugs to the extent that his mind becomes diseased, if he commits an offence while temporarily or permanently suffering from such disease, he may plead the defence under section 34(2)(b).

It is evident that what constitutes the defence under this subsection is *insanity*, and not *intoxication per se*. Just as our law considers insanity caused by illnesses and other natural factors as a defence, it likewise considers insanity induced by intoxicants. The issue is however not free from debate: whilst it is widely accepted that an insane person should not be held criminally liable for his actions, not the same can be said to the person suffering from what I would term: *self-induced insanity*. It may be argued that at this day and age, everybody is aware of the harmful consequences on health of alcohol, drugs, and similar substances. Hence if a person, while in full control of his mental faculties, chooses to consume excessive amounts of alcohol and/or to abuse drugs, it is *his fault* if he ultimately diseases his mind. Hence we re-encounter the fault-liability principle discussed earlier[42].

[42] (above), 105-106.

As we shall be seeing in Chapter III, certain legal systems are very reluctant to accept self-induced insanity as a possible defence to a criminal charge. In the Netherlands, for example, this principle is outrightly rejected, and a person who commits an offence while under a mental disorder or disease for which that person is *himself responsible* is held fully responsible for the offence committed, irrespective of the state of insanity[43].

Although positions such as the Dutch may be justified on grounds of policy, in my view they run counter to the general principles of criminal liability. As we have seen, for liability to be constituted, the *actus reus* and *mens rea* must exist simultaneously; the 'guilty mind' must be present *at the moment of commission of the offence*, not before or after! It is uncontested that a person who voluntarily intoxicates himself is *'at fault'*, but this fault has nothing to do with the offence committed. Professor Mamo, referring to Maino, rightly points out that:

> *'The fact that intoxication was voluntary may be a reason for punishing the intoxication as an offence 'per se', but not a reason for punishing the offence committed under the influence of insanity resulting from such intoxication'*[44]

[43] See p. 176 *et. seq.*.

[44] Mamo, ***Notes***, 92.

Mamo goes on to say that:

> *'The systems which admit intoxication as an excuse only when it is involuntary or accidental wrongly have regard to the time when the intoxication was contracted; whereas regard should properly be had to the time when the offence was committed. It at this latter time the agent was irresponsible by reason of his insanity, the original cause of such insanity is irrelevant for the purposes of liability'.*[45]

To my knowledge, in the sixty-six years of its existence, the plea of insanity induced by intoxication, under section 34(2)(b) has only been raised on a single occasion before the Courts, in the trial by jury: ***Ir-Repubblika ta' Malta v. Charles Steven Muscat*** [46]. In this case, Muscat was, *inter alia*, charged with the wilful homicide of two people, drug possession, and drug trafficking. Among the defences raised by the accused for the two charges of wilful homicide was insanity induced by intoxication, in terms of section 34(2)(b). Evidence at the trial showed that the accused was a heavy cocaine abuser. In his address to the jury, the Judge made some exceptionally-clear pronouncements on the notion of insanity induced by intoxication. The Judge made it clear that for the defence to subsist, the intoxication must have necessarily created a *disease of the mind*, which disease must be medically-

[45] Mamo, *Notes*, 92.

[46] QK (18/10/96).

acknowledged as such, and which must have disrupted the accused's mental faculties in such a manner that at the moment of the killings he was unable to know what he was doing, or to know that what he was doing was wrong; or was unable to act voluntarily. The Judge explained the meaning of *insanity* in Maltese law and pointed out that if the jury were satisfied that the accused was in fact suffering from a disease which satisfies the above requirements, it made no difference whether the intoxication which brought about that disease was voluntary or not. I am hereby reproducing rather lengthy extracts from the Judge's summing up of the case, for the reason that, in my view, they comprehensively cover the defence under section 34(2)(b):

> *'wahda mill-eccezzjonijiet meta wiehed jista' jinvoka l-intossikazzjoni bhala difiza huwa jekk l-intossikazzjoni twassal ghal stat ta' genn. B'genn hawnhekk wiehed jifhem marda tal-mohh, igifieri patologija, dovuta direttament ghall-intossikazzjoni li ggib fix-xejn f'dak li jkun jew il-kapacita tieghu li jaghraf jew il-kapacita tieghu li jrid... jekk dik l-inkapacita' hija dovuta ghal marda tal-mohh, igifieri marda li hija medikament accettata bhala marda tal-mohh, allura f'dak il-kaz ikollkom l-istat ta' genn... B'genn hawn mhux qed nitkellmu dwar semplici stat ta' konfuzjoni,... ta' tensjoni,... irid ikollok marda tal-mohh, igifieri marda tal-mohh medikament riskontrabbli kif nghid, igifieri li fix-xjenza medika, fix-xjenza psikjatrika hija rikonoxxuta bhala marda tal-mohh, fil-mument li dak li jkun ghamel l-att in kwistjoni u li dik il-marda tal-mohh tkun influwenzat b'mod partikolari il-kapacita' ta' dak li jkun li jaghraf ossija li jifhem jew il-kapacita' tieghu li jrid...*
>
> *...Fil-ligi mhux kull kompartament abnormali, stramb jew bizarr huwa ekwivalenti ghal genn. B'genn fis-sens tal-ligi nifhmu... li jrid ikun hemm marda tal-mohh u allura xi haga li fil-medicina hija maghrufa bhala marda tal-mohh li ggib fix-xejn fil-bniedem jew il-kapacita' tieghu li*

> *jaghraf x'inhu jaghmel, dik li nsejhulha la capacita di conoscere, jew la capacita di intendere... cioe iggib fix-xejn il-volonta', dik li nsejhulha la capacita di volere...*
>
> *...Mela, jekk intom tghidu li fil-mument tal-fatt Muscat kien affett minn marda tal-mohh, marda tal-mohh li hija rikonoxxuta fil-medicina jew fil-psikjatrija, tridu taraw pero ukoll jekk minhabba din il-marda tal-mohh hu ma kienx jaf x'inhu jaghmel, jew ma kienx jaf li dak li qed jaghmel kienet haga hazina. Ghax jekk minkejja li kellu marda tal-mohh hu kien jaf x'inhu jaghmel f'dak il-mument partikolari,... u kellu volonta' bizzejjed,... allura minkejja li kien fi stat ta' psikosi, allura m'hemmx il-genn fis-sens tal-ligi...*
>
> *Jekk jirrizulta dan l-istat ta' genn, anke jekk temporanju, fil-mument tal-eghmil ta' xi reat, igifieri marda tal-mohh li ggib fix-xejn il-kapacita' tal-bniedem li jaghraf jew li jrid fis-sens li spjegajtilkom, allura dak il-bniedem mhux kriminalment responsabbli ta' dak li ghamel. U dan irrispettivament minn jekk dak li jkun hax ix-xorb jew id-droga volontarjament o meno. Hawnhekk meta si tratta ta' genn,... il-ligi ma tiddistingwix bejn volontary jew involontary intoxication, ma taghmilx differenza'.*

Unlike the defence under section 34(2)(a), upon the successful plea of the defence under section 34(2)(b), the accused is *not* discharged. Section 34(3), *inter alia*, provides that:

> *'Where the defence under sub-article (2) is established, then,... in a case falling under paragraph (b), the provisions of articles 620 to 623 and 625 to 628 shall apply'.*

A successful plea under section 34(2)(b) would inevitably imply that the accused is an insane person; hence, all the substantive and procedural measures applicable to insane offenders are also applicable in such a case. This dissertation is not concerned with procedural issues, so I

shall not be discussing the procedural provisions under sections 620-622 and 625-628 of the Code. Section 623, however, provides that:

> *'where... the accused is found to be insane, the court shall order the accused to be kept in custody in Mount Carmel Hospital there to remain in custody and detained according to the provisions of Part IV of the Mental Health Act, or any other provision of law or enactment applicable to the case, and those provisions shall apply to the accused accordingly'*

In simple terms, upon successfully pleading the defence under section 34(2)(b), the accused will[47] be sent by the Judge to Mount Carmel Hospital, to be detained and kept in custody. In terms of **section 43(1)** of the ***Mental Health Act***[48], the 'accused' would be treated as if he were a patient in terms of the Act[49]

What is, in my view, a shortcoming of our law is that no provision is made to regulate the position of the intoxicated offender who was *temporarily* insane at the moment of committing the offence, but who gained his full mental capacities by the time of the trial. Since at the moment of committing the offence, the offender was insane according to

[47] Note the word 'shall' in sections 34(3) and 623, quoted above. The law does not grant the courts discretion to decide whether to order that the accused be kept in custody in the Hospital or not. If insanity is proved, the accused *must* be sent to Mount Carmel Hospital.

[48] Chp. 262 of the ***Laws of Malta.***

[49] See ***Mental Health Act***, (above), sections 14-41 for details.

law, he *cannot* be held criminally liable for it; but would it make sense to send him to a mental hospital even if he has re-gained full use of his mental faculties? This issue has, as yet, never arisen before a Court of Law, so it would be interesting to see how our courts would dispose of this lacuna. Although arguably not in accordance with the provisions of section 34(3), above, in my view, such temporary insanity would imply an acquittal, as I cannot imagine a Judge sending to a mental hospital a person who is perfectly sane at the time of the trial.

II.3 (iii) *Intoxication and Intent [section 34(4)].*

Section 34 (4) provides as follows:

> *'Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence'.*

Earlier on in this Chapter[50], I have referred to this provision as a *'blanket provision'*, which covers situations not covered by the earlier subsections. We recall that for a defence of intoxication to subsist under subsection (2)(a), the intoxication must have necessarily been caused

[50] (above), 78.

without the accused's consent by the malicious or negligent act of another person, and must have rendered the accused incapable of understanding or volition at the moment of the commission of the offence. Subsection (2)(b) requires a state of insanity caused by intoxication. All that subsection (4) requires, however, is that the offender was intoxicated to an extent that he could not form the *intent* required for the offence committed. As seen earlier[51], criminal offences require either a *generic* or a *specific* intent on the part of the offender; the *generic* intent being the offender's mere intention to cause harm, or to perform an act which he knows to be unlawful; the *specific* intent being the special purpose of bringing about the foreseen specific consequences of one's act. Both forms of intention are hence fully dependent on the accused's mental faculties. A concise but very accurate definition of 'intention' is given by the judge in the summing-up of the *Ir-Repubblika ta' Malta v. Charles Stephen Muscat*, discussed on p.117-119. In a simple but meaningful phrase, Mr. Justice DeGaetano claimed that: *'l-intenzjoni tfisser li dak li jkun ikun gharaf dak li jrid u jkun irid dak li gharaf'* (intention means that the person knows what he wants and wants what he knows). For Anthony to be guilty of the wilful homicide of Brian, for example, (wilful homicide

[51] (above), 71-72.

requiring a *specific* intent), Anthony must necessarily *want/desire* Brian's death (or want/desire to put his life in manifest jeopardy), *see* Brian's death, and *does something to specifically bring about* Brian's death. If, at the time of causing Brian's death, Anthony did not have the specific intention to kill him (or to put his life in manifest jeopardy) – e.g. he only had the intention to harm him, or to injure him slightly, or had no intention of doing anything at all to him – Anthony cannot be found guilty of the specific-intent offence of willful homicide. If Anthony merely wants to harm Brian, the intent is a *generic* one, even if Brian's death ensues from Anthony's act. In such a case, Anthony cannot be found guilty of the specific-intent offence of wilful homicide, but only of the generic-intent offence of causing grievous bodily harm from which death ensues. If, for some reason, Anthony is incapable of forming the intent required for the offence that he is being charged with, he cannot be held criminally liable for that offence.

Section 34(4) is basically reiterating this principle, and specifying that if the offender's inability to form a required specific or generic intent is due to intoxication, it should make no difference; once intent is lacking, the offender cannot be found guilty. The more complex the intent required by the definition of the particular offence, the more

likely is drunkenness to be useful in disproving the presence of some element requisite to it.

A very important point to note is that inability to form a generic intent, or even more, a specific intent, does not necessarily imply a total incapacity of understanding or volition on the part of the offender. As we have seen, a person may even be incapable of forming the intent for a particular offence but perfectly capable of forming the intent for another. Whilst in perfect harmony with the principles of criminal liability, this provision may be viewed as being too wide in its scope, with the potential risk or rendering a drug/alcohol abuser a privileged offender. This is because the law here does not distinguish between voluntary intoxication, negligent intoxication, and 'accidental' intoxication. Hence a person who *voluntarily* consumes drugs and/or alcohol, or who becomes intoxicated as a result of *his own* negligence, may raise a defence under this subsection, with the possibility of being discharged, just like a person who is intoxicated without his consent by the malicious or negligent act of another person, and who successfully pleads the defence under subsection (2)(a) !

Certain courts initially tried to restrict the application of subsection (4) by applying it *together with* subsection 2(a) and not

independently of it. The Court of Criminal Appeal, however, invariably made it clear that these subsections operate independently of each other. One of such cases is ***Il-Pulizija v. Louis Agius et***[52]. Defendants raised the plea of intoxication under subsection (4) for charges of causing voluntary damage to property and of disturbing public peace and good order, but were nonetheless convicted. They appealed on the grounds that the court had incorrectly applied the law when it held that section 34(4) had to be considered in conjunction with section 34(2)(a). According to the court of first instance, in fact, it was not sufficient that an accused be incapable of forming a specific or generic intent owing to a state of intoxication, but the state of intoxication had to be caused without his consent by the malicious or negligent act of another person. The Court of Criminal Appeal, however, totally disagreed with this interpretation, stressing that subsection (4) is totally independent of subsection (2), and that as long as the intoxication rendered an accused incapable of forming the intent required for the offence, it made no difference if the intoxication was involuntary or otherwise:

> *'...s-sub. art. (4) tal-art. 35 tal-Kodiċi mgħandu ebda rabta mas-sub. art (2)... ix-xorb li bniedem ikun ħa minn rajh, anki mhux mogħti lilu b'ħażen jew traskuraġni minn ħaddieħor, anki jekk ma jwasslux għall-inkapaċita li jifhem u li jagixxi volontarjament, basta 'sintendi ma jkunx ħadu apposta bħala "Dutch Courage" biex jagħmel d-delitt, għandu*

[52] Qorti tal-Appell Kriminali tal-Maestà Tagħha r-Regina, (17/01/1974); unpublished.

> *dejjem jiġi meħud in konsiderazzjoni dwar l-element intenzjonali, ġenerali jew speċifiku, meħtieġ għad-delitt'.*

The issue once again arose in 1986, in ***The Police v. Bassler Beat Jorg***[53]. As in the above case, the court of first instance held that section 34(4) [then, 35(4)] had to be construed in conjunction with subsection (2). Referring to the decision in *The Police v. L. Agius et* (above), the Court of Criminal Appeal held that section 34(4) operates independently of the other subsections. Referring to another judgment: ***Police v. Godwin Guntings***[54], the Court explained that a person:

> *'may be found to have been not capable of forming a specific intent in respect of a particular crime, he may nevertheless be found perfectly capable of forming another specific intent in respect of another crime, or of forming generic intent, depending on the influence of alcohol on the particular person charged with the commission of the offence'.*

The courts' attempts to restrict the application of section 34(4) were hence not successful. This subsection operates independently of subsection (2). Hence, as we have seen, as long as the offender is incapable of forming the intent required *for the offence charged* with, he cannot be held liable, irrespective of whether the intoxication was self-induced, involuntary, or accidental; or whether the accused's mind was

[53] KDQS LXX.IV.674 (17/06/1986).
[54] QAK (03/03/1977).

diseased, or whether he was totally incapable of understanding or volition. As was held in ***Il-Pulizija v. Thomas Sapiano***[55]

> *'id-difiża argumentat... li... l-imputat kien talment xurban li ma setgħax jifforma dik l-intenzjoni speċifika u li għalhekk l-aġir tiegħu ma hux inkriminabbli, skond ir-raba' subartikolu tal-art. 35 Kap. 12. Hu risaput li f'dak is-subartikolu ma hemmx id-distinzjoni li hemm fit-tieni subartikolu nċiż (a) tal-istess artikolu, bejn l-ubrijakezza volontarja minn naħa waħda u ubrijakezza bla kunsens tal-persuna fis-sakra, u prokurata, dolożament jew negliġentement minn ħadd ieħor, min naħa l-oħra'.*

A decision which, in my view, leaves much to be desired, is that delivered by the Court of Criminal Appeal in the names ***Il-Pulizija v. Mario Camilleri***[56]. In this case, Camilleri was charged with, *inter alia*, threatening, resisting, and assaulting Police officers while in the execution of their duties. Camilleri was acquitted of these offences (but convicted of others), after successfully pleading the defence of intoxication. The Attorney General appealed, claiming that the Court applied the law on intoxication incorrectly, as there was clear evidence that Camilleri's state of intoxication was self-induced, and hence a defence under section 34(2)(a) could not subsist. The Court of Criminal Appeal agreed that Camilleri's intoxication was self-induced: *'jirrizulta manifestament ippruvat li kien l-istess appellant Mario Camilleri li minn*

[55] (above), 96-97.

[56] KDQS LXXXII.1V.364 (06/10/1998).

jeddu gab dan l-istat ta' sokor fuqu b'mod volontarju u minghajr xi intervent ta' terzi'; however the Court held that unlike the Attorney General's submission, the Court of first instance acquitted Camilleri on the basis of section 34(4) and not 34(2). The Court of Criminal Appeal, however, erraneously in my view, held that in terms of section 34(4), it was necessary to inquire into whether the appellant could have formed *any* intent, not just the intent for the offence that he was being charged with:

> *'Għandu jiġi eżaminat jekk l-appellat* (appellant) *kienx fi stat li ma setax ikollu l-kapaċita' jifforma intenzjoni għal reat partikolari, iżda kellu l-kapaċita' li jifforma intenzjoni għal reat ieħor'*

In my view, this judgment represents an outright misinterpretation of section 34(4). Although this subsection claims that 'intoxication shall be taken into account for the purpose of determining whether the person charged had formed *any* intention specific or otherwise', it goes on to say: 'in the absence of which he would not be guilty of *the* offence'. Hence it follows that what must be taken into account is whether the accused could have formed the intent required for *the* offence charged with, and not whether he could have formed any intent.

What is, in my view, a correct interpretation of section 34(4), is to be found in the decision: ***Il-Pulizija v. Anthony sive Tony Bonavia***[57]. In this case, Bonavia was over-speeding his car and was spotted by the Commissioner of Police himself, who happened to be in the vicinity. The Commissioner ordered the Police officers that were with him to stop Bonavia, which they did. Bonavia however swore at and threatened the Police officers, threatened the Commissioner, and even attempted to physically assault the Commissioner on at least two occasions. Bonavia was charged with the offences and pleaded that in terms of section 34(4), he was unable to form the specific intent to threaten and assault the Commissioner of Police, owing to his intoxication. The court, however, rejected the plea on the grounds that his behavior and his recollection of the incident were clearly indicative that the accused was not in a state of mind that was incapable of forming the specific intent. The fact that the accused recognised the Commissioner, and even recalled that he was involved in a case with the same Commissioner five years earlier, according to the Court, was sufficient proof that Bonavia's mental faculties were such that he could have formed the specific intent for the offence:

[57] QAK (30/04/1993).

> *'... għalkemm l-imputat kien daqsxejn xurban, mill-komportament tiegħu jidher li hu ma kienx għal kollox mitluf. Fil-fatt hu għaraf lil Kummissarju tal-Pulizija, tant li anke semmielu li kellu każ miegħu ħames snin qabel... għalhekk il-Qorti tikkonkludi fuq dana l-punt li l-imputat ma jistax igħid li hu ma kienx f'posizzjoni li jofforma intenzjoni anke dika speċifika.'*

Bonavia appealed, claiming that, *inter alia*, the Court of first instance treated the defence under section 34(4) too lightly in the sense that it should have inquired deeper into whether Bonavia could have possibly formed the required specific intent or not. The Court of Criminal Appeal, however, rejected Bonavia's arguments, claiming that the Court of first instance's decision represented the correct interpretation of the law, as consolidated by case-law:

> *'m'hemm xejn ċensurabbli fis-sentenza tal-ewwel Qorti għar-rigward ta' x'inhi l-pożizzjoni legali għal dik li hija sokor u l-possibilita' li wieħed jifforma intenzjoni ġenerika jew speċifika skond il-każ. Dak li qalet l-ewwel Qorti, infatti, jikkonforma eżattament ma' dak li ġie dejjem deċiż minn dawn il-qrati'.*

Although section 34(4) is seen by many as the traditional 'loophole' out of which alcoholics or drug abusers may escape criminal liability, this is clearly not the case. Out courts have been meticulous whenever a defence under this subsection was pleaded, examining in detail every piece of evidence to see if the accused was in fact capable of forming the required intent or not. Throughout my research for this

work I have encountered not a single case where an accused was acquitted on the basis of section 34(4).

The plausibility of this subsection may be appreciated when it is invoked in cases which do not involve a state of self-induced intoxication. For example, on pages 90-91 I gave the example of Anthony who tampers with Brian's drink while completely intoxicated. We have seen that if, as a result, Brian becomes completely intoxicated too and commits an offence while in such a state, he cannot invoke the provisions of section 34(2)(a) in his defence, as Anthony's act of intoxicating him was neither malicious nor negligent. In such a case, however, Brian would be able to successfully plead the defence under section 34(4), provided, obviously, that he lacked the intent required for the offence committed.

Another example could be where a person is intoxicated by his own negligence, such as a person who is undergoing treatment with a particular drug, and takes a very limited amount of alcohol at a party but becomes severely intoxicated; or, in the case of the worker in my example on page 84 who negligently fails to secure the lids of the fermentation/distillation vats and becomes intoxicated himself. In such examples, the intoxication is self-induced, despite not being voluntary,

so a defence under section 34(2) would not subsist. If, however, they can prove that at the moment of committing an offence they were incapable of forming the required intent owing to such intoxication, they may successfully invoke the provisions of subsection (4).

Even more important is the case of ***pathological intoxication***. This form of intoxication, which is a medical condition, has been described as:

> *'a temporary psychotic reaction, often manifested by violence, which is triggered by consumption of alcohol by a person with a predisposing mental or physical condition. The underlying condition may be temporal lobe epilepsy, traumatic brain damage, metabolic disturbances, or a variety of other factors... Automatic behaviour results... There is an absence of motor coordination, slurred speech and diplopia (blurred vision) that characterize ordinary alcohol intoxication... The amount of alcohol ingested is irrelevant... '* [58]

This form of intoxication, recognized in the fields of medicine and psychiatry, is increasingly becoming recognized in the field of law. The US Model Penal Code is the first Code to expressly recognize pathological intoxication as a defence:

> *'Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defence if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its*

[58] Tiffany, L.P.; Tiffany, M., ***Nosologic Objections to the Criminal Defence of Pathological Intoxication: What do the Doubters Doubt?***, *International Journal of Law and Psychiatry*, Vol.13, (1990); 49-50.

> *criminality [wrongfulness] or to conform his conduct to the requirements of law'.*[59]

The same Model Code defines pathological intoxication as:

> *''intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know that he is susceptible'.*[60]

The Maltese ***Criminal Code*** is silent on the issue of pathological intoxication. A person who commits a criminal offence while suffering from this condition cannot plead a defence under section 34(2)(a), for the reason that the intoxication is self-induced. Likewise he cannot plead the defence under section 34(2)(b), because although pathological intoxication is recognized as a medical condition, it is, as yet, not officially recognized as a *mental disease* 'per se'[61]. Such a person, however, would be in a position to raise the defence under section 34(4) if he manages to prove that this condition precluded him from forming the intent required for the offence.

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[59] US ***Model Penal Code***, section 2.08(4).

[60] (above), section 5(c).

[61] In their book ***The Legal Defense of Pathological Intoxication***, Quorum Books, New York, (1990), 207, authors Tiffany and Tiffany submit that *'Whether pathological intoxication is a disease concept for these purposes is problematical. In one sense, pathological intoxication is not a mental disease. It can fairly be described as an event and a resulting condition symptomatic of an underlying, physiological abnormality; an analogous phenomenon is the seizure state that is episodically associated with psychomotor or temporal lobe epilepsy... '.*

II.3 (iv) *Intoxication not limited exclusively to alcohol or drugs.*

Subsection (5), the last subsection of **section 34**, provides the following:

> *'For the purposes of this article "intoxication" shall be deemed to include a state produced by narcotics or drugs'*

As we have seen in Chapter I, when the British Colonial Office sent the 'model provision' on intoxication to the Governor of Malta, 'intoxication' meant 'drunkenness'. In the model provision itself, the terms 'intoxication', 'drunkenness', and 'alcoholic excess' are used interchangeably[62]. When Ordinance XIII was enacted in 1935, the Maltese drafters specified that intoxication 'shall be deemed to include a state produced by narcotics or drugs'. Section 34, however, is not *exclusively limited* to intoxication by alcohol, narcotics[63], or drugs. Alcohol has always been regarded as an intoxicant. Narcotics or drugs may produce effects on the human brain which are very similar to those produced by alcohol, so, the legislator felt the need to specify that 'intoxication' shall *include* a state produced by alcohol or drugs. Nowhere in the section, however, does the legislator specify that for the

[62] (above), 47.

[63] 'Narcotic' is defined by ***Mosby's Medical, Nursing, & Allied Health Dictionary*** (4th Ed.), Mosby-Year Book, Inc., (1994), 1043; as *'of or pertaining to a substance that produces insensibility or stupor'*

purposes of the said article, 'intoxication' is *exclusively limited* to a state caused by alcohol, narcotics, and drugs. In this scenario, it is possible to plead a defence under section 34 even if the intoxication is not the result of alcohol, narcotics or drugs. As we have seen, it is not the intoxication *per se*, which excuses the commission of the crime, but the particular *state of mind* brought about by such intoxication. Hence, in my view, intoxication caused by any other substance, which affects the central nervous system and functioning of the brain in the same manner as alcohol and drugs do, would be covered by the provisions of section 34. To my knowledge, there have been no cases before our courts where somebody attempted to raise a defence under section 34 owing to state of intoxication caused by an intoxicant other than alcohol or drugs, such as, for example, a poisonous gas[64]. It therefore remains to see whether the courts would interpret 'intoxication' restrictively or widely.

[64] I have recently been watching a documentary on diving, in which it was stated that deep-sea divers, normally have a nitrogen cylinder attached to their 'normal' oxygen aqualung, as when one exceeds a certain depth, oxygen alone does not suffice to sustain human life. The documentary also stated that divers are normally extra-cautious when loosening the nitrogen valve to allow some of this gas to seep into the oxygen aqualung, as an overdose of nitrogen may instantly damage the central nervous system and the diver may instantly 'become insane'. Although this form of 'insanity' may not necessarily be the insanity required at law, it would be interesting to see the position at law of a diver who becomes intoxicated by a nitrogen overdose and, let's say, stabs another diver with his diving-knife while in such a state. The same would obviously apply to other gases and toxic substances and/or fumes which have a similar effect on the human brain.

What are definitely not considered as intoxication are the withdrawal symptoms of drug abuse. In a particular case: ***Il-Pulizija v. Grazio Spiteri*** [65], the accused somewhat attempted to plead a defence under section 34 on the grounds that being a heavy drug user of cannabis and cocaine, his mind was 'slave' of his physical craving for the drug:

> *'minhabba li kien heavy user mohhu kien skjav ta' l-impulsi tal-gisem tieghu li dejjem irid aktar droga biex jevita l-withdrawal symptoms'.*

The Court of Appeal found the accused capable of understanding and volition at the time of committing the offences, but, moreover, pointed out that it was debatable whether withdrawal symptoms amounted to intoxication, or the direct opposite of it:

> *'Dibattibbli ukoll hu l-punt jekk jistax jingħad li persuna li tkun qiegħda fi kriżi ta' astinenza hi fi stat ta' intossikazzjoni, ossia fi stat ta' sokor, minħabba droga, jew jekk l-istat ta' astinenza jammontax proprju għall-oppost, ċjoe' għal nuqas ta' intossikazzjoni'.*

The Court did not discuss this point in detail for the reason that evidence showed that the accused was still capable of understanding and volition, and was also capable of forming the intent for the offences charged with. Although, as yet, this is the only case where this issue of

[65] KDQS LXXXI.IV.225 (07/07/1997).

withdrawal symptoms has arisen, I find it very difficult to conceive that our courts will ever accept such a defence under section 34.

CHAPTER III

Intoxication : The Notion in some other Legal Systems

III.1 PRELIMINARY CONSIDERATIONS.

After examining the notion of intoxication in the Maltese penal system, it would be interesting to consider the current state of the law in a few foreign counterparts. For reasons of space, I shall only be considering *self-induced* or *voluntary* intoxication. I shall not be discussing how these legal systems deal with involuntary intoxication, with 'Dutch courage' cases, and with insanity resulting from intoxication, for the reason that there appears to be a general *consensus*, and almost complete uniformity on these notions. In fact, in *all* these legal systems, involuntary intoxication *does* excuse the commission of a criminal offence, provided, obviously, that it negatives

the *mens rea* for the offence committed. Likewise, 'Dutch courage' is not a defence in any of the discussed legal systems, but is moreover an aggravation in some others (such as Italy). Finally, with the exception of the Netherlands, a state of insanity produced by alcohol or drugs is considered by these legal systems in an identical manner to insanity produced by other causes, and is hence a defence. Self-induced, or voluntary intoxication, on the other-hand, is the subject matter not only of divergence between one legal system and another, but also of debate within each individual legal system.

III.2 THE UNITED KINGDOM.

In Chapter I, I have traced the development of the notion of intoxication in England from its earliest origins till the 'landmark' judgment ***D.P.P. v. Beard***,[1] which provided the basis for the notion of intoxication in the Maltese Criminal Code. *D.P.P. v. Beard* continued to represent the law on intoxication in England until an authoritative decision was delivered by the House of Lords in ***D.P.P. v. Majewski***.[2] In

[1] (above), 42-44.
[2] (1977) AC 443, HL.

this case, defendant, a drug-addict, was involved in a brawl at a pub, and assaulted the landlord, customers, and a policeman. He was charged with assault occasioning actual bodily harm and assault on a Police officer in the execution of his duties. Majewski gave evidence that shortly before the brawl he had consumed large quantities of alcohol and drugs, "completely blacked out", and did not know what he was doing.

The Judge directed that since the intoxication was self-induced, it could not afford Majewski a defence. Majewski was convicted, and the Court of Appeal dismissed his appeal. The Court of Appeal, however, submitted a question 'on a point of law of general public importance' to the House of Lords, asking: *'Whether a defendant may properly be convicted of assault notwithstanding that by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault'.*

The House of Lords responded by confirming the rule hinted in *D.P.P. v. Beard*, that evidence of self-induced intoxication which negatives *mens rea* is a defence *only* to criminal offences requiring a *specific* intent, and is irrelevant to offences of generic intent. This 'rule' consolidated in *Majewski* created the situation that if, in a crime of

basic intent, the offender did not form the required *mens rea* due to self-induced intoxication, that intoxication could *not* be pleaded as a defence; whilst if the offence was one of specific intent, intoxication could be taken into account in deciding whether the offender could have formed the required *mens rea.*

Such discrimination between offences created a degree of incompatibility with the 'golden rule' of criminal liability: *actus non facit reum nisi mens sit rea* in that it allowed for a defendant to be convicted of a crime notwithstanding that he lacked *mens rea.* The Lord Chancellor himself was aware of this incompatibility, and attempted to minimise it by claiming that in offences of basic intent, self-induced intoxication *in itself* constitutes the required *mens rea* :

> *'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.'* [3]

According to the Lord Chancellor, therefore, the consumption of alcohol or drugs is a 'reckless course of conduct', which constitutes the required *mens rea* for offences of basic intent. This 'innovative'

[3] Lord Chancellor Elwyn-Jones, in ***D.P.P. v. Majewski.***

perception of *mens rea* was welcomed by few criminal law commentators, but criticised by many.

The major criticism was directed towards *Majewski*'s incompatibility with the general principles of liability. Without doubt, the House of Lords tried to reach a compromise between principles of criminal justice and public policy. The House of Lords was willing to 'sacrifice' part of the theory of criminal liability for the sake of protecting the community from criminal conduct of intoxicated persons who freely choose to become so.

Another difficulty arising from *D.P.P. v. Majewski* is how to consistently differentiate between offences of specific intent and those of basic intent. The House of Lords supplied no concrete guidance for such a distinction, despite hinting that crimes of basic intent are those where recklessness would suffice for liability. In the absence of an adequate distinction, authors Smith & Hogan suggest that, 'in order to know how a crime should be classified for this purpose we can look only to the decisions of the courts'[4]. Smith & Hogan, in fact, after consulting

[4] Smith & Hogan, 221.

numerous British court decisions, provide us with the following indicative lists : [5]

Crimes requiring a specific intent :

- Murder;
- Wounding or causing grievous bodily harm with intent;
- Theft;
- Robbery;
- Burglary with intent to steal;
- Handling stolen goods;
- Endeavouring to obtain money on a forged cheque;
- Causing criminal damage under certain sections of the ***Criminal Damage Act*** 1971;
- Indecent assault where proof of indecent purpose is required;
- An attempt to commit any offence requiring specific intent, and possibly some forms of secondary participation in any offence.

Crimes requiring a basic intent :

- Manslaughter;
- Rape;

[5] Smith & Hogan, 221-222. Similar indicative lists are provided by most other English criminal law text-writers.

- Maliciously wounding or inflicting grievous bodily harm;
- Kidnapping and false imprisonment;
- Assault occasioning actual bodily harm;
- Assault on a constable in the execution of his duty;
- Indecent assault where the act is unambiguously indecent;
- Common assault;
- Taking a conveyance without the consent of the owner;
- Criminal damage where intention or recklessness, or only recklessness, is alleged;
- An attempt to commit an offence where recklessness is a sufficient element in the *mens rea* (as in attempted rape).

In accordance with the *Majewski rule*, therefore, in the case of crimes from the first list, self-induced intoxication may be successfully pleaded as a defence, whilst in the case of crimes from the second list, it may not.

A further restriction on the defence of intoxication in England was placed five years later in ***R. v. Caldwell***.[6] In this case defendant had done some work in a hotel but ended up quarrelling with the proprietor.

[6] (1982) AC 341.

He got drunk, and started a fire in the hotel. The fire was discovered and extinguished shortly afterwards, provoking only minor damage and no injuries. Caldwell was charged, *inter alia*, with damaging property with intent to endanger life, or being reckless whether life was endangered.

Caldwell admitted that he did intend to cause damage to the hotel, but argued that he was so intoxicated that he did not consider that he might be putting peoples' lives in jeopardy. The issue before the House of Lords was whether defendant was so drunk as to render himself oblivious of the risk that the lives of people in the hotel would be endangered. Lord Diplock, for the majority, held that:

> *'If the only mental state capable of constituting the necessary mens rea... were that expressed in the words "intending by the destruction or damage to endanger the life of another", it would have been necessary to consider whether the offence was to be classified as one of "specific" intent for the purpose of the rule of law which this House affirmed and applied in R. v. Majewski, and this it plainly is...'*

According to Lord Diplock it was not even necessary to inquire whether recklessness 'as to whether the life of another would be thereby endangered' could constitute the necessary *mens rea* of the offence with which Caldwell was charged. Referring to *Majewski*, Lord Diplock held that 'reducing oneself by drink or drugs to a condition in which the

restraints of reason and conscience are cast off' in itself constituted a reckless course of conduct and an integral part of the crime. The House of Lords accepted the fact that Caldwell could have been unaware of the risk of endangering the lives of residents in the hotel, but held that had he been sober, such risk would have been obvious to him. Consequently, Caldwell's appeal was dismissed. The effect of this 'objective theory' of recklessness was that the defence of intoxication in England has been narrowed in cases of recklessness. This is because if a person, due to intoxication, fails to foresee a risk which he would have foreseen had he not been intoxicated, such person is reckless and is criminally liable without the need of even applying the *Majewski rule.* This objective theory of recklessness is currently being followed by the British Courts in cases of intoxication. For example, in the recent ***R. v. Richardson and Irwin***[7], following an evening's drinking, two students lifted another over a balcony and dropped him about 12 feet to the ground, causing him serious injuries. At their trial for causing grievous bodily harm, the jury were directed that they should convict if a sober person in defendants' position would have foreseen a risk of injury. Allowing defendants' appeal against conviction, the Court of Appeal said

[7] [1999] 1 Cr App R 392, CA.

the question was not what another person would have foreseen but what defendants themselves would have foreseen had they been sober.

Even prior to *Caldwell*, it must be noted, the United Kingdom Criminal Law Revision Committee had criticised the approach taken in *Majewski*. In its report: ***'Offences against the Person'***[8], the Committee proposed that the distinction between basic and specific intent be abandoned and that evidence of self-induced intoxication be considered to rebut the existence of the mental element of *any* offence. The Committee's proposals were however never acted upon. Thirteen years later the Law Commission released the Consultation Paper: ***Intoxication and Criminal Liability*** [9], in which it criticised the existing law regarding intoxication on several grounds. Their main criticisms were that:

- the distinction between basic and specific intent offences, based solely on decided cases, was illogical, unprincipled, and therefore uncertain;

[8] ***Offences Against the Person***, Fourteenth Report, United Kingdom Criminal Law Reform Committee; Cmnd 7844, (1980), Pt.VI, 115.

[9] ***Intoxication and Criminal Liability***, Consultation Paper No. 127, United Kingdom Law Commission, London, (1993).

- in some specific intent cases, the jury had to be told to consider defendant's intoxication in deciding whether he had the specific intent and then to disregard it in deciding whether he was acting in self-defence; and

- in cases involving recklessness, juries were being asked to consider what a defendant actually foresaw (not what a reasonable person would have foreseen), and then to disregard the intoxication.

The Commission proposed to abolish *Majewski* and replace it with a new offence of 'criminal intoxication'. A person would be guilty of 'criminal intoxication' if, when voluntarily intoxicated, commits an offence from a given list[10], immaterially if such person lacks the *mens rea* for the offence.

Two years after its Consultation Paper, however, the Law Commission tabled its final report: ***Legislating the Criminal Code: Intoxication and Criminal Liability***[11], in which it changed its mind

[10] Such offences, involving *"substantial harms to the person, to the physical safety of property, or to public order"*, are outlined by the Commission in para. 6.41 of the ***Intoxication and Criminal Liability*** Consultation Paper, (above).

[11] ***Legislating the Criminal Code: Intoxication and Criminal Liability***, Law Commission No. 229, United Kingdom Law Commission, London, (1995).

on its earlier proposals. The Commission was persuaded through the two-year consultation process that the new offence of 'criminal intoxication' would lead to more contested cases and to longer and more difficult trials[12]. Further, they were convinced that it would not be possible to reach any consensus of opinion as to the form the new offence should take[13]. Consequently they concluded that the creation of a new offence was not recommendable.

The Commission observed that the *Majewski* approach was still the most favoured. The Judges themselves, according to the Commission, submitted that although *Majewski* is *'difficult to state in terms that academic commentators find acceptable... in its practical application..., it is the view of the very clear majority of judges that it presents surprisingly few problems on a day to day basis'*. Considering the amount of support for *Majewski* from those who were directly involved in its practical operation, the Commission recommended the codification of the *Majewski* approach with some minor amendments.

[12] The Commission basically received four objections to the new offence: (i) it could encourage plea-bargaining since it gives defendants a chance to be convicted of a 'less serious' offence than the one actually committed; (ii) expert evidence would have to be called in even in cases of 'minor' offences, hence adding unnecessary length and expenses to minor trials; (iii) the requirement of substantial impairment would require the police to devote more time to inquire into the defendant's movements and his intake of intoxicants prior to the offence; and (iv) the prosecution would not know in advance whether it should include the new offence as an alternative offence on the indictment and hence difficulties could arise in the course of the trial over the question whether and when to add a separate count.

[13] (above), para. 5.18.

Once again, the Law Commission's proposals were not acted upon. In 1998, the Home Office published a Consultation Paper[14] in which it set out proposals for reform of the law concerning non-fatal violence against the person. Annexed to the Paper is a proposed: ***Offences Against the Person Bill.*** **Clause 19** of the said Bill deals with voluntary-intoxicated offenders, and provides as follows:

> *"**19.** - (1) For the purposes of this Act a person who was voluntarily intoxicated at any material time must be treated—*
>
> *(a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and*
>
> *(b) as having known or believed in any circumstances which he would have known or believed in had he not been intoxicated.*
>
> *(2) Whether a person is voluntarily intoxicated for this purpose must be determined in accordance with the following provisions.*
>
> *(3) A person is voluntarily intoxicated if—*
>
> *(a) he takes an intoxicant otherwise than properly for a medicinal purpose,*
>
> *(b) he is aware that it is or may be an intoxicant, and*
>
> *(c) he takes it in such a quantity as impairs his awareness or understanding.*
>
> *(4) An intoxicant, although taken for a medicinal purpose, is not properly so taken if—*
>
> *(a) the intoxicant is not taken on medical advice, and the taker is aware that the taking may result in his doing an act or making an omission capable of constituting an offence of the kind in question, or*
>
> *(b) the intoxicant is taken on medical advice, but the taker fails then or afterwards to comply with any condition forming part of the advice and he is aware that the failure may result in his doing an act or*

[14] ***Violence: Reforming the Offences Against the Person Act 1861***; United Kingdom Home Office, The Stationery Office, London, (1998).

making an omission capable of constituting an offence of the kind in question.

(5) Intoxication must be presumed to have been voluntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that the intoxication was involuntary.

(6) An intoxicant is any alcohol, drug or other thing which, when taken into the body, may impair the awareness or understanding of the person taking it.

(7) A person must be treated as taking an intoxicant if he permits it to be administered to him."

The clarity of this comprehensive clause hardly leaves room for additional comment. The proposition is hence that for all intents and purposes of the Bill, voluntarily-intoxicated offenders be treated as having been aware of the risk which they would have been aware of had they been sober[15]. Undoubtedly, the English Government's aim is to ensure that voluntarily-intoxicated offenders will be held responsible for violent acts committed while in that state – a reminiscence of the Law Commission's proposal for a 'new offence' of criminal intoxication in 1993[16].

To be emphasized, however, is the fact that the above Bill does not deal with the offences of murder and manslaughter. Hence, if, or

[15] The test for recklessness, in this case, would be subjective, and not objective, as in ***R. v. Caldwell***, discussed on p. 144-145.

[16] (above), 148.

when, this Bill becomes law, its provisions will be limited to the offences therein contained, and, unless further legislation is enacted, offences of murder and manslaughter will continue to be regulated by *Majewski.*

At the moment of the writing of this thesis, the above Bill has not been approved by the British Parliament, so, to date, the law governing self-induced intoxication in England is still governed by *D.P.P. v. Majewski.*

III.3 AUSTRALIA (WITH PARTICULAR REFERENCE TO THE COMMON LAW JURISDICTIONS).

Australia is made up of six different 'states', or 'jurisdictions': New South Wales (NSW), Victoria, Queensland, South Australia, Western Australia, and Tasmania; and two 'internal territories' : Northern Territory, and Australian Capital Territory (ACT). Whilst Queensland, Western Australia, and Tasmania have codified their Criminal legislation, the other states adopt common-law jurisdictions. Although British authority to pass statutes affecting Australia ended in 1986, the traditions of British statutes and case-law remain firmly embedded in

the Australian legal system, with Judges expressly referring to English decisions when passing judgment. It is hence interesting to inquire into whether the common-law jurisdictions of Australia have retained the traditional English *Majewski* principles, or whether they have departed therefrom.

The leading authority on self-induced intoxication in these jurisdictions of Australia is ***The Queen v. O'Connor***[17], delivered by the High Court in 1980. In this case defendant broke into a parked car belonging to a Police officer. He was seen by a neighbour who alerted the officer. As the officer reached his car and identified himself, defendant grabbed a map-holder and a knife from the car and ran away. The officer caught up with him in an attempt to arrest him, but defendant opened the blade of the knife and stabbed the police officer in the arm. Defendant was charged with theft and wounding with intent to resist arrest or to do grievous bodily harm. An alternative charge of 'unlawful wounding' was added, as this required only a basic intent, unlike the others, which required specific intent.

[17] (1980) 146 CLR 64.

At the trial, defendant gave evidence that he had been taking a particular drug and consumed alcohol during a substantial part of the day of the incident. He claimed he couldn't recall what happened as *"everything blacked out"*. The trial Judge directed the jury that in accordance with the principles of the *English* case: ***D.P.P. v. Majewski*** (discussed earlier in this Chapter), evidence of defendant's intoxication could only be taken into account for the charges of theft and wounding to resist arrest, where a *specific* intent is required, but it could not be taken into account for the alternative basic-intent charge of unlawful wounding. The jury acquitted defendant on the two charges, but convicted him of the alternative charge.

Defendant appealed, and the Court of Criminal Appeal of Victoria made it clear that it would not accept the views of the British House of Lords in *Majewski*. The Court rejected the distinction between offences of specific intent and those of basic intent, claiming that evidence of self-induced intoxication should be taken into account in *all* criminal charges, as long as it precluded the offender from acting voluntarily or intentionally. The Court of Appeal allowed the appeal and quashed the conviction.

The Solicitor-General of Victoria, however, appealed to the High Court claiming that the voluntary intake of alcohol and/or drugs render all criminal acts done under such state of intoxication as voluntary acts, and that the intention to do the criminal act whilst so intoxicated must be unchallengeably presumed. Basing his arguments entirely on the Lord Chancellor's arguments in *D.P.P. v. Majewski,* the Solicitor-General claimed that the voluntary taking of alcohol and drugs to the point of intoxication, in itself satisfied the requirement of *mens rea.*

The High Court, like the Court of Criminal Appeal, rejected the *Majewski* classification of offences into those of basic or specific intent, considering such distinction as 'illogical and difficult to apply'. The High Court held that evidence of self-induced intoxication is relevant to *any* criminal offence, and where such evidence raises any doubt as to whether the defendant acted voluntarily or intentionally, he should be acquitted. The argument from *Majewski,* reiterated by the Solicitor-General, namely that the voluntary taking of alcohol and drugs to the point of intoxication, amounted to *mens rea,* was also expressly rejected by the High Court.

The principles laid down in *O'Connor* became law in all Australian Common Law jurisdictions[18], and were considered satisfactory, perhaps due to the fact that most offenders who pleaded intoxication in their defence were still convicted because they were found to have the required volition and intention despite the intoxication.

In 1990, the Australian Standing Committee of Attorneys-General established a Committee to develop a Model Criminal Code for all Australian states. With regards to intoxication, the Committee suggested the codification of the *O'Connor* principles. The Standing Committee of Attorneys-General accepted all the Commission's proposals with the exception of those concerning intoxication. In fact, when the ***Criminal Code Act*** was enacted in 1995, the Commission's proposals on intoxication were substituted by provisions similar to those in the code jurisdictions of Australia, which were in turn based on *Majewski.* The Common-Law jurisdictions, however, still opted to retain the *O'Connor* principles and did not adopt the approach of the *Criminal Code Act.*

[18] The states which adopted legislative codes (i.e. Queensland, Western Australia, Tasmania, and the Northern Territory, in principle still follow the British ***D.P.P. v. Majewski*** principles, whereby evidence of self-induced intoxication can be used to deny intention or recklessness in offences of specific intent but not in those of basic intent. Although their Criminal Codes are far from uniform, when it comes to the notion of intoxication they all follow the *Majewski rule.*

In 1997, a notorious incident occurred which generated a heated public debate: Noa Nadruku, a well-known Australian professional rugby player assaulted two women outside a nightclub, punching them violently in the face. Nadruku was charged with the assault. He gave evidence that he had completely 'blacked-out' and was barely conscious after drinking up to 40 schooners of beer, a six-pack of stubbies, and half a bottle of wine in an eleven-hour drinking binge. Although the Magistrate observed that:

> *'The two young ladies were unsuspecting victims of drunken thuggery, effectively being king hit. The assaults were a disgraceful act of cowardice... The behaviour is deplorable, intolerable and unacceptable'*[19],

he notwithstandingly concluded that:

> *'the degree of intoxication is so overwhelming to the extent that the defendant, in my view, did not know what he did and did not form any intent as to what he was doing'*[20].

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[19] Although this case is not reported, the quoted extract is from page 11 of the Transcript of Proceedings in ***S.C. Small v. Noa Kurimalawai***, Australian Capital Territory Magistrates' Court, Matter No. CC97/01904, 22 Oct. 1997. I am most grateful to Ms. Padma Raman, Director of Research and Executive Officer at the Victorian Law Reform Committee, for supplying me with access to the relevant Australian materials.

[20] ***S.C. Small v. Noa Kurimalawai***, (above).

Nadruku's acquittal generated such public outrage that the Federal Attorney-General urged the Attorneys-General of the Victorian, South Australian, and ACT jurisdictions to 'do something' about the defence of self-induced intoxication, preferably, to adopt the approach of the Model *Criminal Code Act 1995*. The Victorian Attorney-General recommended that the Law Reform Committee inquires into the defence and submits its recommendations.

In its lengthy Report[21], tabled in May 1999, the Committee examined the *Majewski* option, and found the distinction between offences of specific and basic intent to be 'utterly confusing'. Besides, the Committee could never accept the possibility of a defendant being convicted of a crime even if he never formed the state of mind required by the definition of the crime charged. Whilst acknowledging that such a conviction may be justified on public policy grounds, the Committee dismissed such principle as morally objectionable and legally absurd:

> *'the distinction between offences of specific and basic intent (is) unnecessarily complex and confusing, it also constitutes a serious departure from fundamental principles of criminal law. To depart from fundamental principles of criminal law and to introduce technical legal*

[21] ***Report on Criminal Liability for Self-Induced Intoxication***, Law Reform Committee (Parliament of Victoria, Australia; May 1999.

> *complexities to an already complex legal system is seen by the Committee as insupportable'.*[22]

On the question of whether the 'special offence' of committing a dangerous act while grossly intoxicated should be introduced, the Committee, whilst acknowledging that such a statutory offence would protect the community from criminal conduct by intoxicated people, nonetheless decided against the introduction of such an offence:

> *'to create an offence of committing a dangerous or criminal act while intoxicated is simply legislating against stupidity and that it is punishing people for moral irresponsibility, that is consuming alcohol or drugs, when the real focus of the law should be on punishing people for their breaches of the law..... It would have the potential to encourage plea bargaining and compromise verdicts and consequently to make trials... longer and more complicated'* [23].

The Committee observed that only in very exceptional circumstances had juries in Australia acquitted defendants on grounds of gross intoxication, so the need to introduce such a statutory offence was almost inexistant.

Finally, on the question of whether *O'Connor* should continue to state the law in Victoria, the Committee, after a close examination of the many arguments for and against, concluded that *O'Connor* was 'logical,

[22] ***Report on Criminal Liability for Self-Induced Intoxication***, (above), Para. 6.24.

[23] ***Report on Criminal Liability for Self-Induced Intoxication***, (above), Para. 6.63.

easy to apply and makes good sense'[24]. In reaching this conclusion, the Committee observed, amongst other things, that it perfectly conforms with the fundamental principles of criminal law.

The Law Reform Committee's Report not only received approval from the Parliament of Victoria, but also from the other Australian Common Law jurisdictions. To my knowledge, until the date of the writing of this thesis, the Common Law jurisdictions of Australia have opted not to introduce the Model *Criminal Code Act* provisions on intoxication. *The Queen v. O'Connor*, in fact, continues to represent the law on self-induced intoxication in these jurisdictions.

III.4 CANADA.

Despite gaining Independence from Britain in 1867, British influence is still evident in Canada. Canada's criminal law, in fact, follows British Common Law, with an emphasis on following precedents. The Federal Government, however, has the power to codify

[24] ***Report on Criminal Liability for Self-Induced Intoxication***, (above), Para. 6.95.

laws for peace, order, and good government of the country. Once again it would be interesting to see the extent of British influence on the Canadian notion of intoxication.

In accordance with the English ***Majewski*** tradition, the position in Canada has been that evidence of self-induced intoxication is only relevant to offences of *specific* intent. Following the enactment of the Canadian ***Charter of Human Rights and Freedoms*** in 1982, numerous Canadian legal commentators argued that the exclusion of evidence of intoxication from offences of basic intent constituted an infringement of the *Charter*[25].

This alleged breach of the *Charter* was brought up in 1988 in ***R. v. Bernard*** [26], involving a charge of sexual assault causing bodily harm. Although the Court held that the exclusion of evidence of intoxication from offences of basic intent did not infringe the *Charter*, it suggested that in cases of extreme intoxication *'involving an absence of awareness akin to a state of insanity or automatism'*, evidence of such intoxication

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[25] The arguments were that the exclusion of evidence of intoxication from offences of basic intent constituted an infringement of the fundamental principles of justice which require that a defendant cannot be convicted unless it is proven that he possessed the relevant guilty intention for the offence; and was also in breach of the presumption of innocence of the accused, since it presumed defendant's 'guilt' without even considering his true intention.

[26] (1988) 2 SCR 833.

could be considered in relation to offences of basic intent. Although a few Judges picked the suggestion and admitted such evidence for basic intent offences[27], the principle was far from being settled. In fact, in the 1990 case ***R. v. Penno*** [28], the Judge noted that *'the question is still open as to whether intoxication giving rise to a state of insanity or automatism is a defence to a general intent offence'.*

An authoritative Supreme Court pronouncement on the issue came in 1994, in ***R. v. Daviault*** [29], involving an alcoholic charged with dragging a 65-year-old woman from her wheelchair and sexually assaulting her. Evidence at the trial showed that Daviault had consumed seven or eight beers and an entire bottle of brandy prior to committing the offence. Daviault claimed that not only had he no intention to assault the woman, but had absolutely no recollection of the incident. The judge held that Daviault's intoxication was so gross that he couldn't have formed the required intent, and hence acquitted him. An appeal was lodged on the grounds that the judge should not have considered Daviault's intoxication because sexual assault was an

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[27] Among such cases are: ***R. v. Finlayson*** (1990), o.j. 422 (judgment of the Ontario District Court); ***R. v. Edgar*** (1991), 10 C.R. (4th) 67 (B.C. Prov. Ct.); R. ***v. McIntyre*** (1992), 100 Nfld. & P.E.I.R 144 (P.E.I.S.C.); and ***R. v. Saulnier*** (1992), 110 N.S.R. (2d) 58 (N.S.C.A.).

[28] (1990), 59 C.C.C. (3d) 344 (S.C.C.).

[29] (1994) 3 SCR 63.

offence of basic intent. The Court of Appeal overturned the judgment and convicted Daviault. Daviault, however, appealed to the Supreme Court, which, in turn, reversed the Court of Appeal's conviction and re-acquitted the offender.

The arguments of the Supreme Court were that in terms of the *Charter of Human Rights and Freedoms*, a court could admit evidence of self-induced intoxication even in cases of offences of basic intent, provided that the intoxication is 'extreme' – i.e. akin to automatism or insanity:

> *'...the Charter could be complied with, in crimes requiring only a general intent, if the accused were permitted to establish that, at the time of the offence, he was in a state of extreme intoxication akin to automatism or insanity...'* [30].

As happened with the *Noa Nadruku* case in Australia[31], Daviault's acquittal generated public outrage in Canada, especially because many people viewed the decision as giving intoxicated men an excuse to rape women. Public outrage intensified itself when that same year, in three

[30] Mr. Justice Cory, speaking for the majority of the Supreme Court, in ***R. v. Daviault*** (above), at para. 103.

[31] (above), 157-158.

separate cases, three men were acquitted from charges of assaults on women on grounds of 'extreme' intoxication[32].

Public pressure resulted in a Bill being passed by the House of Commons on the 22nd June 1995 to introduce in the ***Criminal Code*** provisions regarding intoxication. In the opening paragraphs of the Bill, the legislator made it clear that :

> *'people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it.'*

A new section – **Section 33.1** – was inserted in the Criminal Code. This section, which prevails over any other inconsistent principle in Canadian Common Law, provides as follows:

> *' (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)*
>
> *(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or*

[32] The cases were the following: ***R. v. Blair*** (1994), AJ No.807; ***R. v. Theriault*** (published in *'The Ottawa Citizen'* of the 18th November 1994 under the heading: *"Cocaine high lets man beat assault charge".);* and ***R. v. Compton*** (published in *'The Telegraph Journal'* of the 10th November 1994 under the heading: *"Drunk excuse works".)*

> *involuntarily interferes or threatens to interfere with the bodily integrity of another person.*
>
> *(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person. '*

By enacting such legislation, the Canadian Government eliminated the inconsistencies of Common Law on the subject, and tried to strike a balance between the principles of criminal law and human rights, and the Government's obligation to protect the community in general from criminal conduct. As was the case of the similar endeavours by the British House of Lords in *Majewski*, this 'balance' is achieved by 'sacrificing' certain principles of criminal law. The above codification represents the confirmation of the Common Law principles on the subject, as they stood prior to *Daviault*, allowing evidence of intoxication to be considered in relation to offences of specific intent, but not in relation to offences of basic intent. As an additional 'safeguard' in protection of the community, the above-quoted Section introduces a standard of "reasonable care" which all Canadians – including intoxicated ones – are expected to observe.

III.5 NEW ZEALAND.

New Zealand's legal system is also a Common Law one based on the British model, with Judges, more often than not, following the precedents of English Common Law. Until 1975, the law concerning self-induced intoxication in New Zealand was that evidence of intoxication was only relevant to offences requiring a specific intent. In 1975, however, the New Zealand Court of Appeal delivered the landmark ***R. v. Kamipeli*** [33] judgment, which departed from this principle, and which represents the law on the subject till this very date.

In this case, defendant consumed a considerable quantity of beer and on his way home punched and kicked a passer-by who subsequently died. The defendant was charged with murder but pleaded that he was so drunk at the time that he didn't know what he was doing. The Court of Appeal explicitly rejected the principle that evidence of self-induced intoxication was only relevant to offences of

[33] (1975) 2 NZLR 610.

specific intent. The Court, while affirming the principle that drunkenness was not in itself a defence, held that evidence of intoxication should be taken into account in *any* offence in order to determine whether all the elements of that offence have been proved beyond reasonable doubt.

Less than two years after *Kamipeli*, the notorious *Majewski* judgment was delivered by the British House of Lords. Bearing in mind that the precedents of English Common Law are normally followed by the New Zealand Judges, it still remains open for the Court of Appeal to abandon the *Kamipeli* principles for those in *Majewski.* To the date of the writing of this thesis, this has not been done, hence, although the options remain open, *Kamipeli* represents the law on intoxication in New Zealand.

In 1991 came a suggestion from the New Zealand Law Reform Committee to codify the *Kamipeli* principles. In accepting the principles, the Committee was aware of the remote possibility of having intoxicated offenders acquitted by the Courts, but dismissed this preoccupation on the grounds that *'it is very rare indeed for a person to escape liability on this basis'.* Ten years have passed since the Committee's recommendation to codify the *Kamipeli* principles, and, despite not

being yet codified, *Kamipieli* continues to represent the law on intoxication in New Zealand.

III.6 GERMANY.

Just like the other systems of criminal law, in Germany an offence requires voluntariness and capacity. If either of these elements is missing, the offender is not criminally liable. An offender is presumed to have intended and understood the consequences of his actions, which presumption is rebuttable if the accused proves that some constitutive element of criminal liability is missing. Hence, if an accused wants to plead intoxication in his defence, he must show that at the time of committing the offence he lacked the required voluntariness or capacity by reason of such intoxication.

Section 20 of the German ***Penal Code*** provides that:

> *'Whoever upon commission of the act is incapable of appreciating the wrongfulness of the act or acting in accordance with such appreciation due to a pathological emotional disorder, profound consciousness disorder, mental defect or any other serious emotional abnormality, acts without guilt'* [34].

[34] Section 20 of the German ***Penal Code***; Unofficial Translation (from German) supplied by the Federal Ministry of Justice, Germany.

Section 21 of the same Code, in turn, provides that :

> *'If the capacity of the perpetrator to appreciate the wrongfulness of the act or to act in accordance with such appreciation is substantially diminished upon commission of the act due to one of the reasons indicated in Section 20, then the punishment may be mitigated pursuant to Section 49 subsection (1)'.*[35]

Hence total incapacity in terms of Section 20 excludes guilt altogether, whilst diminished capacity in terms of Section 21 renders the guilty offender liable to a mitigated punishment. It follows that an intoxicated offender who can prove to the court that his state of intoxication deprived him of the capacity to appreciate the wrongfulness of his act, will not be held liable for that act. If, on the other-hand, the offender can only prove that such capacity was 'substantially diminished' by reason of the intoxication, the offender is criminally liable, but, upon conviction, receives a mitigated punishment.

German courts have adopted the usage of considering the defendant's Blood-Alcohol Concentration (BAC)[36] when it comes to determining whether his consciousness was seriously impaired or not,

[35] Section 21, German ***Penal Code***.

[36] BAC is a unit of measurement of alcohol in blood, expressed as a percentage of alcohol by weight in volume. Hence a BAC reading of 0.20% denotes that the person in question has 0.20 grams (g) of alcohol per 100 millilitres (ml) of blood.

and to what degree. Naturally, this usage may only be followed where a BAC test is performed on the offender shortly after the commission of the crime. According to the German authors Fischer and Rehm[37], the possibility of reduced liability only arises where the BAC exceeds 0.20%. The authors stress that this is merely a guideline not a rule, and in fact they quote a case where the German Constitutional Court found a defendant with a BAC of 0.254 fully liable for a charge of murder, on the ground that he was accustomed to consuming large quantities of alcohol and that some of his behaviour at the time of committing the offence did not show that his consciousness was seriously impaired[38]. Where a BAC test is available to the courts, this is considered merely as part of the evidence tendered and does not prevail over any other relevant piece of evidence.

Unlike any of the previously-discussed legal systems, the Germans have opted to introduce the 'special' offence of being 'negligently or intentionally intoxicated'. Hence, if a person is charged with a particular crime and is acquitted upon a successful plea of intoxication under Section 20 of the *Penal Code*, that person may still

[37] Fischer, B., Rehm. J.; ***Alcohol Consumption and the Liability of Offenders in the German Criminal System***, (1996).
[38] (above), 712.

face liability for the 'special offence' under **Section 323(a)(1)** of the same Code, which provides that:

> *'Whoever intentionally or negligently get intoxicated with alcoholic beverages or other intoxicants, shall be punished with imprisonment for not more than five years or a fine, if he commits an unlawful act while in this condition and may not be punished because of it because he lacked the capacity to be adjudged guilty due to the intoxication, or this cannot be excluded'.*

The introduction of this Section represents the German alternative to the *Majewski rule*. Whilst the countries which follow the *Majewski* tradition are prepared to 'sacrifice' certain basic principles of criminal liability in the case of offences of basic intent, for the general well-being of the Community, the Germans have 'sacrificed' the important liability principles of capacity and voluntariness *only* in relation to a single offence: that of committing a criminal offence while being negligently or intentionally intoxicated.

The punishing of the deliberate act of intoxication with its harmful consequences even where a defendant would not be liable under the 'normal' conditions of liability, is aimed at protecting the community from harmful conduct of citizens who choose to consume excessive amounts of intoxicating substances. In the words of Fischer and Rehm:

> *'social and utilitarian principles in regard to individual responsibility take priority over legal mechanisms of individual rights, especially in the context of an alteration of the state of consciousness being caused by one's own choices'*[39].

The German 'experiment' of introducing this 'special offence' seems to be yielding fruit. Official statistics for the year 1999[40] show that out of a total of 697,257 cases before German Penal Courts, 4,060 cases involved an alleged breach of Section 323(a). These 4,060 cases resulted in 3,922 convictions and just 138 acquittals. In this scenario it is not surprising that the German Government and many German legal commentators share the view that Section 323(a) presents an adequate compromise between the principles of criminal law and the protection of the German community from criminal conduct of irresponsible individuals.

[39] Fischer, B., Rehm. J.; (above), p.719.

[40] I am most grateful to Dr. Bernhard Böhm, from the German Federal Ministry of Justice, for supplying me with the statistics.

III.7 SWITZERLAND.

The notion of self-induced intoxication in the Swiss ***Penal Code*** is almost identical to that in the German Code. Once again, in Switzerland, voluntariness and capacity are essential requisites for criminal liability, and any factor which negatives either of them also negatives criminal liability. **Article 10** of the Swiss ***Penal Code*** (which is the equivalent of Section 20 of the German counterpart), reads:

> *'Non è punibile colui che, per malattia o debolezza di mente o per grave alterazione della coscienza, non era, nel momento del fatto, capace di valutare il carattere illecito dell'atto o, pur valutandolo, di agire secondo tale valutazione...'* [41]

Whilst total incapacity in terms of this Article excludes guilt altogether, **Article 11** of the same code (like Section 21 of the German counterpart), provides for a mitigation of punishment in the case of diminished capacity :

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[41] **Article 10** of the ***Codice Penale Svizzero*** – the Official Italian Version of the Swiss Penal Code. A rough translation into English would read: *"Not punishable is he who, due to disease or weakness of the mind, or due to a serious consciousness disorder, was not, at the moment of the act, capable of appreciating the wrongfulness of the act or, if he did appreciate such wrongfulness, was not capable of acting in accordance with such appreciation..."*.

> *'Se la sanità mentale o la coscienza dell'imputato era, nel momento del fatto, soltanto turbata o se lo sviluppo mentale dell'imputato era incompleto, cosicchè fosse scemata la sua capacità di valutare il carattere illecito dell'atto o, pur valutandolo, di agire secondo tale valutazione, il giudice può attenuare la pena secondo il suo libero apprezzamento...'* [42]

If a defendant proves to the court that by reason of his self-induced intoxication he acted involuntarily or lacked capacity, that intoxication is a defence and the defendant will be acquitted or have his punishment mitigated. As in the discussed cases of Malta, the Common Law jurisdictions of Australia, New Zealand and Germany, in Switzerland a state of intoxication which negatives the offender's voluntariness or capacity is relevant to all offences, be they of basic intent or of specific intent.

It is interesting to note that **Article 44(1)** of the Swiss *Penal Code* provides that, without prejudice to any other punishment at law, an alcoholic offender may be sent by the judge to a rehabilitative institution for alcoholics. By including this provision, the Swiss

[42] **Article 11** of the ***Codice Penale Svizzero***, (above). A rough translation into English would read: *"If the mental health or consciousness of the defendant was, at the moment of the act, only disturbed, or if the mental development of the defendant was incomplete, so that it diminished his capacity to appreciate the wrongfulness of the act, or his capacity to act in accordance with such appreciation, the judge may mitigate the punishment according to his discretion..."*.

legislator wants to seek the rehabilitation of alcoholics or drug-addicts[43] not only in their own interests, but moreover, in the interests of the community at large.

As an 'additional safeguard' in the public interest, just like the Germans, the Swiss have also opted to make provision for a 'special offence' of committing criminal acts while intoxicated. **Article 263(1)** of the Swiss ***Penal Code*** in fact provides that:

> *'Chiunque, essendo in istato di irresponsabilità a cagione di ebbrezza colposa, prodotta da alcool o da altra intossicazione, commette un fatto represso come crimine o delitto, è punito con la detenzione sino a sei mesi o con la multa'*[44].

The Swiss legislator, like the German, wants to protect the community in general from the harmful conduct of irresponsible individuals who choose to become intoxicated, even if this may be interpreted as a predominance of policy over the strict legal principles of criminal liability. Unlike the countries which distinguish between offences of basic intent and those of specific intent[45], however, the Swiss legislator,

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[43] Although the quoted **Article 44(1)** refers only to alcoholics, **sub-article (6)** of the same article makes the provisions of the entire article applicable also to drug-addicts.

[44] **Article 263(1)** of the ***Codice Penale Svizzero***, (above). A rough translation into English of the quoted Section would read: *"Whoever, while in a state of irresponsibility due to drunkenness, produced negligently by alcohol or other intoxicants, commits a criminal offence, is punished with imprisonment for a term of up to six months or with a fine"*"

[45] Examples of which, as we have seen in this Chapter, include the United Kingdom, the 'Code Jurisdictions' of Australia, and Canada.

like the German, is prepared to 'sacrifice' the strict legal principles of criminal liability *only* in relation to this 'special offence', and not to *all* offences requiring a basic intent.

III.8 THE NETHERLANDS.

Whilst self-induced intoxication may, to varying extents, provide a defence to a criminal charge in all the legal systems discussed so far, this is not quite the case of the Netherlands. The Dutch ***Criminal Code*** does not even contain an express provision on intoxication. **Section 39(1)** of the *Code* deals with people of unsound mind :

> *'A person is not punishable who commits an act which cannot be imputed to him because of defective development or morbid disturbance of his mental faculties'.*[46]

In the Netherlands, even where there is evidence that a defendant's mental faculties are seriously disturbed by reason of self-induced intoxication, that evidence would probably be rejected as a basis for unsound mind on the ground that the defendant's drunkenness was his

[46] Translation taken from the ***Report on Criminal Liability for Self-Induced Intoxication***, Law Reform Committee (Parliament of Victoria, Australia; May 1999, para. 4.30.

own fault. In simple terms, if a person freely consumes drink or drugs to such extent that his mental faculties are seriously disturbed, he can only plead 'unsoundness of mind' under Section 39(1), and the tendency is that such plea will be rejected by the court due to the fact that the 'unsoundness of mind' is self-induced, and hence, contrary to the wording of the Section, it *can* be imputed to the defendant. One of such cases is ***HR***, delivered by the Supreme Court on June 9th 1981. The case involved a man charged with manslaughter. Evidence at the trial showed that the alleged manslaughter was committed while the accused was suffering from *paranoid psychosis*, a mental disorder caused by cocaine abuse. The Supreme Court held that the Court of Appeal was correct when it decided that the accused should be held responsible for all his actions while in such a state of intoxication or insanity, because *he himself was responsible* for the mental disorder.

In theory, the only possibility for intoxication to successfully constitute a defence to a criminal charge in the Dutch penal system is where such intoxication negatives the intent required for the particular offence. In practice, however, the successfulness of such a plea is very remote since Dutch judges have adopted a position similar to that in *HR,* above, and to the Lord Chancellor's in the British *D.P.P. v.*

Majewski,[47] in that they claim that the *mens rea* required is satisfied through defendant's 'fault' in becoming intoxicated in the first place. Hence, rather than *proven*, the *mens rea* in such cases is *presumed*. In this scenario it is very hard to conceive of self-induced intoxication as a 'defence' in the Netherlands.

Finally, unlike Germany and Switzerland, Dutch law makes no provision for a 'special offence' of committing a criminal act while intoxicated. This is understandable because as we have seen above, in the absolute majority of cases, an intoxicated person will still be held fully liable for the offence committed just as if he had been sober.

III.9 ITALY.

In Italy, as a rule, self-induced intoxication is no defence to any criminal charge. This rule is so stringent that it 'sacrifices' part of the theory of criminal liability for the sake of protecting the Italian community from the conduct of voluntarily-intoxicated individuals.

[47] (above), 141.

Criminal liability in the Italian penal system is based on the offender's capacities of understanding and volition. An absence of either of these two capacities, under 'normal' circumstances, would suffice to exclude liability. **Article 85** of the ***Codice Penale*** provides that:

> *'Nessuno può essere punito per un fatto preveduto dalla legge come reato, se, al momento in cui lo ha commesso, non era imputabile. È imputabile chi ha la capacità di intendere e di volere'.*[48]

In the case of intoxication, however, an additional requirement is necessary. Ordinary intoxication, even if it affects the offender's capacities of understanding and volition, is *not* a defence to a criminal charge. **Article 92** of the Italian ***Codice Penale***, in fact provides that:

> *'L'ubriachezza non derivata da caso fortuito o da forza maggiore non esclude ne diminuisce l'imputabilità...'*

This Article, which speaks of 'drunkenness not derived from a fortuitous event or from circumstances beyond one's control'[49] refers to both voluntary as well as to negligent drunkenness. In the words of Francesco Antolisei[50], a negligently-intoxicated person is one who could

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[48] ***Codice Penale***, **Art.85**. A rough translation would read: *'Nobody may be punished for an act which the law considers an offence, if, at the moment of the commission of such act, the person was not subject to liability. Subject to liability is he who has the capacity of understanding and volition'.*

[49] The translation is mine, from **Article 92**, (above).

[50] Antolisei, ***Manuale***, *Parte Generale*, 583-584.

have foreseen that the consumption of the given substance in the given amounts, would make him drunk. In terms of Article 92 above, both voluntary and negligent drunkenness neither exclude nor diminish criminal liability. Although the Article speaks of 'drunkenness' and not 'intoxication', **Article 93** makes it clear that the relevant provisions of the law are also applicable to offenders under the effect of narcotics / drugs.

The Italian Code even goes a step further, and provides for an increase in punishment in cases of offences committed by 'habitual drunkards' or drug-addicts:

> *'Quando il reato è commesso in stato di ubriachezza, e questa è abituale, la pena è aumentata... è considerato ubriaco abituale chi è dedito all'uso di bevande alcooliche e in stato frequente di ubriachezza. L'aggravamento di pena... si applica anche quando il reato è commesso sotto l'azione di sostanze stupefacenti da chi è dedito all'uso di tali sostanze'* [51].

Article 221 of the Code, in similarity with the Swiss counterpart, further provides that upon serving the punishment, the offender may be sent by the Judge, if he deems so appropriate, to a drug or alcohol

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[51] ***Codice Penale***, **Art.94.** A rough translation would read: *'When a criminal offence is committed in a state of drunkenness, and this is habitual, the punishment is increased... a habitual drunkard is he who is addicted to alcoholic beverages and who is frequently in a state of drunkenness. The increase in punishment... is also applicable where the offence is committed by a drug-addict while under the effect of drugs'.*

rehabilitation centre for further rehabilitation. One may therefore deduce that the Italians have given principles of policy prevalence over legal principles in that an intoxicated offender is still criminally liable – moreover, to a greater punishment – even if he lacks the *mens rea* for the offence committed, owing to his voluntarily-contracted intoxication. In the words of Francesco Antolisei, this severity is necessary to rid the Italian people from the 'social scar' of alcoholism[52].

The only possibility for self-induced intoxication to constitute a defence in the Italian penal system, is where it is so extreme that it creates a defect of the mind. **Article 88** of the *Codice Penale* talks about a *complete* defect of the mind, whilst **Article 89** talks about *partial* defect of the mind:

> *'Non è imputabile chi, nel momento in cui ha commesso il fatto, era, per infermità, in tale stato di mente da escludere la capacità di intendere o di volere.'* [53]
>
> *'Chi, nel momento in cui ha commesso il fatto, era, per infermità, in tale stato di mente da scemare grandemente, senza escluderla, la capacità d'intendere o di volere, risponde del reato commesso; ma la pena è diminuita.'* [54]

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[52] Antolisei, ***Manuale***, 583 : *'Il nostro codice, peraltro, nel disciplinare l'ubriachezza si è ispirato a criteri di notevole severità allo scopo di combattere con energia la piaga sociale dell'alcoolismo'.*

[53] ***Codice Penale,* Art.88.** A rough translation would read: *'Not criminally liable is he who, at the moment of committing the offence, was, due to infirmity, in such a state of mind that excludes the capacity of understanding or of volition'.*

[54] ***Codice Penale,* Art.89.** A rough translation would read: *'Who, at the moment of committing the offence, was, due to infirmity, in a mental state that greatly diminishes the capacity of understanding or of volition, without excluding it, is answerable for the offence committed; but the punishment is diminished'*

One of the factors which may potentially create a 'defect of the mind' is extreme intoxication. The *Codice Penale* acknowledges this and, in **Article 95**, specifically provides that in cases of 'chronic intoxication produced by alcohol or drugs, the provisions of Articles 88 and 89 apply. What is of fundamental importance is that the intoxication must be 'chronic'. It does not suffice that the person be drunk, or 'under the effect' of drugs. Many Italian authors define 'chronic intoxication' as intoxication which goes beyond mere 'mental disturbance'. According to Antolisei, it is a 'true collapse of the psyche with profound and definitive mental alterations' [55]. In simple terms, chronic intoxication implies a state very much akin to insanity. Hence, if a person's intoxication (even if voluntarily-contracted) is so severe so as to create a complete defect of the mind, which defect is present at the moment of the commission of the offence, that state of intoxication is a defence and excludes liability. If, on the other-hand, the severity of the intoxication is such that it only creates a partial defect of the mind, it does not exclude liability, but, upon conviction, the offender receives a mitigated punishment. Any other form of voluntarily-contracted intoxication which does not create

[55] Antolisei, ***Manuale***, 587 : *'...un vero sfacelo della psyche con alterazioni mentali profonde e definitive...'*

a defect of the mind in the above parameters is, as we have seen, not only not a defence in the Italian penal system, but an aggravation.

III.10 RECAPITULATIVE REMARKS.

After examining in depth the notion of intoxication in Malta (in Chapter II), and concisely inquiring into some foreign counterparts, it is possible for one to indulge in a critical evaluation and comparative analysis of the notion of intoxication in all the discussed countries. This exercise, unfortunately, I cannot do for reasons of space. In Chapter V, however, I shall be considering various options for reforming the Maltese notion of intoxication, and in the process I shall be referring to, and critically evaluating certain positions adopted in the legal systems discussed in this Chapter.

By way of recapitulation, the table overpage summarises, in a visual form, which of the above-discussed legal systems admit evidence of self-induced intoxication in relation to all criminal offences, and consequently which of them opt to limit such evidence exclusively to offences of specific intent (i.e. in terms of the *Majewski rule*). The

column at the far-right shows whether the country in question has opted to introduce a 'special offence' of committing a criminal offence while voluntarily intoxicated.

Country	**Types of Offences in relation to which Intoxication is Admissible as a Defence**	**'Special Offence' of Intoxication**
United Kingdom	*Specific intent offences only*	*No*
Australia (Common Law States)	*All offences*	*No*
Australia (Code States)	*Specific intent offences only*	*No*
Canada	*Specific intent offences only*	*Indirectly* *
New Zealand	*All offences*	*No*
Germany	*All offences*	*Yes*
Switzerland	*All offences*	*Yes*
The Netherlands	*All offences (but very difficult)*	*No*
Italy	*All offences*	*No*

* i.e. included in Section 33.1 of the Penal Code (See p. 164).

CHAPTER

IV

Intoxication :

Some Basic Psychological and Physiological Considerations.

IV.1 PRELIMINARY CONSIDERATIONS.

In Chapter II, we recall, I opted to refer to the plea of intoxication as a 'mental condition defence' rather than a 'general defence'. Following the study of the notion of intoxication in Maltese criminal law, undertaken in that same chapter, and the subsequent overview of the foreign counterparts considered in Chapter III, it emerges with more clarity that it is not intoxication *per se*, which constitutes a defence to a criminal charge, but particular *mental conditions,* brought about by alcohol, drugs, or other intoxicating substances. It would be beneficial to this study, at this point, to inquire into the nature of such

intoxicating substances, and see how they can affect the human brain to create the 'mental conditions' required by law for a defence of intoxication to succeed.

Besides not being competent to indulge in profound medical and psychological analysis of these substances, such an exercise would be extraneous to the purposes of this thesis. Instead, I have inquired into the *very basics* of alcohol and of some common drugs of abuse to see whether, and/or in what manner, these may affect the brain.

The following overview, it may be noted, is not limited exclusively to the mental effects of the intoxicants under discussion; some external manifestations of the related intoxication are also mentioned. These, as we have seen can be mere *indications* that the person in question is 'under the effect of drink or drugs', they do not, by any means, denote that the person is intoxicated in the manner required by law for the defence to subsist. Likewise, it must be stressed even at such an early stage that different intoxicants may affect different individuals very differently. It is hence scientifically impossible to establish benchmarks which determine, *a priori*, a person's mental state from either his physical appearance, his external conduct, or the amount of intoxicant consumed.

IV.2 ALCOHOL.

The history of alcohol is said to pre-date the history of man. In a book published recently by a leading Canadian medico-legal pharmacologist, it is submitted that:

> *'A giant ancient cloud of alcohol surrounds star G34.3 in the Aquila galaxy, ten thousand light years away. The dense cloud contains enough alcohol to provide twelve thousand liters of whiskey for everyone on earth every day for the next billion years'* [1].

Astronomical considerations apart, alcohol production by *fermentation* may be traced back to the times of the ancient Egyptians, and on a wider scale, to the Chinese about four thousand years ago. The production of alcohol by *distillation*, on the otherhand, was first discovered by Arabian alchemists, who named it *Al Kohl.* Today, the term alcohol encompasses both kinds – i.e. fermentation-produced and distillation-produced alcohol, even though in common parlance we refer to the latter type of alcohol as 'spirit'.

[1] Rockerbie, R.A., ***Alcohol and Drug Intoxication***, Trafford Publishing Service, Canada, (1999), 1.

IV.2 (i) *Short-term effects.*

The effect of alcohol on the human brain has been described as follows:

> *'Alcohol is a cortical depressant. Since it is the higher and most recently evolved brain functions that are first affected by depressants, the immediate effect of a dose of alcohol is to inhibit those cerebral functions that are associated with orderly community behaviour and with fine critical judgments; an illusion of cerebral stimulation is thus precipitated'*[2].

Alcohol in any of the forms mentioned above, is a **central nervous system depressant**. The central nervous system consists of the brain and the spinal cord. In a sober individual of normal mental health, the various integrated regions of the brain constantly interact with each other to provide the individual with a constant 'normal' state of alertness. This interaction between the regions of the brain takes place through a network of fibres known as the *reticular activating system.*

[2] Mason, J.K., ***Forensic Medicine for Lawyers*** (2nd Ed.), Butterworths, London, (1983), 263.

Shortly after being ingested, alcohol is absorbed from the stomach and upper intestine into the circulatory system[3], and is distributed according to tissue water content. The first place that alcohol starts to reach in relatively-high amounts is the brain. This is because the circulatory system constantly pumps vast proportions of blood to the brain to provide it with the high amount of nutrients and energy required for its functioning. It is estimated that under normal circumstances[4], once ingested, alcohol takes only about thirty seconds to start reaching the brain.

Among the most sensitive receptors to alcohol perturbation are the fibres of the reticular activating system, which, as we have seen,

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[3] The rate of absorption is dependant on numerous factors. One of the main factors which *increases* the absorption rate of alcohol is the concentration of alcohol in the stomach: the greater the amount of alcohol, the greater the absorption. Drinking over an empty stomach, therefore, accelerates the absorption rate. Nausea, for example, may lead to an acceleration of gastric emptying and hence to an increased alcohol absorption rate. Most drugs (both pharmaceutical and those of abuse, with the exception of *marijuana*) also have the effect of increasing gastric emptying and hence enhance alcohol absorption. Other factors which accelerate the absorption of alcohol by the body include a high alcohol concentration, elevated body temperature, and drinking during daytime. On the otherhand, factors such as a full stomach, a low alcohol concentration, emotional stress, intense mental activity, reduced body temperature, tobacco, marijuana, and drinking during night-time, *decrease* the absorption rate of alcohol from the stomach into the body.

[4] i.e. in the absence of factors which increase or decrease the absorption rate.

control the interaction between the various regions of the brain. The moment alcohol reaches these brain fibres, the normal healthy interaction between the regions of the brain is disturbed, and the person begins to experience the first signs of 'drunkenness'.

The region of the brain that is affected first by the malfunction of the reticular activating system, is the region commonly referred-to as the *frontal lobe* (see diagram to the right). The mental faculties that operate from this region include those that control judgement,

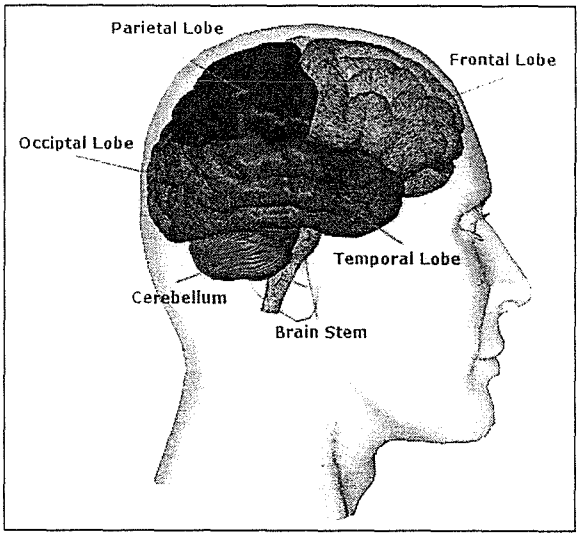

*Diagram courtesy of Robert P. Lehr, Ph.D., Department of Anatomy, School of Medicine, Southern Illinois University; *Traumatic Brain Injury Resource Guide*

reflection, observation, attention, impulses, restraint, and thought processes. As the alcohol concentration in the brain increases, the sensory region of the brain is affected. This sensory region is located partially in the frontal lobe, and partially in the *parietal lobe* or midbrain (see diagram above). Once alcohol affects this region, the person's senses start to weaken. Sensations of touch, pressure, pain, and cold are first affected, followed by the destabilization of the *sensory association area.*

The function of the sensory association area is to put together information that arises from other parts of the brain, and characterizes sensations into shapes, positions, and spatial orientation of objects. The psychomotor area of the parietal lobe is also affected, resulting in the loss of fine motor skills and a slower reaction time. A considerably higher brain alcohol concentration affects the more complex motor function, resulting in muscular incoordination of voluntary movement, i.e. shaking. Alcohol concentration in the *temporal lobe* (see diagram on p.190) results in slurred speech and impaired hearing.

Involuntary movements relating to equilibrium, postural reflexes, and smoothening of complex movements are controlled by the *cerebellum* (see diagram on p.190). High alcohol content in the cerebellum produces gross muscular incoordination, which, in turn, results in constant jerky movement and even total loss of equilibrium.

The next region to be affected is the *occipital lobe* (see diagram on p.190), which controls vision. High alcohol concentration in the occipital lobe results in blurred vision and a poor judgment of distances. According to Rockerbie, although very sensitive tests can detect significant changes in vision at low alcohol concentrations,

practical disturbances may not arise until very high concentrations of alcohol are reached[5].

The area of the central nervous system to be affected last is the *medulla*, or brain stem (see diagram on p.190). A very high alcohol concentration in this area threatens respiration, swallowing, and cardiac activity. Total loss of consciousness (coma) may result, and even death due to cardiac and/or respiratory arrest.

Alcohol concentration in the blood (BAC), as already hinted in Chapter III[6], is most commonly expressed as a percentage of alcohol by weight in a volume of blood. A BAC of 0.1%, for example, denotes a presence of 0.1 grams of alcohol in every 100 millilitres (ml) of blood. It is not possible to scientifically determine the exact state of mind of an intoxicated individual, even if given the exact amount of alcohol ingested, the time-lapse since the ingestion, and all other relevant factors which increase or decrease the absorption rate, as no living organism is identical to another. The way in which a BAC of, let's say, 0.20%, affects Anthony's mental capacities, may be substantially

[5] Rockerbie, R.A., ***Alcohol and Drug Intoxication***, 173.

[6] (above), 169.

different from the way in which the same amount affects Brian's, which may, in turn, be also different from the way it affects Charles's.

It is for this reason that legal systems have refrained from laying down an *a priori* BAC rate which should be reached or exceeded for a state of intoxication to be considered as having affected a person's faculties of understanding and/or volition in such a manner as to diminish or exclude criminal liability. As we have seen in Chapter III, the use of BAC test results before German criminal courts is becoming common, but these results are merely *indicative* and are considered alongside any other relevant piece of evidence. Moreover, the law does not lay down a specific BAC rate which diminishes or excludes liability. We recall Fischer and Rehm's exposition that although a BAC rate of at least 0.20% is generally considered by German courts as being enough to diminish or even exclude liability, people with *higher* BAC rates were, at times, still found to be capable of understanding and volition[7].

Notwithstanding the fact that a particular BAC rate can affect the brain of a person rather differently from the way it affects another's,

[7] (above), 170.

members of the medical professions propose rough indications as to how particular BAC rates are likely to affect the normal[8] human being:

BAC Rate	**Likely Effects on the Normal Average Human Being.**
0.02%-0.03%	No loss of coordination, slight euphoria and lack of shyness. Depressant effects on central nervous system not apparent.
0.04%-0.06%	Feeling of well-being, relaxation, lower inhibitions, sensation of warmth, flushed skin, euphoria. Some minor impairment of reasoning, memory, and judgement may also occur. This state may be referred-to as 'mild intoxication'.
0.07%-0.09%	Slight impairment of balance, speech, vision, reaction time, and hearing. Euphoria. Judgement and self- control are reduced, and reason, memory, and judgement are impaired.
0.10%-0.125%	Significant impairment of motor coordination and loss of good judgement. Speech may be slurred; balance, vision, reaction time and hearing will be impaired. Euphoria. Such a state of intoxication is physically very evident.
0.13%-0.15%	Gross motor impairment and lack of physical control. Blurred vision and major loss of balance. Euphoria is reduced and dysphoria (i.e. anxiety, depression, restlessness) begins to appear.
0.16%-0.20%	Dysphoria predominates, nausea may appear. The drinker has the appearance of a 'sloppy drunk'.

..... / continued

[8] i.e. excluding the presence of factors such as diseases, pathological reaction to alcohol, drug consumption, etc.

BAC Rate	**Likely Effects on the Normal Average Human Being.**
0.25%	Difficulty or inability to stand or walk; total mental confusion. Dysphoria with nausea, incontinence, and vomiting. In the medical field, this stage is considered to be 'extreme intoxication'.
0.30%	Loss of consciousness, incontinence, low body temperature, poor respiration, fall in blood pressure, clammy skin.
0.40%	Onset of coma; possibility of death due to respiratory arrest.
0.40% and up	Death very possible.

Emphasis should once again be made that these are merely *rough* indications, and may vary substantially from one person to another. To illustrate the uncertainty of this type of table, the Professor of Forensic Pathology Bernard Knight writes that in Australia, numerous drunken drivers have been found to have a BAC rate of 0.50% - a concentration which, according to such tables, should have killed the persons in question! Likewise, incredibly enough, people (chronic alcoholics) have survived BAC concentrations of 1.50% [9]

[9] Knight, B., ***Simpson's Forensic Medicine*** (11th Ed.), Arnold, London, (1997), 178.

To get a somewhat more concrete idea of the amount of alcohol involved in the above BAC percentages, one may consider the following: the ingestion of two drinks consumed in rapid succession is likely to produce in the average person a BAC rate of 0.5%; the ingestion of five drinks consumed in a two hour period or less is likely to produce in the average person a BAC rate of 0.10%. Driving a motor vehicle while intoxicated with a BAC rate of 0.08% (or higher) is illegal under Maltese law[10].

Another factor which likewise makes it difficult to establish fixed levels of intoxication which will be deemed, *a priori*, to reduce or totally impair a person's faculties of understanding and volition, is that these two faculties are so complex that they cannot be confined to a single region of the brain, but to the brain in its entirety. As we have seen, there exists a scientific indication as to which areas of the brain are affected by alcohol before others are, but here we are not talking about specific regions of the brain, but of the brain as a whole, comprising of billions of impulses and reactions which ultimately constitute what in common parlance we know as *'knowledge'* and *'will'*. It is easy to say

[10] ***Traffic Regulation Ordinance*** (Chapter 65 of the ***Laws of Malta***), Section 15I.

that a person 'knew' what he was doing, or 'did not know' what he was doing. Likewise it is easy to say that a person 'willed' his action, but the impulses and reactions of the brain which constitute these faculties are more complex than science has thought us so far, and, in my view, even more complex than the human brain itself can ever allow man to understand completely! If there is one organ of the human body which, to date, presents huge dilemmas and mystery to the members of the medical professions, it is precisely the brain.

In the light of all this, as already mentioned in the introductory part of this Chapter, it is simply *impossible* to lay down a universal and certain line of demarcation between where a person is in full capacity of understanding and volition, where such capacities are reduced, and where they are inexistent. In conformity with Fischer and Rehm, the general trend in the German courts, and the opinion of numerous psychologists and toxicologists worldwide, the Canadian medicolegal pharmacologist Rockerbie too is of the opinion that for an average person's faculties of understanding and volition to be affected in a manner so as to amount to legal incapacity, under normal circumstances, a presence of at least 0.20% BAC is required[11].

[11] Rockerbie, R.A., ***Alcohol and Drug Intoxication***, 189.

Such types of lists and opinions of medical professionals are undoubtedly helpful to say the least, but the fact remains that these are indicative and not based on scientific certainty. In the absence of BAC test culture under Maltese law[12], Maltese courts, as we have seen, still opt to get an indication of the accused's mental state at the moment of committing the offence, either by considering, from the evidence produced, the offender's conduct before, during, and subsequent to the commission of the offence; or by appointing experts to inquire into and give their opinion as to what *could have been* the accused's mental state at the time. Just as in the case of BAC tests, neither of these two methods yields scientific certainty as to the exact mental state of the offender at the moment of committing the offence, so it ultimately rests upon the Magistrate's, jury's, or Judge's moral conviction, after considering *all* the evidence, to see whether the accused before him/her/them lacks any of the requisites for criminal liability according to law.

[12] The practice of performing such tests on criminal offenders is inexistent in Mata, with the exception, as we have seen, of offences under the ***Traffic Regulation Ordinance***.

IV.2 (ii) *Long-term effects / concept of 'disease of the mind'.*

Persistent excessive consumption of alcohol can lead to various medical complications, and this is a scientific *fact.* It is today common knowledge that excessive drinking may cause liver cancer, high blood pressure, and inflammation of the stomach (gastritis), among a myriad of other medical conditions. What is perhaps not known to many is the fact that *alcoholism* in itself (i.e. irrespective of ulterior medical complications) is considered by the World Health Organisation as a mental illness[13]. Likewise, both the American Medical Association's ***Standard Nomenclature of Diseases and Operations*** (1961), and the American Psychiatric Association's ***Diagnostic and Statistical Manual*** (1968), include various forms of acute alcohol intoxication in the sections relating to metal illnesses. 'Alcoholics' are defined by the World Health Organisation as:

> *'those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable mental disturbance or an interference with their bodily and mental health, their interpersonal relationships and their smooth social and economic functioning; or who show prodromal signs of such developments'.*[14]

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[13] ***International Classification of Diseases*** (9th Revision), World Health Organisation, Geneva, (1977). 'Chronic alcoholic brain syndrome', in fact, is classified under the heading *'Alcoholic psychoses'.*

[14] Moser, J., ***WHO and Alcoholism***, in Caruana, S., ***Notes on Alcohol and Alcoholism***, Medical Council on Alcoholism, London, (1975), 165.

According to R.D. Mackay, however, the view that alcoholism is a mental illness, seems to be losing its popularity[15]. Mackay refers to Fingarette, who describes this view as a 'great myth' that is unsupported by scientific evidence[16].

In reality, the debate as to whether the World Health Organisation and the Medical/Psychiatric associations are right, or whether Fingarette and some other writers are right, should be of little or no concern to us. The reason is that for the purposes of Maltese law on intoxication, it is irrelevant if drunkenness is *per se* a disease or not. What is very relevant, though, as we have seen in Chapter II, is whether drunkenness (and drug addiction) can *produce* a state of insanity or not.

In simple terms, even if we had to agree with Fingarette that alcoholism and drug-addiction are not, *in themselves*, mental diseases; as long as they may *give rise* to a state of insanity as required by Maltese law, the Criminal Code provisions on intoxication remain unaffected. As we have seen in Chapter II, in essence, a defence under

[15] Mackay, R.D., ***Mental Condition Defences in the Criminal Law***, Clarendon Press, Oxford, (1995), 146.

[16] Fingarette, H., ***Heavy Drinking – The Myth of Alcoholism as a Disease***, University of California Press, USA, (1988).

Section 34(1)(b) is a defence of *insanity* and not of *intoxication* or *'alcoholism'*. Besides, what is of fundamental importance for the purposes of this provision of the Code is that there is a general consensus among the various coteries within the medical profession, that the persistent excessive consumption of alcohol and drugs may, in fact, produce a state of insanity.

In a publication by the British Medical Association, the *'long-term effects and risks'* of alcohol consumption are described as follows:

> *'Heavy drinkers risk developing liver diseases, for example, alcoholic hepatitis, liver cancer, cirrhosis, or fatty liver (excess fat deposits that may lead to cirrhosis). High blood pressure and strokes may also result from heavy drinking. Inflammation of the stomach (gastritis) and peptic ulcers are more common in alcoholics, who also have a higher than average risk of developing dementia (irreversible mental deterioration)'*[17].

We have seen in Chapter I that as early as the first half of the nineteenth century, British courts were already acknowledging the medical/psychiatric view that intoxication *could* in fact produce a state

[17] Henry, J.A. (Ed.), ***The British Medical Assooiation New Guide to Medicines and Drugs***, The British Medical Association, Dorling Kindersley, London, (1998), 441. (The underlining in the quotation is mine).

of insanity[18]. As the American authors Tiffany and Tiffany rightly point out when commenting on the British notion of intoxication:

> *'the common law had a well recognized rule that "fixed" insanity, even resulting from long, continued use of alcohol, could be treated by the jury as insanity. This evidently was no more than recognition that long-term alcohol abuse can lead to brain damage sufficient to constitute legal insanity. "Habitual use of alcohol or drugs can result in permanent damage to the brain in the form of an 'organic brain syndrome' or 'organic mental disorder'". Courts would permit the use of this rule to establish the defense of legal insanity...'* [19].

As we have seen in Chapter II, although to the date of the writing of this thesis, the plea of insanity caused by intoxication has only been raised on a single occasion before the Maltese courts, in terms of Section 34(2)(b) of the Criminal Code, this form of insanity continues to be recognized by Maltese penal law, as it does by the penal laws of many other countries, including most of those discussed in Chapter III.

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[18] (above), 39 *et. seq.* (See in particular the ***R. v. Davis*** judgment discussed on p.40).

[19] Tiffany, L.P.; Tiffany, M., ***The Legal Defense of Pathological Intoxication with related issues of Temporary and Self-Inflicted Insanity***, Quorum Books, New York, (1990), 228.

IV.3 DRUGS.

If alcohol is a 'phenomenon' with ancient origins, drugs are not much different either: as far back as history can be traced, including Egyptian hieroglyphics, there are references to medicinal drugs recommended for various ailments. As man gradually began to understand drugs better, he discovered that these contain certain properties which produce a feeling of well-being, even if taken by individuals suffering from no illness. Hence began the phenomenon of 'drug abuse', which, ironically enough, today is responsible for the death of thousands of people each year. In the 3rd National Outlook Symposium on Crime in Australia that took place in March 1999, the following comment was reportedly made:

> *'human kind is a drug taking species, and such historical examples as the use of wine and incense in biblical times; South American tribes chewing cocoa leaves, Pacific Islanders drinking kava; and the American Indian smoking tobacco are all testament to this assertion'* [20].

[20] ***Report on Criminal Liability for Self-Induced Intoxication***, Law Reform Committee (Parliament of Victoria, Australia; May 1999; para. 5.1.

The drug abuse problem as we know it today, however, began in the early 1960's, with the spirit of liberation that these brought about. One of the many forms of manifestation of this 'liberation' was the consumption of drugs, or 'going on chemical holidays'. Dangerous drugs began to be used for recreational purposes, and, as Rockerbie points out, *'were given such seemingly harmless loving names as snowbirds, hearts, and rainbows'* [21].

The so-called 'drugs of abuse' may be classified into three main groups :

- Central nervous system depressants;
- Central nervous system stimulants;
- Hallucinogens;

(a) Central nervous system depressants.

Drugs which fall within this group include heroin, morphine, methadone, opium, and the barbiturates. The effects of these substances on the brain are very similar to those of alcohol, alcohol

[21] Rockerbie, R.A., ***Alcohol and Drug Intoxication***, 265.

being itself, as we have seen, a central nervous system depressant. We recall from the above discussion that these forms of depressants are responsible, *inter alia*, for the disruption of the coordination between the various regions of the brain, and, eventually, to a mental confusion of such an intensity that may even lead to unconsciousness and death.

(b) Central nervous system stimulants.

The most common drugs of abuse which fall within this group are cocaine, ecstasy, and amphetamines. The effects of these substances are euphoria, stimulation, reduced fatigue, loquacity (i.e. talkativeness), sexual stimulation, alertness, and increased mental ability. Large doses produce agitation, anxiety, paranoia and hallucinations. Paranoia may cause violent behaviour. The excessive and regular use of cocaine or amphetamines increases paranoia and may lead to psychosis – i.e. a serious mental disorder. Ecstasy, for example, was found to destroy a structural component (*serotonin transporter*) of nerve cells in the brain (*serotonin neurons*), causing damage to the brain itself and promoting mental illnesses. According to the British Medical Association, not only have psychiatric illnesses been reported among ecstasy users, but such

users have an increased likelihood of developing depression even *years* after stopping the drug[22].

(c) Hallucinogens.

The most common hallucinatory drugs of abuse are LSD and cannabis/marijuana. Hallucinogens contain both stimulant and depressant substances; hence any of the effects considered in the above two categories is possible in a user of hallucinogens. Initial effects of LSD, for example, include restlessness, dizziness, a feeling of coldness with shivering, and an uncontrollable desire to laugh. As more of the substance reaches the brain, a person may experience loss of emotional control, unpleasant or terrifying hallucinations, and overwhelming feelings of anxiety, despair or panic. Cases of attempted are not infrequent among habitual LSD users. The British Medical Association even claims that some people under the influence of this drug have jumped off high buildings, mistakenly believing they could fly.[23] According to the same Association, the long-term use of LSD may lead to psychological difficulties, mental disturbances and even permanent

[22] Henry, J.A. (Ed.), ***The British Medical Association New Guide to Medicines and Drugs***, 444.
[23] Henry, J.A. (Ed.), ***The British Medical Association New Guide to Medicines and Drugs***, 446.

mental illness (psychosis)[24]. The effects of cannabis are deemed to be much milder than those of LSD. In small doses, the drug promotes a feeling of relaxation and well-being, enhances auditory and visual perception, and increases talkativeness. Short-term memory loss may result, as well as mild mental confusion. Although hallucinations may occur, these are indeed rare. The British Medical Association even claims that in some individuals, the drug may have little or no effect at all[25]. Although the long-term use of this drug (especially if smoked) may produce serious physical illnesses, such as bronchitis and lung cancer, there is, as yet, no medical evidence of permanent psychiatric illnesses, despite *temporary* psychiatric disturbances being recorded in very heavy users of the drug.

IV.4 CONCLUDING REMARKS.

In conclusion to this basic overview of some of the psychological and physiological effects of alcohol and drugs, I feel it imperative, for the purposes of this thesis, to outline a single consideration which is of

[24] (above).
[25] (above).

fundamental relevance to intoxication as conceived in Maltese criminal law: there is not a single drug (alcohol included) which is proven to produce a *particular*, *specific*, mental situation in a *given person.* Science may guide us as to which intoxicants (and in what doses and length of use) *may* affect the human brain; as to which intoxicants *may* produce a temporary or permanent mental illness; but the *certainty* which would prove so useful in criminal trials remains in the realms of wishful thinking.

If Anthony has been consuming a particular, specific, drug for a particular, specific period of time, it does *not* necessarily mean that his mental faculties are somewhat affected. If, through the said consumption of the drug, Anthony's mental faculties *are* in fact affected, it does not necessarily mean that his faculties of *understanding* and *volition* are affected. Further, if Anthony's faculties of understanding and volition *are* in fact affected, it does not necessarily mean that they *were* affected *at the time of the commission of the offence* and *in the manner required by law.* The mental state of an offender at the moment of committing an offence can *only* be determined through the opinion of competent experts and the totality of the evidence *in each particular case*, and not through *a priori* assumptions, presumptions and calculations.

CHAPTER V

Intoxication : Proposals for Reform

As stated in the very preliminaries of this thesis[1], this work does not attempt to formulate miraculous solutions for a legal dilemma which has existed for centuries. In Britain alone – the source of our notion – the defence of intoxication has been the subject of rigorous debate at least since the year 1551[2], not to mention the continuous debate among jurists, lawyers, and coteries of legal commentators world-wide. This work has attempted an examination of the Maltese ***Criminal Code*** provisions on intoxication, and an inquiry into how the same notion is conceived in a variety of legal systems (i.e. legal systems with diverse criminal law traditions). Such an exercise has led me to identify a number of issues which, in my view, deserve further comment and consideration, especially if one is to recommend certain reforms.

[1] (above), 2.
[2] (above), 30.

Being a relatively-recent section in our Code, section 34 has never been substantively amended, apart from the 1956 Amendments relating to the issue of 'insanity', rather than to intoxication *per se*[3]. It also appears that this provision will remain unaltered with the advent of the proposed extensive amendments to the ***Criminal Code*** due later this year or early in the next. The fact must however be acknowledged that the existing provisions of section 34, and, moreover, the way these have been interpreted and applied by our courts, have invariably yielded equitable results in the interests of justice; and, to date, have never resulted in debatable acquittals (or convictions), as certain counterparts have[4]. With the substantial increase in alcoholism and the dramatic increase in drug abuse[5], however, it is to be expected that in the years to come, the defence under section 34 will be pleaded before our criminal courts much more often than it has been so far. For this reason, it would be appropriate to consider various options for reforming the existing provisions, to keep them up to date with the needs of the ever-changing society.

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[3] (above), 56 *et.seq.*

[4] See in particular the Australian ***Nadruku case*** (above), 157-8; and the Canadian Supreme Court judgment in ***R. v. Daviault*** (above), 162-3.

[5] See p.26 *et.seq.*

V.1 RECONCILING PRINCIPLE AND POLICY.

As we have seen, the debatable issue, and the dilemmas concerning the defence of intoxication, are not few. Yet these have a common lynchpin: the reconciliation of criminal law principles with those of public policy. Little are the socio–legal problems associate with the so-called 'accidental' intoxication, as in such cases it is generally accepted, both legally and socially, that the person in question was not *at fault* neither in committing the offence, nor in becoming intoxicated in the first place. The voluntarily-intoxicated offender, however, has an extremely critical *locus standi* on the borderline between principles of criminal law, and public policy. The reason is simple: the basic principles of criminal law instruct that no person is to be held liable of an offence, unless this is accompanied by a 'guilty mind' (required generally, and, in some cases, by specific definition of the said offence) on the part of the offender. On the otherhand, the public interest inevitably requires the protection from harmful or 'criminal' behaviour of individuals who are irresponsible enough to consume intoxicating substances, to the prejudice of not only their own health, but of the general well-being of society.

The Maltese ***Criminal Code*** provisions concerning the voluntarily-intoxicated offender[6], are based entirely on *principle* not on policy. Although, as we have seen, our law contains no *express* provisions on 'voluntary' or 'self-induced' intoxication, such an intoxicated offender may, depending on the extent of the intoxication, plead a defence under two subsections of section 34: subsection (2)(b), and subsection (4). For a voluntarily-intoxicated offender to plead a defence under section subsection 2(b), the intoxication must be of such an intensity to have actually *diseased* the offender's mind. As long as the voluntarily-intoxicated offender can prove that *at the time of committing the offence*, his brain was diseased in a manner to impair the functioning of his capacities of understanding or volition, he will not be held criminally responsible. Yet, as we have seen[7], such a person will not be discharged, but will be sent to a hospital for the mentally disabled 'there to remain in custody and detained according to the provisions of Part IV of the Mental Health Act'[8].

[6] (above), 105 *et.seq.*

[7] (above), 119 *et.seq.*

[8] **Section 623** of the ***Criminal Code***; (above), 120.

A much more 'appealing' defence to the voluntary-intoxicated offender would hence be that under subsection (4). This defence is easier to prove (all that the accused has to prove is that at the moment of committing the offence, he was, by way of intoxication, incapable of forming the required intent), and moreover, its successfulness results in an acquittal. Although, as we have seen[9], our courts have been extremely cautious in the application of this subsection, the fact remains that a voluntarily-intoxicated person may emerge 'scot-free' from the commission of a criminal offence, even if it is a serious one[10]. This may create an uneasy feeling among the general public, that a drug/alcohol abuser is, after all, really a privileged offender. In this scenario, I would personally consider two main points for debate and possible reform:

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[9] (above), 130-1.

[10] The irony in this issue is that it is easier for such an offender to escape liability for more serious crimes than for less serious ones! The reason is that most serious crimes, such as wilful homicide, require a *specific* intent, which can be impaired more easily by intoxication than the *generic* intent. Hence, at the most, the voluntarily-intoxicated offender may find himself facing responsibility for a 'less serious' charge than the one actually committed. By means of an example, if the case is one of wilful homicide, if the offender proves that he was unable to form the required specific intent, at most, he can be found guilty of the generic intent offence of causing grievous bodily harm from which death ensues (which attracts a milder punishment than wilful homicide). Now, if the same offender proves that, owing to his intoxication, even if voluntarily-contracted, he was incapable of forming even a basic intent, he could be *acquitted* !

1. The position of the voluntarily-intoxicated offender *vis-à-vis* the defence under section 34(4); and

2. The position of the voluntarily-intoxicated offender *vis-à-vis* the defence under section 34(2)(b), when the insanity is only a *temporary* one.

V.1 (i) *The voluntarily-intoxicated offender and intent.*

Whilst many legal systems, like ours, do not contain express provisions concerning the voluntarily-intoxicated offender, and hence, do not hold him criminally liable if the requisites for liability are missing, other systems have adopted either of three approaches in the interests of the community at large:

- Applying the *fault-liability* principle in respect of offences of *basic* intent; or

- Applying the *fault-liability* principle in respect of *all* offences; or

- Enacting a special offence of *'committing a criminal offence while voluntarily intoxicated'*

Having, in my researches, and in this work itself, observed and evaluated each of the above approaches, I am very strongly in favour of the third approach, and would recommend reform in our law in that respect. The first approach, favoured in countries such as England[11], Canada[12], and the 'code states' of Australia[13], may be highly criticized on various aspects. These criticisms were amply highlighted in the foregoing Chapters of this study, so one need not repeat. To refresh one's memory, however, the main criticisms were that such a distinction between offences creates confusion and inconsistency, may encourage plea-bargaining, and runs counter to the principle of criminal liability that a criminal offence must necessarily be accompanied by *mens rea*. The fact that a person is *at fault* in consuming drugs and/or alcohol, does not in any way mean that that person has the required *mens rea*, or has the required *intent* for the offence committed. To substitute the *mens rea* requirement with what I

[11] (above), 139 *et.seq.*
[12] (above), 160 *et.seq*
[13] (above), 156.

have earlier termed as *'pre-contracted fault'*, is, in my view, and in the view of many legal commentators world-wide, unacceptable. It is even more unacceptable when made applicable to a whole range of offences – i.e. all basic intent offences. Besides, even if one were to accept the doctrine of fault-liability, it would be highly debatable on what grounds such liability would be applicable to offences of basic intent and not also to those of specific intent. If the intent *for the offence* is missing in *both* types of offences, and is substituted by fault-liability in the case of basic-intent offences, why is it not likewise substituted also in the case of specific-intent offences? The legal anomalies or, as has been said, absurdities[14], surrounding this approach are many.

The second approach, favoured in countries such as the Netherlands[15], and, I was recently informed, Scotland, may be criticized on the same grounds, except, obviously for the last-mentioned ground, as in this case fault-liability is advocated in respect of *both* types of offences. In my view, such a system would represent an unnecessary complete departure from the principles of criminal liability.

[14] (above), 158.

[15] (above), 176 *et.seq.*

As already stated, the third approach, adopted in legal systems such as the German[16] and the Swiss[17], is, in my view, the most plausible. The Germans, we recall, have enacted the following 'special' provision in their *Penal Code* :

> *'Whoever intentionally or negligently get intoxicated with alcoholic beverages or other intoxicants, shall be punished with imprisonment for not more than five years or a fine, if he commits an unlawful act while in this condition and may not be punished because of it because he lacked the capacity to be adjudged guilty due to the intoxication, or this cannot be excluded'.*[18]

The Swiss have likewise enacted the following :

> *'Chiunque, essendo in istato di irresponsabilità a cagione di ebbrezza colposa, prodotta da alcool o da altra intossicazione, commette un fatto represso come crimine o delitto, è punito con la detenzione sino a sei mesi o con la multa'* [19]

What these provisions are saying is that if a voluntarily-intoxicated offender (or an offender who became intoxicated through his own negligence)commits a criminal offence but cannot be held liable for that offence on account that he lacks the required *mens rea*, the required

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[16] (above), 168 *et.seq.*

[17] (above), 173 *et.seq.*

[18] German ***Penal Code*, section 323(a)(1)**; (above), 171.

[19] Swiss ***Penal Code*, section 263(1)**; (above), 175.

intent, that person will be liable for the 'special' offence of committing a criminal offence while voluntarily or negligently intoxicated. This approach is much less criticisable than the former ones, because in this case, the fault-liability principle is the *exception* not the rule. In simple terms, the special offence of 'committing a criminal offence while voluntarily or negligently intoxicated' would be the *only* exception to the rule that the *mens rea* for the offence must exist, and must exist at the moment of commission of the offence. Although, admittedly, people who 'love the principles of law' would also criticise this approach, on account that it *does* go counter to the principles of criminal liability, in my view, there is ample justification for the creation of this sole exception. As has been stressed throughout this thesis, the main dilemma on intoxication is how to strike a balance between principle and policy. Granting principles of policy precedence over principles of law is simply unacceptable. Likewise, however, if one is to apply in the most strict manner the principles of liability, this would create the most unjust situation of literally rendering drug/alcohol abusers *privileged offenders* before the law. To avoid such injustice and social problem, the British, Canadians, and certain Australians are willing to 'sacrifice' part of the principles of criminal liability in respect of all *basic intent* offences when it comes to voluntary intoxication; the Dutch are willing to sacrifice part of such principles in respect of *all offences*; whilst the Germans and the

Swiss can get the same results by sacrificing part of such principles *only in respect of a single offence* !

In my view, this third approach represents an adequate reconciliation between principles and policy. I would hence recommend the enactment of a similar provision in the Maltese ***Criminal Code***, so that the voluntarily-intoxicated offender who successfully pleads the defence under section 34(4), will not go away 'scot-free', but will face liability for this special offence. An interesting point to consider, however, is the difference in the maximum punishment for such an offence in Germany and Switzerland. While both provisions provide for the fining of the individual, the maximum term of imprisonment upon conviction for this special offence is *five years* in Germany, and *six months* in Switzerland. Considering that a voluntarily-intoxicated person may, by reason of his irresponsibility, escape punishment for the most serious of crimes, under section 34(4), it is only appropriate that if a similar 'special offence' is introduced in our Code, the punishments applicable to this offence would be proportionate to those of the 'original' offence committed. In this respect, I find a *maximum* term of five years' imprisonment to be appropriate. Alternatively, one may consider not establishing a punishment *per se* for this special offence, but making such punishment as a percentage/fraction of the

punishment under the 'original' offence. By means of an example, if this fraction is set at, let's say $^1/_3$ of the punishment applicable for the 'original' offence; and Anthony, while voluntarily-intoxicated, commits rape (which offence carries a term of imprisonment from three to nine years[20]); if, on account of his voluntarily-contracted incapacity Anthony 'escapes' criminal liability for that offence, and the provisions of this 'special offence' are invoked, the respective punishment range for the latter offence would be one to three years.

V.1 (ii) *The offender who is temporarily insane at the moment of committing an offence.*

On page 119 *et.seq.* we have seen that, in terms of section 34(3), if an offender successfully pleads insanity induced by intoxication under section 34(2)(b), he is not acquitted but sent to a hospital for a mentally disabled. Section 34(2)(b) admits intoxicant-induced insanity as a defence even if it is temporary. What I have termed as a 'shortcoming'[21] of our law is that no provision is made to regulate the position of the intoxicated offender who was *temporarily* insane at the

[20] ***Criminal Code*, section 198.**

[21] (above), 120.

moment of committing the offence, but who gained his full mental capacities by the time of the trial. Since at the moment of committing the offence, the offender was insane according to law, he *cannot* be held criminally liable for it [subsection (2)(b)], and has to be sent to a hospital for the mentally disabled [subsection (3)]. Although there is, as yet, no case-law on the matter, I opined that in such a case the Judge would probably discharge the offender on account that it would not make sense to send to a mental hospital a person with full control of his mental faculties.

Such a decision, once again, might be viewed as granting the voluntarily-intoxicated offender some privilege to escape liability. Once again, if the (temporary) insanity was self-contracted, it is only appropriate that the offender does not escape liability completely. In view of this, I would recommend that the 'special offence' of 'committing a criminal offence while voluntarily or negligently intoxicated', discussed above, be extended to cover instances of voluntarily-intoxicated offenders who were insane at the moment of committing the offence, but who are sane at the time of the trial.

V.2 ANCILLARY CONSIDERATIONS AND RECOMMENDATIONS.

V.2 (i) *Intoxication caused without the offender's consent by the malicious or negligent act of another person.*

In terms of section 34(2)(a), intoxication shall constitute a defence to a criminal charge if, by reason thereof, 'the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person...'. As specified earlier[22], I would recommend that the words *'without his consent'* be substituted by the words: *'without his knowledge'*. The reason, as explained earlier, is that a person may *know* that he is being intoxicated, and, despite not expressly consenting, nonetheless does nothing to prevent the intoxication. In my view such a person should not be able to 'escape' liability.

[22] (above), 91-92.

V.2 (ii) *Diminished Responsibility.*

For a person to successfully plead the defence under section 34(2)(a), besides being caused without the offender's consent by another person, the intoxication must be *complete* – i.e. it must render the offender incapable of understanding or volition. A debatable issue is whether our Code should provide for *diminished responsibility* in a case where, as a result of intoxication induced by *another person*, an offender's mental capacities are seriously disturbed but not altogether disrupted. At present, the defence which such an offender may raise, is that under section 34(4). If the court finds that the accused was unable to form the intent for the offence charged with, it will *discharge* him. On the contrary, if one were to consider the doctrine of *diminished responsibility*, if it is found that such an offender was unable to form the required intent for the offence charged, but was nonetheless not totally incapable of understanding or volition, such an offender would not be discharged, but would receive a mitigated punishment.

V.2 (iii) *Pathological Intoxication.*

Although, in foreign countries, there is an increasing lobby to introduce this form of intoxication or 'medical condition' as a defence, as, for example, in the ***Model Penal Code*** of the United States[23], it is, in my view, not recommendable to specifically introduce provisions on the matter in the Maltese ***Criminal Code***. The reason is simple: if such a condition affects the offender's mind in a manner that it precludes him from forming the necessary intent for the offence charged, a defence may be sustained under the existing provisions of section 34(4). If this medical condition will, in the near or distant future, be officially recognized as a mental disease by the competent medical/psychiatric authorities, a defence under the existing provisions of section 34(2)(b) could be sustained.

[23] (above), 132 *et. seq.*

V.2 (iv) *Dutch Courage.*

Although one can presume almost with certainty that the Maltese courts would not accept 'Dutch courage' as a defence under section 34(4), there is no express provision to that effect. *In theory*, therefore, if a person voluntarily consumes drugs and/or alcohol with the purpose of facilitating the commission of a crime, but, at the moment of committing the said crime, he lacks the required intent, he may plead a defence under subsection (4). Once again, although our courts are most likely to reject such a plea, it would be recommendable that express provisions be enacted to this effect. In my view, not only should Dutch courage not be a defence to a criminal charge, but it should be an ***aggravation*** of the offence committed. In the Italian ***Penal Code***, for example, express provision is made to the effect that a person who becomes intoxicated in an attempt to facilitate the commission of a crime, or in an attempt to constitute a defence for the crime committed, would be liable to an increase in punishment:

> *'... se l'ubriachezza era preordinata al fine di commettere il reato, o di prepararsi una scusa, la pena è aumentata'.*[24]

[24] *Codice Penale*, Art.92.

In my view, the enactment of provisions in the Maltese ***Criminal Code*** on the same lines would be recommendable.

V.2 (v) *Definition of Intoxication.*

Although, as we have seen[25], section 34(5) is not restrictive in its definition of 'intoxication', it would be recommendable, for reasons specified in Chapter II, that the phrase: *'"intoxication" shall be deemed to include a state produced by narcotics or drugs',* be amended to read something on the lines of: *'for the purposes of this section, "intoxication" shall include a state produced by alcohol, drugs, or any other substance which may affect a person's faculties of understanding or volition.'*

V.2 (vi) *Compulsory Rehabilitation.*

As we have seen in Chapter III, certain legal systems such as the Swiss[26] and the Italian[27] provide that if a drug-addict or alcoholic

[25] (above), 134-136.
[26] (above), 174-175.
[27] (above), 180-181.

commits an offence while intoxicated, and is convicted; upon serving the punishment, the Judge may, if he deems so appropriate, send that person to a drug or alcohol rehabilitation institution for rehabilitation. In my view, and in the view of many doctors, psychiatrists, and people directly involved in the running of rehabilitative institutions, such provisions are not recommendable, as the rehabilitation from such vices requires strong will-power and not coercion.

V.2 (vii) *Blood-Alcohol Concentration (BAC) Tests.*

Although this is strictly a matter of procedure in the compilation of evidence by the Police, and not a matter of substantive law, one may still give it a mention. As we have seen in Chapter III[28], the German courts have adopted the usage of considering BAC test results as a *rough indication* as to what could have been the state of mind of the accused at the moment of committing the offence. Although in Malta, BAC (and breathalyser) tests are provided for under the ***Traffic Regulation Ordinance*** for offences relating to traffic[29], one might perhaps consider the idea of taking BAC tests of persons suspected of

[28] (above), 169-170.
[29] (above), 198.

having committed *any* criminal offence, if there is suspicion that such persons were intoxicated at the moment of committing the offence. Although a BAC test, as amply stressed in Chapter IV, is not a means of determining an offender's state of mind, it may prove *helpful* to a court, alongside other evidence, in determining, in the first place whether the accused was really intoxicated at the time of committing the offence, and it may also be *indicative* as to the possible state of mind of the offender. Let us consider a simple example:

> Anthony commits an offence and is apprehended soon afterwards. The Police suspect intoxication and perform a BAC test. If at the trial he pleads that at the time of committing the offence he was incapable of understanding and volition, but the BAC test result shows that only very little amount of alcohol was present in his body soon after the offence was committed, the court would have an additional reason, an additional piece of evidence, in favour of rejecting the plea[30].

This is obviously a procedural issue which, if done, should be done by the Police. It will obviously only apply to cases where the alleged

[30] The converse obviously applies: if the BAC result shows a high blood-alcohol content, the Court may have an additional reason to accept the accused's plea.

offender is apprehended soon after having committed the offence, as the blood-alcohol concentration decreases with the lapse of time. Notwithstanding their inaccuracy, and the various legal issues involved[31], BAC tests may prove *helpful* to criminal courts in their quest for establishing the truth, and hence, in the interests of justice.

V.3 THE *'PRIVILEGED OFFENDER'*.....

Just as all the above issues are subject to debate, so is my questioning of whether a drug/alcohol abuser is somewhat 'privileged' in criminal law. The term 'criminal law' itself is relative: is one going to consider whether a drug/alcohol abuser is a 'privileged offender' in criminal law in general, or is one going to inquire into whether such an abuser enjoys certain 'privileges' in the criminal law of a particular country? My examination of the notion of intoxication in Maltese criminal law, and the subsequent overview of the same notion in legal systems with different traditions, may hopefully place the reader in a better position to appreciate the legal principles, complexities, and

[31] An interesting legal issue would be: can the Police force a BAC test on an individual?. The reply would probably be in the negative, as the offender's consent would be required. But if the offender is *completely* intoxicated and gives his consent, is such consent a *valid* consent?

dilemmas involved, and to decide for himself whether in each of these systems, and in 'criminal law' in general, a drug or alcohol abuser indeed enjoys some 'privilege' over the sober individual.

The debate continues.....

APPENDIX — The 'Model Provision' on Intoxication Supplied by the British Colonial Office.

Enclosure 2 in Circular despatch dated 7th September, 1934

NOTE OF AUTHORITIES

General rule of law	(Intoxication, at the time of the commission (of a crime, shall not constitute a defence (to any criminal charge.
R.v.Pearson (1835) 2 Lew.C.C.144	(Nothing is an offence which is done by a (person who, at the time of doing it, is, by (reason of intoxication, incapable of knowing (the nature of the act, or that he is doing (what is either wrong or contrary to law: (provided that the thing which intoxicated (him was administered to him without his (knowledge or against his will.
R.v.Cruse (1838) 8 C. and P.541 R.v.Doherty (1861) 16 Cox 309 R.v.Meade (1909) 1 K.B.895 D.P.P.v.Beard (1920) 14 Cr.App.110 and 160	(Where a specific intent is an essential (element in an offence, intoxication, whether (complete or partial, and whether voluntary (or involuntary, shall be taken into account (for the purpose of ascertaining whether such (intention in fact existed. The rule, (however, is not applicable only to cases in (which it is necessary to prove a specific (intent, for generally speaking, a person (cannot be convicted of a crime unless the (mens was rea.
Halsbury Vol.9, 2nd Ed., p.439 R.v.Marshall (1830) 1 Lew C.C.76 R.v.Goodier (1831) 1 Lew C.C.76 R.v.Pearson (1835) 2 Lew C.C.144 R.v.Meakin (1836) 7 C. and P.297 R.v.Thomas (1837) 7 C. and P.817 R.v.Letenock (1917) 12 Cr.App.Rep.221 R.v.Gamlen (1856) 1 F. and F.90 But see R.v.Carroll (1835)7 C. and P.145	(In cases where a certain degree of provoca- (tion has existed, the drunkenness of the (accused may be taken into consideration upon (the question whether the prisoner was excited (by passion, or feared an attack upon himself (or his property, or whether he acted from (malice.
R.v.Beard (1920) 14 Cr.App.110 and 160	(If actual insanity if fact supervenes as the (result of alcoholic excess the criminal law (as to insanity shall apply.

Copy of the original 'model provision' on intoxication, sent to the Governor of Malta by the British Colonial Office on the 7th September 1934 (Ref. pages 46-49 of this thesis).

** Courtesy of Dr. Ray Mangion's Private Archives, Hamrun, Malta.*

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* For the statutes that are still in force today, see ***'Table of Statutory Material'*** on p.9 *et. seq.*

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