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Abstract

The relationship between alcohol and violence is one that has caused concern for centuries. Conflict between public policy issues and the application of criminal theory has meant that the debate as to how to deal with the individual who commits acts of violence while severely intoxicated is far from settled.

Canada typifies the modern position with continuing disagreement between those who favour a protectionist stance which denies, in whole or in part, a defence based on intoxication and those who feel that to allow a defence is technically correct within the framework of existing criminal theory. The latter position, which concentrates on the need to show criminal intent to justify punishment, reflects the current law of New Zealand and the common law states of Australia. This approach to the issue of intoxicated violence has recently attracted the attention of the Supreme Court of Canada. Attempts by the Court to move Canadian law in this direction have since been thwarted by the Canadian Parliament. There are fears however that this will not be the last word on the matter and that a widening of the scope of the defence is inevitable.

It is submitted in this thesis that such a move would not be in the interests of Canadian society. The Australian and New Zealand approach will be criticised and shown to be untenable. Despite an inherent uncertainty as to the exact link between alcohol and violence, statistics from various medical papers will show that the incidence of alcohol
related violence is high enough to warrant the complete elimination of the defence of intoxication. The legal theory that purports to uphold the defence in Australia and New Zealand will be also be examined.

In Scotland it is presently the case that intoxication provides no defence to any crime. Scottish law in this area will be considered and put forward as a viable alternative to the solutions that have recently gained prominence in Canada with respect to the problem of intoxicated violence. The main conclusion of this thesis will be that the Scottish approach is justifiable from both a legal theory and public policy viewpoint.
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Chapter 1 - The Law of Intoxication: “As drunk as a Lord or as sober as a Judge?”

(a) Introduction

Alcohol occupies a special, yet unenviable, place in modern society whose love-hate relationship with the ‘demon’ drink has shifted back and forth for centuries. In Scotland, for example, it has been the most famous export for two hundred years and at the same time been one of the most infamous factors in contributing to an appalling health record. In soccer it was seen as the root of all evil and legislation\(^1\) banned its sale at matches and forbid intoxicated supporters from entering stadia. Despite this, the game in Scotland is sponsored to the hilt by spirits and beer companies.\(^2\) There can be no doubt that alcohol as a commodity has greatly influenced society. It provides employment, raises taxes, acts as a social lubricant as well as a thirst quencher. Unfortunately, it is also a drug with dangerous properties. Its use can result in addiction, disease, impaired driving and even death. Society has thus had to cope with the problems of, amongst others, liver disease and alcoholism.

In situations where alcohol misuse has been followed by violence, however, the criminal courts have often been called upon to intervene and provide an appropriate response to violent behaviour which ordinarily would be subject to penal consequences. Unfortunately

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\(^1\) Criminal Justice (Scotland) Act 1980, c.62, Pt V (ss 68-77).

\(^2\) The Premier League in Scotland, the top soccer division, is currently sponsored by Bells, a major whisky distillery. Rangers, the present league champions, are sponsored by McEwan’s Lager.
the presence of alcohol has complicated matters and led to a situation where views as to what the appropriate response should be are varied. Opinions that acts of drunken violence are clearly criminal have been tempered by the idea that despite the harm caused by this behaviour, the perpetrator is in some way less morally responsible than one who commits an act of violence whilst sober. Debate concerning the moral culpability of persons accused of crimes of violence whilst intoxicated is centuries old and, sadly, far from settled. Due to a diversity of opinion as to the role of alcohol in crime, some jurisdictions have acquitted individuals on the basis that their intoxication at the time of the violent incident prevented the accused from intending to act as he did. Elsewhere convictions have followed regardless of the degree of intoxication based on the view that intoxicated violence is nonetheless morally reprehensible and therefore worthy of criminal sanctions. This debate has recently resurfaced in Canada and in the course of this thesis the two extreme opinions, and their underlying justifications as to the moral and criminal responsibility of individuals who bring about their own intoxicated state and then commit acts of violence, will be examined in an attempt to demonstrate that a defence based on self induced intoxication is undesirable.

The laws of Scotland, Australia and New Zealand have been chosen to provide a contrast to current Canadian law which, in common with all of these countries, shares a past linking it to English law in this area. The criminal law relating to intoxication in each of these countries is dominated by one or two cases. The leading cases from these Commonwealth jurisdictions share a number of similarities. In each case the accused was
male. All the crimes involved violence of a serious nature. **Beard v. D.P.P.**\(^3\), the starting point for any discussion of modern Commonwealth law in this area, concerned the rape and murder of a thirteen year old girl in England. Current English law is to be found in the case of **Majewski v. D.P.P.**\(^4\), where the accused was charged with six separate counts of assault. The accused in the Australian case of **R. v. O'Connor**\(^5\), stabbed a police officer, while in New Zealand authority is to be found in a case where a nineteen year old youth kicked a man to death.\(^6\) The Scottish approach, as laid down in **Brennan v. H.M.A.**\(^7\), concerned the murder of a father by his son.

In every instance the courts were faced with an accused who was extremely intoxicated at the time of the incident in question. Evidence given in the trial of Ian Brennan indicated that on the afternoon of the day that he stabbed his father, he had consumed between twenty and twenty-five pints of lager, a quantity of L.S.D. and a glass of sherry. As well as consuming an undisclosed amount of alcohol, Stephan Majewski had supposedly taken eight sodium nembutal tablets, a hallucinogenic drug, and up to twenty amphetamines in the final twenty four hours before his pub brawl. Kamipeli's condition was attributed to the consumption of about eight quart bottles of beer. For O'Connor it was the

\(^3\) [1920] A.C. 479 (H.L.) [hereinafter *Beard*].

\(^4\) [1977] A.C. 443 (H.L.) [hereinafter *Majewski*].


consumption of alcohol and an unnamed hallucinatory drug that formed the foundation for his defence.

While there may be no known direct link between the misuse of alcohol and other intoxicants and crimes of violence, the co-existence of these two factors is well known. Much of the discussion of this is based on at best anecdotal evidence of the correlation of these two phenomena. In Majewski, Lord Justice Lawton, of the Court of Appeal, stated:

The facts are commonplace - so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the defendant did and then claim that they were not guilty of any offence.\(^8\)

This recognition is not limited to the bench. Authors such as D. Mayfield, a professor of psychiatry at Kansas University Medical Centre, have commented on the high incidence of alcohol related violence. This author reviewed several historical and cultural sources and concluded that “[t]here is no doubt that the belief is quite generally held that drunkenness is a common cause of violent assaultive behaviour.”\(^9\)

Statistical evidence would seem, on the face of it, to back up these assertions. In Australia 75% of murder cases have been discovered to have links with some degree of alcohol intoxication.\(^10\) Reports show that between 1953 and 1974 there were 367 men accused of

\(^8\) Majewski, supra note 4 at 447.


murder in the West of Scotland.\textsuperscript{11} Of this figure, 58\% were intoxicated at the time of the offence. Dr. Nick Heather\textsuperscript{12} of Ninewells Hospital in Dundee undertook a study to ascertain the extent of intoxication in juvenile delinquency cases in Scotland. His study found that 63\% of the 200 interviewees were intoxicated at the time of the commission of their offence. Moreover, nearly one in four of the offenders were drunk at the time of committing all their previous offences. Following recent changes to Canadian law, ten persons have been acquitted of crimes, eight of which involved violence against women, based on intoxication at the time of the offence.\textsuperscript{13} The importance and relevance of these figures will be discussed at greater length in chapter 3. The relationship between alcohol and violence raises the question of how the courts ought to deal with the abuse of a substance that is possibly linked with anti-social behaviour yet is commonly available for public consumption.

Despite tackling what might be perceived as similar, if not identical, issues, the courts of the respective countries have managed to produce very distinct outcomes. Australia and New Zealand have adopted what one might describe as a theoretically pure approach. The doctrine of \textit{non facit reum nisi mens sit rea}, which requires the existence of a guilty state of mind before one can be held criminally responsible, has been followed to its logical

\footnotesize


\textsuperscript{13} E. Sheehy, “A Brief on Bill C-72, An Act to Amend the Criminal Code” June 6, 1995 printed in the Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs, Issue No. 112 - Meetings Nos. 158 to 164 at 112A:9 [hereinafter Minutes].
conclusion and it has been held in both of these countries that extreme intoxication can negate the intent for any offence. When this is so the Crown will be unable to prove one of the essential elements of the crime and an acquittal must follow. In stark contrast to this, the Scottish courts have ruled that intoxication cannot provide a defence to any criminal charge. Brennan was convicted of murdering his father and was therefore sentenced to a mandatory life sentence. This strict approach is based on a unique view of the mental element of crime, heavily influenced by policy considerations and the perceived inherent impracticalities of such a defence.

The English courts have adopted a rather curious middle ground which is part policy and part theory which denies the defence for some crimes, based on concerns for public safety, but allows it for other crimes, based on the need for the Crown to prove \textit{mens rea}. In deciding \textit{Beard}, the House of Lords formulated this uneasy compromise based upon the distinction of whether the crime is one of basic intent or one of specific intent. If the latter, the Crown must prove the existence of some special purpose or intent that goes beyond the mere wish to complete the action involved. In England, it has been held that extreme intoxication can make one incapable of forming the \textit{mens rea} for such offences. If this occurs, the intoxication is used to cast a reasonable doubt as to the existence of the requisite intent. Thus the Crown will have failed to prove one of the aspects of its case. Although the accused will then be acquitted of the specific intent offence he will not always be entitled to an outright acquittal. Normally a conviction of a lesser basic intent
offence will follow.\textsuperscript{14} Such offences do not require evidence of this purposive element. For example murder (specific intent) can be reduced to manslaughter (basic intent) where there is evidence of extreme intoxication sufficient to make the formation of specific intent impossible. In England, it is felt that the categorisation of offences has been done on a case by case basis which has focused on public policy concerns without any real underlying general principle.\textsuperscript{15}

It is within these complex parameters that the Supreme Court of Canada came to discuss the position of the intoxicated and violent ‘offender’. Previously\textsuperscript{16} the Court had followed the English law approach as defined above. In the case of \textit{R. v. Daviault}\textsuperscript{17}, however, the majority of the Canadian bench moved the law away from the problematic and dichotomous \textit{Beard} rule.

Once again, the case involved a crime of serious violence that had been perpetrated by a male accused who had voluntarily consumed a large quantity of alcohol. The accused was charged with the sexual assault of an elderly neighbour. It was claimed by the defence that

\textsuperscript{14} This is not always the case. In some non violent crimes, such as theft, there is no lesser charge and an outright acquittal may occur.

\textsuperscript{15} For a fuller discussion of this doctrine see J.C. Smith & B. Hogan, \textit{Criminal Law}, 8th ed. (London: Butterworths, 1996) at 228-230. See especially at 229 where the authors state that “... the designation of crimes as requiring, or not requiring, specific intent is based on no principle but on policy.” [emphasis added]. It should be noted at the outset that the terms general intent and basic intent are synonymous.


\textsuperscript{17} [1995] 93 C.C.C. (3d) 21 (S.C.C.).
Daviault lacked the necessary *mens rea* on account of his having consumed about eight bottles of beer during the day and approximately 35 oz. of brandy on the evening of the incident. At trial the *Leary* decision was followed and Daviault was convicted, as sexual assault is considered to be an offence which requires only basic intent. Daviault's conviction was overturned by the Supreme Court which held that extreme intoxication could provide a defence even in cases of basic intent offences where the accused could show, on the balance of probabilities, that he was so drunk that he was incapable of forming the guilty intent necessary for the act. Public outcry at this result meant that the law as espoused in *Daviault* did not survive for very long. Within nine months Parliament had stepped in to deny the defence of intoxication to any general intent crime that involved interpersonal violence.

Section 33.1 of the Criminal Code\(^\text{18}\) of Canada now deems such intoxication to be a marked departure from the standard of reasonable care expected in society and thus sufficiently reprehensible to justify a conviction in relation to violent basic intent offences. *Daviault*, however, remains applicable to all specific intent offences and those basic intent offences that do not involve violence. In such cases, extreme intoxication akin to automatism may prevent the Crown from proving the mental element of the case. Although the constitutionality of this legislation has not been tested, there are concerns that a constitutional challenge is inevitable.\(^\text{19}\)


It is somewhat difficult to understand at the outset how five countries with a common starting ground on a single issue can finish with such diverse answers to, what seems to be, an identical problem. It will be the thesis of this paper that the strict Scottish approach is the most appropriate response to the issue of intoxicated violence. Ultimately it comes down to a question of whether or not fairness allows a criminal court to convict someone of an offence of violence committed while in a state of extreme intoxication. It is submitted that the conviction of accused persons for acts of drunken violence is indeed fair. A number of factors will be examined to back up this assertion.

An examination of the doctrine of *mens rea* will be essential in determining if legal theory allows for the conviction of an individual who may not intend his actions but who might still be seen as being at fault for the end result. It is in this area that Scots law differs from the other four countries. While Canada, Australia and New Zealand have followed the English development of *mens rea*, Scotland is still influenced by the altogether different concept of *dole*. This objective, and very often morally charged, test of criminal culpability has been instrumental in laying the foundation for the Scottish courts to abolish the defence of intoxication completely. Although criminal law theory regarding the mental element required for criminal responsibility is not uniform, it will be argued that even in Canada the principle of *mens rea* would allow for the conviction of persons accused of drunken violence.
In addition to legal theory, the role of public opinion in shaping the criminal law cannot be ignored when discussing controversial areas of the law. Canadian experiences, in particular, demonstrate how public outrage at an individual case can influence law reform. This will be discussed at greater length in chapter 5. This can be contrasted with the position in Scotland, which will be examined in chapter 2, where public opinion and notions of public morality are given great regard by the judiciary in the first instance. In such circumstances ideas of criminal legal theory are often seen to be of secondary importance to considerations of current social standards of what is acceptable behaviour. It is submitted that the public feelings of outrage expressed in the aftermath of Daviault goes some way to supporting the denial of a defence based on intoxication.

Medical evidence concerning the relationship between alcohol and violence will also be considered, in addition to the legal and social issues involved, in an attempt to come to a conclusion as to the desirability or the practicability of a defence to crimes of violence based on self induced intoxication. It is hoped that taken together these three factors will highlight the problems inherent in the notion that self induced intoxication ought to provide a defence to crimes of violence and thus vindicate the position taken by modern Scots law.

(b) Theory and Methodology

The misuse of alcohol can be linked to a number of problems in society. In this paper I propose to narrow the field of study to concentrate on one of the more unfortunate and sinister side effects of excessive drinking. In discussing the legal response to the social
problems that arise out of the abuse of alcohol I will concentrate primarily on the treatment of violent crime. While not wanting to trivialise other types of offences, crimes of interpersonal violence undoubtedly cause the greatest concern in this area. Homicides and assaults, of whatever nature and degree, attract the most social stigma and the stiffest penalties. Unlike many crimes of dishonesty, the effects of violence can never be undone and the consequences may very often be permanent.

For the purposes of this paper 'intoxication' unless otherwise stated, is taken to mean a self induced condition caused by the ingestion of extreme amounts of alcohol. Such a condition is often referred to as 'acute' intoxication. Involuntary intoxication will not be examined on account of the different policy factors involved. Alcoholism or 'chronic' intoxication will be similarly excluded. Although the courts in England have stated that intoxication caused purely by illicit drugs will be treated on the same basis I propose to concentrate on alcohol because of its peculiar role in the countries under consideration as a socially and legally accepted intoxicant.

During the course of this thesis I will argue for a uniform solution, for the countries concerned, to the problem of intoxication based upon the strict model used in Scotland. In

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20 Sheehy, supra note 13 at 112A:9.


particular, the options open to Canada will be discussed and their merits analysed. It is hoped that the conclusion provides a guide as to how the future of Canadian criminal law might be shaped. A comparative study of the laws in question is clearly essential. An awareness of alternative solutions to similar legal problems in other jurisdictions can contribute to the search for answers "...that will stand the test of time."\(^{24}\) *Brennan* has been followed for almost twenty years in Scotland with almost no controversy. The *Daviault* decision lasted a mere nine months.

Such a consideration of different methods of dealing with what is essentially the same problem necessitates the use of comparative theory from the outset. Grossfeld, from the University of Munster in Germany, poses the question, "[w]hat does comparative law have to offer?"\(^{25}\) The answer to this is developed throughout the remaining 15 chapters of his book. It would seem that comparative law provides the opportunity to widen one's horizons and learn from the mistakes made by other legal systems. Thus one can examine different ways of solving similar, if not identical, problems and learn from the successes as well as the failures of alternative legal systems. The effect of this can be viewed as double edged. As well as a critical view of external laws one can appreciate the defects in one's own system. From such a study Grossfeld concludes that it ought to be possible to anticipate the problems of practice and show the way forward.\(^{26}\) In doing so it is necessary

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\(^{26}\) Ibid. at 14.
to employ 'analytical' as opposed to 'descriptive' comparative law. The former is described as going deeper than a mere factual comparison of the similarities and differences between two or more legal systems. The methods outlined in the rest of this paper will be used in conjunction with comparative theory in order to provide a cohesive framework for the thesis itself.

There is one major caveat in this however. Grossfeld emphasises the need for suitability of subject matter before one can embark on a comparative study. He argues that differences in geography, language, religion and culture might render such comparisons futile. It is submitted here that the debate concerning intoxicated 'offenders' would benefit from such a study. Indeed to date most of the literature and case law draws on the experience of foreign jurisdictions. I would argue that the countries under consideration do not differ in any material way that would detract from a comparative study. Perhaps the strongest and most influential factor can be traced to the origins of the countries themselves as we know them. The effects of colonisation can be seen in the development of the legal systems of the states in question. Thus, with the exception of Scotland, the dominance of English common law and the influence of the House of Lords is apparent in all the cases referred to. Even Scotland, which developed its legal system independently from English common law and where the House of Lords has never had jurisdiction in criminal matters, the basic/specific intent dichotomy was followed for a number of years. Moreover the

27 Glendon, supra note 24 at 8.

28 Grossfeld, supra note 25 at 74.
common characteristics run deeper than the similar legal systems. The effects of colonisation and the centuries of emigration from Britain to Canada, Australia and New Zealand has produced countries of similar cultural makeup. All the states could be described as Western democratic states in which English is the predominant language. Christianity is (or perhaps more accurately was) the primary religion of all these countries. In addition to this, the common characteristics of the cases referred to earlier, underline the fact that this is a common problem. From these facts one might tentatively conclude that there are no obvious differences that would explain or justify why a drunken killer can be convicted of murder in Scotland, manslaughter in England and Canada and acquitted in Australia or New Zealand.

A preliminary review of the leading and most up to date criminal textbooks for each country under consideration reveals that the law in this area is dominated in each country by only one or two important cases. These cases have formed the starting point for research in this area. As such they represent the preliminary sources for this work. A great deal of discussion has been spawned as a direct result of these few cases, mostly in the form of short articles in legal journals, and can be considered as secondary material along with law reform proposals.

From the case law it is clear that the judges in the respective cases base their conclusions on numerous assumptions. It is these assumptions that will be subject to critical review for at least some part of this thesis. Thus it will be necessary to question the basis for these
beliefs. To what extent is judicial knowledge founded on accurate medical information? Are the views of judges and juries clouded by misconceptions or flawed reasoning?

Case law suggests that alcohol intake is seen as lowering inhibitions in its earlier stages. The courts have traditionally taken the view that alcohol in more serious doses might then lead to a loss of intent and ultimately to automatism.\(^{29}\) Quite clearly such matters raise medical issues that are outwith the boundaries of legal knowledge. Or do they? It would appear that very often judges rely on their own personal experience in these matters, seeing them as questions of fact to be decided by them alone. In adversarial systems, as in those under review here, one can nearly always find an expert witness to provide favourable testimony for one’s own case. In deciding whether an accused acted with intent or not, Crown and defence witnesses cannot both be right. It could be argued therefore that the mismatch between legal and medical perspectives relating to this area of law are as a result of judicial error or narrow-mindedness or due to the confrontational nature of our court systems.

For this reason I have undertaken a review of some medical papers on the subject of alcohol intoxication to see whether or not some of the beliefs held by the judiciary as to the effect of alcohol can be justified. The availability of such information and its clear relevance to the debate requires that this paper contain an element of interdisciplinary study. Such an approach can at best be very limited on account of my non medical

\(^{29}\) As was successfully argued by the defence in Daviault, supra note 17.
background. In an area of law such as this where law and medicine are so inextricably linked it is impossible to critique judicial opinions without at least some background knowledge of medical issues. It is only with these considerations in mind that one can turn to an analysis of the substantive law. This will be undertaken with two major frameworks in mind.

My own experience of legal education, at the University of Glasgow, concentrated very much on the practical issues faced by the law without explicit reference to any theoretical frameworks. Thus critique of the law as it stood was done primarily by examining the current status of the law and the effect of its practical application in everyday life. From this, defects in the law were identified and discussed with a view to improving the law. This was never done from a feminist or post modernist or realist perspective. It was just done.

Although cognisance was made of factors external to the law, much of the work was undertaken by examining the law itself and drawing analogies from other areas of law. From this inconsistencies can sometimes be brought out into the open. The notion that subjectivity is a necessary prerequisite of criminal responsibility, can be called into question. For example one can question the need for subjective intent in dealing with cases of intoxication when ignorance of the law is no defence to a criminal charge. The public policy issues behind creating offences of causing death while drinking and driving may be

useful in pointing out factors relevant to the situation where a drinker uses a knife rather than a car to kill someone. The very existence of strict liability offences calls into question the absolute views taken of intent and mens rea. I would therefore like to utilise such a method in the course of my thesis and develop arguments in favour of abolishing the notion of intoxication as a defence using, amongst others, the examples outlined above.

This critical method of analysing the law from a narrow and concentrated perspective to highlight the problems faced in its application will obviously not suffice on its own. Criminal law does not and cannot exist in a vacuum. It was created and is still being developed and amended to deal with contemporary issues in modern society. It follows that one cannot ignore the current influences that shape the criminal law. It is here that law and policy come together. It was the balance of strict legal theory and social policy that was under close scrutiny in Brennan and the other intoxication cases. It is the relative importance which is attached to such factors that shaped the law and will determine future changes in this area.

Thus, while Scots Law often looks at a problem by relating it to analogous criminal law issues, the courts have not avoided the consideration of external factors. In lectures given to the College of Philadelphia in the late 18th century, James Wilson described what he called “Scottish common-sense philosophy”. Many would argue that case of Brennan was influenced by this “common-sense” approach which is broad enough to cover just about any factors that the court felt were relevant. In doing so the Scottish Court was able to deal with the problem of intoxication without addressing issues such as feminist
perspectives overtly. Cotterrell describes what he calls the concept of ‘Ideology’ as “...systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security.” Common sense is cited as one of the major characteristics of ideology.31

Perhaps the Scottish method of addressing problems could be described as employing a critical method. It might on the other hand be ideological thought. Practical reasoning, as is described below, may have had its part to play. The criticism of law in Scotland may unknowingly draw on all of these theories and methods. Whatever it is called, this will be used as the primary method of discussing the law of intoxication as it presently stands.

Developments in Canada have centred around an altogether different framework to that seen in Scotland and England. The Supreme Court’s decision in Daviault to widen the scope of the defence of intoxication stimulated a public backlash. Feminist legal theory contributed to this outcry, voicing concerns about the potential message that acquittals might give with regards to crimes of male violence against women.

The connection between the decision and feminist perspectives on law runs much deeper than the facts of the Daviault case. While the case itself did involve sexual assault, perpetrated by a male accused on a female victim, the implications were seen in the wider

concept of the acceptance of male violence in society in general. Thus the Metro Action Committee on Public Violence Against Women and Children (METRAC) stated that “[f]eminist anti-violence advocates immediately made the connection between the Daviault decision and the ongoing development of legal excuses for men’s violence within the criminal justice system.”32 Such views were not however restricted to women’s or legal groups. It would seem that the public at large was quick to recognise the inherent dangers of the flawed reasoning behind Daviault.33 The particular dangers involved are well recognised. Male violence against women and children has become one of the most pressing issues in society today. Much of this violence is linked to, if not caused by, alcohol intoxication. To excuse such violence because of drunkenness perpetuates the status quo. Indeed one could argue that the acceptance of such an excuse goes further and even legitimises such violence causing an escalation of male dominance.

It is within this social context that that the Canadian response to intoxication as a defence must be considered. The law in Scotland has never been subject to such a feminist analysis. The Brennan case involved a fight between two men, is twenty years old and was resolved in such a way that would not have drawn feminist criticism had such a school of thought been dominant at the time in Scotland. The recent history of Canadian criminal law requires that feminist theory be addressed. Isabel Grant, a Canadian legal academic,

32 Brief to the Legislative Committee on Bill C-72, Susan Bazalli, June 1995 in Minutes, supra note 13 at 112A:41.

33 E.g. “Canada’s highest court has declared open season on women” Toronto Star (11th October 1994).
points out that the coexistence of alcohol and violence has contributed to the subordination of women and a denial of equal protection by the criminal law.\textsuperscript{34}

This subordination can be analysed in a number of ways. Firstly one could ask 'the women question'.\textsuperscript{35} In considering laws that might otherwise appear to be gender neutral, asking the woman question concentrates on the possible consequences for women that might otherwise have been overlooked. Indeed in Daviault, the Supreme Court concentrated on the criminal law as it related to the accused and not the victim, female or otherwise.

The possible consequences for women have already been voiced. The National Association of Women and the Law\textsuperscript{36} expressed fears that to allow the defence of extreme intoxication in general intent offences would lead to a decriminalisation of male violence. Thus if women were to see men acquitted of such crimes the reporting of their incidence would undoubtedly drop. The police would be unlikely to investigate such crimes and the Crown would not be inclined to pursue prosecution as the likelihood of a conviction would be low.

The consequences for women would not, therefore, be to their advantage. To take such male behaviour out of the criminal justice system would be to legitimise the male use of

\textsuperscript{34} "Second Chances: Bill C-72 and the Charter" (1995) 33:2 Osgoode Hall L.J. 379 at 389.

\textsuperscript{35} See generally K. Bartlett, "Feminist Legal Methods" (1990) 103 Harvard L.R. 829.

\textsuperscript{36} Minutes, \textit{supra} note 13 at 112A:12.
violence as a control mechanism aimed at women. The law itself would be used to uphold the subordination of women. Without the ‘women question’, “...differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women.” To develop the law in this area without recognising that it is women who suffer the most from violence of this sort denies the law the full legitimacy that it needs to survive. The fact that the Daviault decision lasted for only nine months is evidence of this.

Feminist legal theory does not stop once one has asked the ‘woman question’. The approach of feminist practical reasoning takes a more proactive role in shaping what the law ought to be, rather than forming a mere critique of how the status quo affects women. In many respects this reflects the theories and methods that have been used to shape the law of Scotland in this area.

Bartlett, an American feminist from the Duke University School of Law, describes how the practitioners of Practical Reasoning “...believe that the practicalities of everyday life should not be neglected for the sake of abstract justice.” The relevance of this to the intoxication debate is obvious. While it could be said that under a strict interpretation of the doctrine of actus non facit reum nisi mens sit rea an intoxicated accused ought not to

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37 Bartlett, supra note 35 at 843.

38 Ibid.

39 Ibid. at 849.
be held criminally responsible for his actions, one could argue that the same person cannot
be said to be morally blameless. This methodology described by Bartlett includes a
consideration of emotive and intellectual elements\(^{40}\), which clearly came to the fore in the
aftermath of *Daviault*.

It is with these considerations in mind that Bartlett describes how feminist practical
reasoning is very much a common sense approach that respects but does not blindly
adhere to precedent. It would seem that the author feels that such an approach considers
human factors to be as least as important. When reading the Scottish case of *Brennan*\(^{41}\)
one can sense that these factors shaped the decision of the High Court of Justiciary in
Scotland, although the Judges might not have be aware of the exact methodology that
they were applying. I would be very surprised indeed if they had considered themselves to
be applying any kind of feminist legal theory.

By drawing on these theories and methods outlined above I would hope to be able to
reach some conclusion as to how the law might best deal with the intoxicated offender. As
Bartlett points out "[a] point - perhaps the point - of legal methods is to reach answers
that are legally defensible or are in some sense "right""\(^{42}\). I would argue that the Scottish
approach that rejected the notion of self induced intoxication as an excuse for violence is

\(^{40}\) *Ibid.* at 856.

\(^{41}\) *Supra* note 7.

\(^{42}\) Bartlett, *supra* note 35 at 867.
legally defensible or 'right'. It will be submitted in the course of this thesis that Canada, in its present situation of uncertainty, would do well to avoid the approach advocated in Australia and New Zealand, as represented in the cases of *O'Connor* and *Kamipeli*. Scottish law offers an alternative to the *Beard* rule; an alternative that has been vindicated by twenty years of effective and uncontroversial operation.
Chapter 2: Scotland - Paradigm or Pariah?

[\textit{A}ny Scots lawyer would assert with conviction that the criminal law of Scotland today, and its administration, have little to be ashamed of. Indeed the more I see of other systems in the criminal field the more I am convinced that ours has fewer blemishes than most, and has perhaps more to teach than to learn from them. The Criminal Law of Scotland undoubtedly works.]^{43}

This bold assertion, given by the judge who presided over the \textit{Brennan} appeal to a meeting of English lawyers, is perhaps indicative of strong feelings of nationalistic pride in Scotland's distinct legal system. One cannot, however, transpose an entire legal system from one country to another; local problems very often require local solutions. Sheriff Iain Macphail, a leading Scottish academic and judge, writes that despite the efficiency of much of Scottish criminal law "... Scottish rules and practices are not necessarily suitable for transplantation into the English system."^{44} It is submitted in this chapter that the Scottish approach to intoxicated violence is one such area of law where Scotland "... has perhaps more to teach than to learn..." and that Canada, in its quest to settle \textit{Daviault}, could benefit greatly from a closer examination of \textit{Brennan}.

With the progression of time, the rule in \textit{Beard} has become less and less popular. There is no shortage of criticism of the English law in this area.^{45} If a legal system wishes to abolish

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^{44} "Safeguards in the Scottish Criminal Justice System" [1992] Crim. L.R. 144 at 144.

the Beard rule, as the Supreme Court of Canada attempted to do, in part, in Daviault, then there are a number of options open. Scottish law provides one such option. It will be argued that despite the apparent harshness of Scots law regarding intoxication, it is nonetheless the most appropriate way of dealing with individuals who carry out acts of violence while in a state of extreme self induced intoxication.

The conviction of Ian Brennan for the murder of his father demonstrated the continued willingness of the Scottish judiciary to act on ancient principles rather than on more recent case law. Despite the fact that the rule in Beard had been reaffirmed by the House of Lords only months earlier in Majewski, the High Court of Justiciary preferred the two hundred year old works of David Hume. Unfortunately principles are not universal. If the Scottish approach is to be understood and accepted as a viable alternative to Beard, then its reasoning must be explained and its advantages clarified.

Fortunately this task is made easier by the straightforward wording of the judgement in Brennan given by Lord Justice General Emslie. Speaking for the whole Court, he concluded that:

46 Baron David Hume 1757-1838, lawyer and judge of the Court of Sessions (not to be confused with David Hume the eighteenth century Scottish philosopher), is recognised as the most important of the criminal “Institutional Writers”, whose work is quoted in court as authority. See e.g. D.M. Walker, Scottish Legal System (Edinburgh: W.Green & Sons, 1981) at 401 where the author writes:

The highest degree of authority attaches to the writings of a small number of writers, all of bygone ages, who all treated in their works of the whole law of Scotland, or at the least very large tracts of it. These are known as institutional writings, and a statement of one of them, in default of other authority, will almost certainly be taken as settling the law.
There is nothing unethical or unfair or contrary to the general principle of our law that self induced intoxication is not by itself a defence to any criminal charge including in particular the charge of murder. Self induced intoxication is itself a continuing element and therefore an integral part of any crime of violence, including murder, the other part being the evidence of the actings of the accused who uses force against his victim. Together they add up or may add up to that criminal recklessness which is the purpose of the criminal law to restrain in the interests of all the citizens of our country.\textsuperscript{47}

Before dealing with the specific case of self induced intoxication it is necessary to explain in greater detail what Lord Emslie meant when he stated that the decision was in accordance with “...the general principle of our law”.\textsuperscript{48} Scottish criminal law\textsuperscript{49} is unique within the Commonwealth as it has managed to avoid any real influence from England. Scottish criminal appeals have never gone beyond the High Court of Justiciary in Edinburgh. Neither the House of Lords nor the Privy Council have been able to influence the criminal law of Scotland to any great degree. After 1707 the Act of Union maintained the independence of the Scottish legal system despite political assimilation. Although civil appeals from the Scottish courts can go ultimately to the House of Lords criminal cases cannot. As a result, criminal law in Scotland has often been used to emphasise the difference between the two jurisdictions.\textsuperscript{50} Further evidence of Scotland’s distinctiveness

\textsuperscript{47} Supra note 7 at 51.

\textsuperscript{48} Ibid. [emphasis added].


\textsuperscript{50} E.g. in Scotland fifteen sit on a jury and have three verdicts open to them: guilty, not guilty and not proven. Unlike England, decision is by simple majority, so there is no such thing as a “hung” jury. In Scotland there is no offence of manslaughter; the term culpable homicide is used instead.
in criminal matters can be seen in its keeping largely to its common law\textsuperscript{51} roots in criminal law in stark contrast to many areas of modern English law.\textsuperscript{52}

The uniqueness of Scottish law is important in the intoxication debate. In deciding \textit{Brennan} the Court overturned the two earlier decisions of \textit{Campbell v. H.M.A.}\textsuperscript{53} and \textit{Kennedy v. H.M.A.}\textsuperscript{54} which had tried to assimilate Scots Law with the doctrine developed in \textit{Beard}. In doing so the Court demonstrated “...that Scots law is no slavish copy of English law in this regard.”\textsuperscript{55} The crucial difference between the two countries lies in conflicting concepts of the mental element in crime. While the mental element in English criminal law developed from the doctrine of \textit{actus non facit reum nisi mens sit rea}, Scots law traditionally employed the principle of \textit{dole}\textsuperscript{56} to describe the mental element of a

\textsuperscript{51} “Fundamentally, unlike [English] criminal law which has suffered statutory intrusions - not all of them happy ones - Scots criminal law has remained based on the common law throughout its history and the Supreme Criminal Courts have long been considered to have “an inherent power, as such, competently to punish every act which is obviously of a criminal nature though it be such which in time past has never been the subject of prosecution!”.” per Lord Emslie \textit{supra} note 43 at 34.

See also T. Jones, “Common Law and Criminal Law: the Scottish Example” [1990] Crim. L.R. 292 at 292, where the author states that “[u]nlike the position elsewhere in the United Kingdom, there has been no great “statutorification” of the substantive criminal law.”

\textsuperscript{52} There are a small number of exceptions where criminal legislation has been used in Scotland to cover mostly regulatory offences. For example legislation now controls the use of drugs, firearms and motor vehicles.

\textsuperscript{53} [1920] Sess. Cas. 1 (Ct. Just., Scot.).

\textsuperscript{54} [1944] Sess. Cas. 171 (Ct. Just., Scot.).


\textsuperscript{56} A derivative of the Latin word \textit{dolus}, meaning evil intent, fraud, deceit, guile. For a comprehensive description of the historical background of this see Stair, \textit{supra} note 49 at paras 57-60.
criminal offence. For Hume, *dole* related as much to the sense of "bad moral character"\(^{57}\) of the accused as it did to the mental element of the specific crime in question. While the personality of the accused is now irrelevant\(^{58}\) in questions of guilt or innocence in modern Scottish law the continued use of *dole* "...reminds the reader or listener of the moral component of guilt, the historical roots of this branch of the law, and the essentially Scottish nature of *Scots* criminal law."\(^{59}\) Although in practice the label *mens rea* is now used in Scottish courts, due to the influence of the nomenclature used by English and U.K. statutes and recent Scottish textbooks\(^{60}\), the application of the rule is still based on the traditional Scots term.\(^{61}\)

The historical influence of *dole* remains extremely important in present day Scots law. It is because of *dole* that the mental element of crime continues to convey strong moral connotations that have survived the most recent influences of U.K. statutes. It is not uncommon to hear phrases such as "evil intent"\(^{62}\), "wicked recklessness"\(^{63}\) or "shameless


\(^{58}\) A. McCall-Smith, "Criminal Events" in R.F. Hunter, ed., *Justice and Crime* (Edinburgh: T&T Clark, 1993) at 122 where the author writes that "[i]t hardly needs to be repeated that the criminal law punishes offenders for what they do rather than what they are."

\(^{59}\) Stair, *supra* note 49 at para 66.


\(^{61}\) Stair, *supra* note 49 at para 57: "Although [*Mens rea*] ha[s] no particularly long history of use in Scotland, and although Scottish judges have used and continue to make use of a variety of different terms to express the same concept, it is now much too late in the day to reverse this process of Anglicisation ... The caveat must be observed, however, that although the same terms may now be used regularly on both sides of the Border, the meanings attached to the specific terms (such as intention, knowledge and recklessness) to which the general ones relate are not identical in the two jurisdictions."

indecency” used in modern Scots law to describe the mental element of a crime. David Hume describes the state of mind required for the commission of a crime as a “corrupt and evil intention”. Such terminology is clearly morally based and therefore must rely on the personal views of the judges sitting in individual cases.

Scottish criminal law is well used to this moralistic approach, especially when dealing with contentious, and possibly controversial, issues. As a mostly common law jurisdiction, Scotland has kept its faith in its judiciary, with regards to the vast majority of crimes, at a time when other jurisdictions have moved towards legislated criminal codes or statutes. Nowhere is the importance of this seen more clearly than in the Declaratory Power of the High Court of Justiciary, which typifies the moral stance taken in Scotland with regards to criminal matters. The exercise of this power, which derives from the Court’s Nobile Officium, enables the law to be developed by the judiciary in new areas that have hitherto not been encountered. Thus the criminal law can be adapted to penalise new acts that are perceived as being clearly criminal but which have never arisen before. The

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67 I do not propose to address the question of what conduct would fall into the category of ‘clearly criminal’. A discussion of natural law principles would be inappropriate here. The issue of whether or not intoxicated violence can be said to be ‘clearly criminal’ will however be dealt with below.
Declaratory Power allows the Court to represent the views of the general public in moral issues, something that it has clearly had to do with regards to the intoxication debate. Such an obvious recourse to natural law ideology would surely offend most positivist thinkers. However the punishment of any criminal activity necessarily involves the consideration of moral issues to a certain degree. Even statute law imposes normative standards based upon the legislature’s attempt to reflect community morals by proscribing certain acts which are deemed worthy of the label ‘criminal’. After all “[l]aw is not a self contained logical system but a decision procedure for the conduct of our lives in society.” The only difference between statutory or codified criminal law and the Scottish position is that the latter is judge made and decided on cases brought before the court, sometimes relating to conduct which is being prosecuted for the first time, as opposed to being debated in parliament. Substantively the two may be very similar and equally normative.

To many this might be seen as retroactive criminality, which would conflict with the principle of *nulla poena sine lege*, but in Scotland it is seen as the ‘common sense’ way.


69 Ibid.

70 That is there can be no crime without a previous statement of law. In the absence of this it may be argued that a prosecution might conflict with Article 7 of the European Convention of Human Rights – “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

71 E.g. L. Farmer, “‘The Genius of our Law...’: Criminal Law and the Scottish Legal Tradition” (1992) 55 Mod. L. Rev. 25 at 33, where the author describes Scot Law as a system based on “...‘the testimony of experience’ against one based on the ‘fallacious conjectures of human wisdom before the event.’”
of dealing with unforeseen, yet inherently criminal, acts.\textsuperscript{72} It has been said that a common law system of criminal justice cannot possibly avoid being retroactive.\textsuperscript{73} The whole system is entirely dependent on an acceptable interpretation of current social values by the judiciary and an acceptable use of the power. The Scottish system has worked because to date it has not been abused by those who exercise this power. It has been said that “[i]n every case where the declaratory power has been used it has outlawed behaviour which the public probably thought was illegal or ought to be so. For example in \textit{Khaliq}, public support for the court’s decision was overwhelming.”\textsuperscript{74}

The continued existence of the Declaratory Power has come in for some fierce criticism of late. Lord Emslie’s words in 1982 that the proposition had never been “seriously questioned”\textsuperscript{75} no longer hold true. Professor Willock, of Dundee University, draws our

\textsuperscript{72} E.g. \textit{Khaliq v. H.M.A.} [1984] S.L.T. 137 (Ct. Just., Scot.). The case involved a shopkeeper who sold glue to children in full knowledge that they were using the products for solvent abuse. Despite the fact that the selling of glue was not criminal in itself, the accused was charged with:

...culpably, wilfully and recklessly supply[ing] to [18 named children, variously aged from 8 years to 15 years] ... and to other children under the age of 16 years whose identities are to the prosecutor unknown, quantities of insolvents, and in particular Evo-stik glue, in or together with containers, such as tins, tubes, crisp packets and plastic bags, for the purpose of inhalation of the vapour solvents and said containers for said purpose and the inhalation by said children of the vapours of solvents was or could be injurious to the health of said children and to the danger of their lives and in consequence of your said actions you did cause or procure the inhalation by said children of vapours from said quantities of solvents to the danger of their health and lives. Taken from C. Gane, & C. Stoddart, \textit{A Casebook on Scottish Criminal Law}, 2nd ed. (Edinburgh:, W. Green & Son, 1988) at 459.

Pleas by the defence that such a charge did not describe a crime known to Scots Law were rejected by the High Court of Justiciary.

\textsuperscript{73} \textit{Stair}, supra note 49 at para 5.

\textsuperscript{74} \textit{Styles}, supra note 68 at 217.

\textsuperscript{75} \textit{Supra} note 43 at 34.
attention to the "... conventional wisdom which condemns the declaratory power of the
High Court of Justiciary." Willock's condemnation of this approach to law making
operates on a number of levels. He argues in the first instance that law making of a moral
nature ought to be the sole preserve of the democratically elected and accountable
parliament.

Professor Styles, also of Dundee University, disagrees. He claims that "[t]oday,
acceptance of the existence, inevitability and even desirability of judicial legislation is
widespread." Although this itself might be an untenable viewpoint, he adequately dispels
any notions that the U.K. Parliament is more accountable than the Scottish bench. The
anonymity of the House of Commons and the effect of the "whip" in party politics is
contrast with the openness and individual responsibility of the Scottish bench. Such
factors lead Styles to state that "Lord Hailsham once described the modern political
system as an 'elected dictatorship'. Perhaps, in a sense, we might equally describe the
exercise of the declaratory power by the Justiciary Court as an 'unelected democracy'".

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77 Ibid. at 103.
78 Supra note 68 at 211.
79 Ibid. at 215-217.
80 Ibid. at 218.
The political realities of modern Scotland strengthen Styles' argument. The law making role of the Scottish bench has become all the more important in recent years on account of Scotland's unfortunate political situation. Professor T. B Smith, a leading Scottish academic, wrote:

Since the Union took effect the Westminster Parliament has never served Scottish needs adequately. Today, reasons for dissatisfaction and recognition of them are more widespread than ever before. Parliament is too much concerned with too heavy an English orientated legislative program and with too many problems concerning external relations to devote adequate time to the consideration of Scottish problems.\(^{81}\)

Since this was written in 1970 this state of affairs in Scotland has become all the more acute after almost twenty years of Conservative Government in Scotland. A more recent evaluation described Scotland as "... a country whose legislature is composed of members with little interest in Scottish matters of any sort."\(^{82}\) Thus it has fallen to the judges of the High Court of Justiciary to maintain the integrity of Scottish criminal law and protect the interests of the Scottish public.

Willock argues that judges acting alone are in no position to fulfil this role adequately. He states that "[w]hether or not exercises of the Declaratory Power - if any there be - are "in accordance with the will of the people" is something on which... there can be no firm knowledge."\(^{83}\) While there may be no empirical way of demonstrating consensus, it is


\(^{82}\) Styles, supra note 68 at 220.

\(^{83}\) Supra note 76 at 104.
submitted that general public opinion provides the only measure of the “will of the people”. The Scottish public have shown in recent years that it is willing to voice dissatisfaction as to the outcomes of single cases.\textsuperscript{84} In representing the interests of the Scottish public, the Scottish bench often seems to paint with a very broad brush in developing a criminal system that reflects the needs of a whole country. One might argue that it is unfashionable and essentialist to talk about the population of a whole country in such a simplistic and general way. Modern legal literature takes great pains to avoid language that excludes minorities or fails to appreciate the diversification of society. While this may be necessary in North America, it does not have the same importance in a country whose entire population\textsuperscript{85} is smaller than many North American cities. In the past Scotland has suffered from intense emigration without any real immigration to counter this. In such circumstances society inevitably becomes inward looking and parochial. Despite recent diversification amongst the Scottish population, particularly in Glasgow where there are strong Chinese and Asian (Pakistani/ Indian) communities, the demographic makeup remains largely homogenous.\textsuperscript{86} Thus it can be argued that in dealing with controversial moral issues, such as intoxicated violence, the Scottish bench are faced with fewer competing interests than arise in other jurisdictions. In such circumstances the task undertaken by the courts to formulate universally acceptable criminal standards becomes much less arduous. Admittedly the gender divide in Scotland is no different from

\textsuperscript{84} The acquittal of Francis Auld for the murder of Amanda Duffy in 1994 led to widespread criticism of the Scottish law’s retention of the ‘not proven verdict’. This one case resulted in a nationwide campaign, led by George Robertson, M.P.. To date the campaign has been unsuccessful.

\textsuperscript{85} The population of Scotland is currently approximately 5 million and relatively stable.
elsewhere. By adopting a zero tolerance approach to alcohol and violence the Scottish courts have not incurred the criticism of feminist legal scholars.\textsuperscript{87} The case of \textit{Ebsworth v. H.M.A.}\textsuperscript{88} in particular demonstrates a desire to protect the vulnerable, especially women, from the worst excesses of alcohol abuse by men.

Indeed, the task has been simplified by traditional Scottish views regarding religion. In this, one of the centres of the Reformation, Calvinistic views as to the nature of sin and evil continue to shape the way we think and act. Such roots have undoubtedly contributed to the modern day role of the Catholic and Presbyterian Churches in Scotland. In particular the General Assembly and Kirk Session of the Church of Scotland, have been influential in formulating a unified social opinion on many matters in modern life, including criminal issues.\textsuperscript{89} The debate concerning the extent to which the criminal law is, or ought to be, controlled by some identifiable common morality is centuries old. While one might

\textsuperscript{86}See e.g. \textit{Encyclopaedia Britannica} (Chicago: Helen Hemingway Benton, 1974) Vol. 16 at 405.

\textsuperscript{87}Sheehy, supra note 13 at 112A: 5. The author’s criticism of “British” common law unbelievably concentrates exclusively on English law in complete ignorance of even the existence of a distinct Scottish system. Her conclusions, from a feminist viewpoint, as to the moral culpability of acts of intoxicated violence are not dissimilar to modern Scottish law. It can be assumed that \textit{Brennan} would meet with Sheehy’s approval.

\textsuperscript{88}See especially \textit{Ebsworth v. H.M.A.} [1992] S.L.T. 1161 (Ct. Just., Scot.) [hereinafter \textit{Ebsworth}]. The case involved an individual who committed a serious assault, while intoxicated, after consuming an extremely high dose of painkillers. The accused had broken his leg 10 months before the assault was committed but had not sought any medical attention. The drugs were consumed for their painkilling effect. \textit{Brennan} was applied and the accused was convicted. It was felt that his conduct was reckless and sufficiently blameworthy to justify such an outcome.

\textsuperscript{89}Farmer, supra note 71 at 32 where the author writes that “... beliefs about crime and punishment are clearly related to Protestant beliefs about sin, obedience to authority and the effectiveness of the moral discipline enforced by the Kirk Session.”
accept the views of Lord Devlin\textsuperscript{90} over H.L.A. Hart\textsuperscript{91}, or \textit{vice versa}, the fact remains that Scots criminal law continues to be developed in a manner that places great importance on communal notions of what is wrong or immoral. While the unique practices of the Scottish criminal justice system and the content of the substantive law may be "... long established and generally accepted in a small country, they may not be suitable for adoption elsewhere."\textsuperscript{92} It is not suggested here that Canada, or any other country for that matter, follows Scotland's moral system of criminal justice except however in relation to self-induced intoxication and violence.

The denial of a defence of intoxication would seem to be a popular approach, both inside and outside of Scotland. It must be said that, despite the inflexibility of the Scots law approach, this rule has been applied consistently for twenty years without controversy. In the twenty years since \textit{Brennan} there has been no serious academic discussion in Scotland regarding the law of intoxication.\textsuperscript{93} This lack of controversy is an important indicator of the support from both the public and the legal profession in Scotland. In stark contrast to

\textsuperscript{90} \textit{The Enforcement of Morals} (London: Oxford University Press, 1965) - which advocates the use of the criminal law to enforce minimum moral standards.

\textsuperscript{91} \textit{Law Liberty and Morality} (Stanford, Calif.: Stanford University Press, 1963) - which criticises the view that the law can use morality as a guideline.


\textsuperscript{93} Ferguson, \textit{supra} note 55, with only three pages, was the only article written in Journal of the Law Society of Scotland about \textit{Brennan}. The Juridical Review, the journal of the law schools of Scotland, contains no articles relating to \textit{Brennan}. Together, the four leading general sources of Scots criminal law, namely Gordon (\textit{supra} note 66), Stair (\textit{supra} note 49), Jones & Christie (\textit{supra} note 49) and Gane & Stoddart (\textit{supra} note 72), devote a total of approximately 25 pages to the issue of intoxication. This can be contrasted with the countless articles and law reform proposals that have been published in relation to the other Commonwealth countries' answers to intoxication.
this English law has had to endure years of time consuming and expensive debate over its complex model for dealing with the intoxicated ‘offender’. Even in England it was felt that a complete defence would be morally unacceptable and offend both common sense and justice.

As stated above, however, the strict Scottish stance is a relatively recent development. Beard was followed for fifty years, during which views in Scottish society as to the nature of alcohol changed dramatically. At the time when Beard was decided, Scotland:

...had the most ferocious temperance movement in Britain. Even after the Second [World War], new council housing estates like Drumchapel [in Glasgow] were deliberately built without licensed facilities. In my own lifetime Scottish pubs remained shut on the Sabbath and had the weirdest, strictest opening hours in Europe.

Ironically, therefore, when Scottish disapproval of drinking was at its height, the criminal law allowed for the defence of intoxication in specific intent crimes. By the time of Brennan, in the late seventies, Scottish attitudes to alcohol were very different and sadly world famous. The country suffered from some of the worst abuses of alcohol, especially

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95 With regards to a complete defence Lord Salmon in Majewski, supra note 4 at 484, said “[i]t would shock the public, it would bring the law into contempt and would certainly increase one of the really serious menaces facing society today.”

96 Ibid. See especially paragraphs E and F.

violence. During this period soccer violence\(^98\) was at its worst and surely would have influenced the decision taken. In the late seventies Scottish nationalism was enjoying a high degree of public support, which may or may not have contributed to an abandonment of the English legal doctrine espoused in *Beard* and reaffirmed in *Majewski*. The most recent reports would suggest that Scottish attitudes are moving back towards a more controlled use of alcohol. Current evidence even suggests that Scotland has the lowest per capita consumption of alcohol in the UK.\(^99\) Social trends can alter almost imperceptibly over a long period of time, as happens with alcohol, or overnight, as happened in Scotland over gun control following the Dunblane shootings. On account of their unusual role in shaping the law in Scotland, the courts have had to deal with formulating public policy with regards to intoxication in the absence of open and public debate.

Thus, it is within this somewhat complex context, that Lord Emslie stated that holding the intoxicated and violent individual responsible for his actions was neither “...unethical [n]or unfair...”\(^100\) The question must now be asked is whether the judgmental approach taken in Scotland can be justified at the end of the twentieth century. In essence, is the punishment of the violent, yet extremely intoxicated, individual fair?


\(^99\) See C. Alba, “Drunk Scot ‘myth’” [*Glasgow* Herald*] (31st January 1997). Figures of the Office of National Statistics confirm that the average weekly consumption for adults is 4.6 units (2.5 pints of beer or 4 glasses of wine). The UK average is 5.4 units.

\(^100\) *Brennan*, supra note 7 at 51.
Scottish experiences demonstrate a community sense that the conduct in question is in some sense ‘wrong’. However, can one say that community consensus is enough in such a controversial area of the criminal law? In general such consensus, operating through parliament, will suffice for offences described as *mala prohibita*. This covers statutory crimes that are either trivial or that involve the drawing of arbitrary lines, such as speed limits. Violent and intoxicated conduct does not fall into this category however. It ought more properly to be seen as *mala in se*. As such it is not enough to say that public or judicial consensus is sufficient to deem such conduct punishable. Were this not so punishment of even the most blameless acts would be permissible, provided it had the necessary public support. Where crimes are classified as *mala in se* there is a need to provide evidence of what makes the conduct bad in itself. The inherent ‘badness’ must be explained in order to lend the law some degree of legitimacy.

I would submit that intoxicated violence does indeed carry characteristics that would justify labelling the acts as *mala in se* and hence worthy of punishment. Several different factors support this statement. The most concise statement of this conclusion is to be found in the words of Lord Justice General Hope, at that time the most senior judge in Scotland. In the case of *Ebsworth*, he averred that “[t]he element of guilt or moral turpitude lies in the taking of drink or drugs *voluntarily* and *reckless of their possible..."
consequences". The statement of modern Scots criminal law thus counters the use of intoxication as a defence to an act of violence on two distinct but inseparable fronts. This approach implies that the element of choice in self induced intoxication prevents it from being seen as an exculpatory factor in the true sense. In addition, Lord Hope's words demonstrate that such behaviour (intoxicated violence) is in itself blameworthy and thus liable to punishment on account of its recklessness.

Where a defence operates to the effect that the accused committed the act but in circumstances that should not result in conviction, then the law is in effect stating that the individual is blameless. The essence of defences is the individual's lack of choice in the matter. Criminal liability ultimately rests on the notion that human beings are autonomous by their nature and choose to act in the way that they do. The punishment of involuntary acts goes against all punishment theory, including deterrence, as the law would soon lose the respect of the community, something which has added importance in the Scottish legal system as described above. Sistare writes that "...causative responsibility, generally, and voluntariness in particular, mark the bedrock of individual responsibility....a finding of voluntariness marks the difference between any degree of responsibility and the absence of responsibility." This is especially true when dealing with offences of a violent nature.

102 Supra note 88 at 1166 [emphasis added].

103 See e.g. P. Brett, An Inquiry Into Criminal Guilt (Sydney: The Law Book Co. of Australia, 1963) at 41 where the author states that "[t]he thread which connects together the various members of this family of excuses is that in every instance the defendant is free from moral fault or blameworthiness."

104 Stair, supra note 49 at para 87.

Where the accused had no option but to act in the way he did, the law may provide a defence or an excuse. Thus self-defence arises out of the actings of another. Insanity and diminished responsibility are a result of illnesses outwith a person’s own control. Accidents, coercion and necessity arise as a result of unforeseen or unavoidable circumstances. All these excusing factors are beyond the individual’s control.

Self-induced intoxication, in contrast to this, lies wholly within the power of the individual. By undertaking a course of action that involves the voluntary and foreseen consumption of intoxicants, the individual brings about the circumstances that result in the occurrence of the ‘offence’ in question. In situations where a defence applies, the court will be quick to withdraw the availability of it where the accused could have legitimately chosen an alternative course of action. Thus, for example, an individual who pleads self defence in Scotland, but who could have fled rather than retaliated\textsuperscript{106}, will see their plea fail. The notion of ‘choice’ is central to the success of the defence. With intoxication, the accused could have chosen not to drink to excess. It is this logic that allows for the defence to be used in cases of involuntary intoxication, despite the fact that the ultimate state of mind in both voluntary and involuntary intoxication may be exactly the same. The individual’s lack of choice in the matter removes him from being seen in the same moral light as the self induced intoxicated individual.

Ironically the imposition of subjective views as to moral culpability from the Scottish bench has allowed the criminal law to develop in a direction that permits objective criteria to dominate. While the application of *mens rea* in a normative fashion calls for the judiciary to individually set moral standards, the use of such standards necessarily calls for recourse to the 'reasonable person'. Objectivity as a standard in criminal law is not something unique to Scotland, however, but its application in these circumstances is distinctly Scottish. It has been said that "...no one can see inside any person's mind, and intent must always be a matter of inference - inference mainly from what the person does, but partly also from the whole surrounding circumstances of the case." Th108us there is no real enquiry into the actual frame of mind of the accused in a criminal trial. Instead, the facts surrounding the offence itself are seen to indicate whether or not a guilty state of mind is present. Considerations of individual intentions are only ever seen in practise when the accused raises the possibility of some exculpatory factor such as self defence. In normal circumstances, therefore, the Crown need not really lead evidence of a guilty state of mind. On account of this, the mental element is regarded as 'culpability' rather than actual 'intent'.

In truth part of the reason for objectivity in Scottish criminal law is the inherent practical approach taken to issues of a problematic nature. It has long been the tradition of the criminal courts in Scotland to put practical considerations before theoretical accuracy.

107 Jones & Christie, supra note 49 at 46.

This is true of practitioners, judges and academics. While discussing the subject of capital punishment, Lord Cooper of the Scottish bench, stated that:

It is contrary to the tradition and genius of our criminal law to deal with its basic conceptions \textit{in vacuo}.... The Scottish law of crime never approaches a problem like this in the abstract. The approach is always from the other end and any attempt to imprison such conceptions within the framework of a definition would be, in my judgement, inevitably disastrous, and would gravely embarrass, even cripple, the administration of law for an indefinite period.\footnote{Supplementary Memo to the Royal Commission on Capital Punishment (Evidence 18th day, 4th April 1950) at 428 para 4. [taken from Farmer, \textit{supra} note 71 at 29].}

In discussing this fact of Scottish law, Lindsay Farmer of Strathclyde University, Glasgow, uses this quote to underline the point that ‘conceptual difficulties’ seldom arise in Scotland as they are overridden by practical considerations. The author states that “[I]legal practice is given authority over abstract theory...”\footnote{Farmer, \textit{supra} note 71 at 35.} Although this fact is not directly linked to the issue of \textit{dole} it has nonetheless been of immense importance in the development of the law of intoxication. While a truly subjective test might be the fairest method of assessing criminal responsibility\footnote{Stair, \textit{supra} note 49 at para 86.}, the practicalities demand otherwise. To ask that the Crown subjectively prove the mental element in every case would place a “…very difficult and often impossible onus on the prosecution.”\footnote{\textit{Ibid}.} It is feared that such an obstacle “…would screen many great offenders from the due punishment of their transgressions.”\footnote{Hume, \textit{supra} note 65 at i, 21.} The use of objectivity in matters of a purely evidentiary nature is itself unremarkable and by no
means restricted to Scotland. Scottish criminal law does however make greater use of objectivity than is seen elsewhere in the Commonwealth. Case law shows that in Scotland objectivity takes on a substantive role, over and above that employed in relation to questions of evidence.

On account of the moral basis of Scots law, objectivity has taken on a central role to the almost complete exclusion of subjective issues. Fletcher writes that ".. normative theorists are more inclined to view negligence as a proper ground for blaming an actor for making a mistake or causing an accident". While normative evaluations of the mental element in Scots law have not allowed negligence to form the basis of criminal guilt, the role of recklessness has been accorded great importance in Scotland. Unlike English law, where actual intent may be required as the mental element for an offence Scottish theory allows for recklessness to satisfy the need for the mental element in most common law crimes. In Scotland murder and even attempted murder can be committed recklessly, provided that such recklessness is "wicked". So too can assault, rape and culpable homicide. These crimes of violence more or less cover all of the problem areas that arise out of alcohol abuse. As such, they show that as far as law is concerned the question is not one of intention but rather one of recklessness. It follows that the issue may be resolved by


115 Stair, *supra* note 49 at para 81 where the authors write "[w]ith respect to common law offences, however, [negligence] is not thought to be adequate at all, on the basis that simple lack-of-care is simply not a mental element, or that negligence is insufficient unless gross."

recourse to community standards as opposed to an analysis of the individual's actual state of mind at the moment of the incident. If recklessness is to reflect the notion of community standards then it must be viewed objectively. Any attempt to assess the knowledge or foresight of the individual would open the door for accused persons to be acquitted on hindsight. Judicial considerations on either side of the Scottish/English border demonstrate fundamental differences in the tests of the two countries regarding recklessness.

In England the position is governed by the two cases of *R v. Caldwell*\(^{117}\) and *R v. Lawrence*.\(^{118}\) Between them, and the earlier case of *R v. Cunningham*\(^{119}\), the law relating to recklessness in England can be summarised thus:

> When he acted D must have had one of three possible states of mind regarding the risk. (1) He may have known of the risk. (2) He may not have considered whether there was a risk or not. (3) He may have considered whether there was a risk and decided that there was none. The first variety of recklessness, which will be called "Cunningham recklessness" after the leading case, requires proof of the first state of mind. The second variety "Caldwell recklessness" requires proof of either the first or, where the risk would have been obvious to a reasonable person who gave thought to the matter, the second state of mind. A person with the third state of mind is not reckless in either sense.\(^{120}\)

It is this third state of mind that allows for what Smith and Hogan call the "... "lacuna" or "loophole" in the Caldwell/Lawrence principle."\(^{121}\) Thus despite all the objective rhetoric


\(^{120}\) Smith & Hogan, supra note 15 at 62.

\(^{121}\) *Ibid.* at 65.
of the House of Lords in *Caldwell* and *Lawrence*, the law of England is ultimately limited by a subjective opt out clause that permits the accused’s assessment of the risk, however unreasonable, to result in a complete acquittal.

Once again the law of Scotland is very different. In *Gizzi v. Tudhope*,\(^\text{122}\) the Criminal Court of Appeal rejected any notion of subjectivity in the assessment of recklessness. The case involved the reckless discharge of firearms, which occurred when some workmen, hidden from sight by a row of trees, were injured by two men practising clay pigeon shooting. When charged, the first accused Gizzi stated “I didn’t think that it [namely the shot] would go that far.”\(^\text{123}\) His co-accused, Conetta, added “I didn’t know that anyone was about when I was firing the gun.”\(^\text{124}\) If these statements are believed then clearly both accused had considered the risks involved and concluded that no risk existed. Thus they would fall into what Smith and Hogan described above as the third state of mind and hence within the *Caldwell/Lawrence* loophole. The High Court of Justiciary, again led by Lord Justice-General Emslie, rejected such an idea and the two convictions were upheld.

The importance of objectivity can be seen in the words “...the area in which the clay pigeon shooting was taking place was one in which it might reasonably have been expected that members of the public or children and others might come to be...”\(^\text{125}\)


\(^{124}\) *Ibid.*

\(^{125}\) *Ibid.* at 216.
actual frame of mind of either of individual was not considered relevant to the outcome of the case. In order to avoid an overly harsh application of this rule, the Scottish courts have set the actual standard for recklessness fairly high. Thus for one to be held criminally responsible on account of recklessness one must display "...an utter disregard of what the consequences of the act in question may be so far as the public are concerned." The case of Brennan shows that the High Court of Justiciary believed that together violence and extreme self induced intoxication is reckless and displays a disregard for the safety of others. By holding this to be so the court spoke for the country as a whole and declared such behaviour to be worthy of criminal sanction and that to impose punishment was neither "...unethical [n]or unfair...". No one would argue that, under normal circumstances, punishment for violent conduct towards another human being was unfair, but when extreme alcohol intoxication is involved concerns have arisen concerning the propriety of this approach. Brett argues that to deny a defence to an accused who was so drunk that he claims not to have intended his actions is "...to require higher standards of the drunken man than of the sober man." In response to this statement, the assertion that acute self-induced intoxication is morally wrong relies on the notion of foreseeability regarding the increased probability of violence. If one accepts the simple statement that

126 Jones & Christie, supra note 49 at 49, where the authors write that "[the Court] was unconcerned that the appellants had not been subjectively reckless."


128 Brennan, supra note 7 at 51.

129 Brett, supra note 103 at 196.
deliberate interpersonal violence is morally wrong, then it follows that a known course of action that *might* bring about violence should equally be morally wrong. This depends on what the level of foresight actually is.  

Scots law however does not enquire as to the actual forseeability in each case. The hardened and seasoned drinker is treated in the same way as the novice drinker. Such a disregard for the actual circumstances has come in for some criticism, but this has largely fallen on deaf ears.  

Again objectivity has been allowed to prevail in criminal matters in Scotland. Forseeability is measured by the standard of the reasonable person. Such a person is deemed in Scotland to be aware of the dangers of abusing alcohol. Thus the courts put forward the irrebuttable presumption that the public know in advance that violence might follow serious intoxication. While science has failed to conclude that there is a direct link between alcohol and violence, the courts in Scotland have used the strong correlation and public perceptions of this, as a justification for imposing criminal responsibility. Individual forseeability would be a very dangerous way to develop the criminal law. It would allow for the easy fabrication of the defence based on the sole testimony of one who had consumed alcohol to excess and committed an act of violence. This would effectively base the defence on hindsight. If this logic of individual experience

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130 See generally chapter 3 *infra*.


were applied across the board then one could argue that speeding or drink driving was permissible for individuals who had done this before without causing an accident.

Any attempt at a subjective assessment of the intoxicated offender's state of mind during the offence suggests the possibility of moral innocence, despite the impossibility of knowing what was in the mind of the accused. Sheehy writes that:

The use of an objective standard to evaluate the offender's "guilty mind" is not only consistent with the community's notions of what constitutes "moral innocence" versus "gross fault" in this context of intoxicated offending but is necessitated by the fact that the offender has, by his or her own voluntary conduct in excessive consumption of alcohol or drugs or both, put his or her self outside of our abilities to assess "subjective fault" and driven us to the objective measure.\(^{133}\)

The rejection of subjective judgement is of crucial importance in the intoxication debate in Scotland. It permits the moral judgement regarding alcohol induced violence, described above, to be made without creating a conflict between the theory and practice of criminal law. The use of objective standards is "...a direct appeal to ordinary expectations."\(^{134}\) I would submit that any civilised society could ordinarily expect its citizens not to consume alcohol to excess and then commit serious acts of violence. Were this not the case then the criminal law would be failing to fulfil its role as protector of the peace.

\(^{133}\) *Supra* note 13 at 112A:18.

Chapter 3 - Judicial and Medical Views of Intoxication

Intoxication has always been a complex area of the criminal law\textsuperscript{135}, with issues of public policy coming into conflict with the strict application of legal theory. Differences in opinion have arisen because public policy means different things to different people and will vary according to current circumstances. Thus, for example, a society experiencing high levels of alcohol related violent crime might adopt a different legal approach to a society where such behaviour is rare. The use of morally charged language, as discussed in chapter 2 in relation to Scottish criminal law, does nothing to simplify the debate. Parameters such as objective blameworthiness are, admittedly, plagued by uncertainty. It is suggested in this chapter that current medical opinion can help to provide us with a more definite answer to this problem of alcohol related violence, one which should be universally applicable and free from the ambiguities inherent in terms such as public policy and morality. It is not argued that such considerations are useless but that the guidance of objective scientific fact may help resolve differences in legal opinions.

Unfortunately the confusion and complications surrounding the law of intoxication have been heightened by the interaction between law and medicine. Case law reveals that judicial thinking in this area has been shaped by a consideration of two competing values that underpin the nature of criminal theory in the area of defences. Arguments for the protection of the public have been used to restrict or even deny the possibility of

\textsuperscript{135} See generally the discussion of historical texts by Lord Birkenhead in Beard, supra note 3 at 494-495.
intoxication as a defence in some countries. On the other hand, fears that to disallow intoxication as a defence casting doubt over the existence of criminal intent would be unfair for the accused, have resulted in a more liberal approach in other jurisdictions. In deciding which side of the debate on which to come down, judges have been influenced by a number of commonly held assumptions as to the role of alcohol in crimes of violence. As a result various assertions have been made regarding the physical properties of alcohol. The purpose of this chapter, therefore, is to identify the relevant judicial assumptions and assertions made regarding intoxication and to place them in the context of the medical debate. It is hoped that this will help to indicate the most appropriate method for dealing with intoxicated individuals who commit acts of violence.

Part A - Judicial Perceptions of Intoxication

(1) Public Protection

The perception of the criminal courts as keepers of the public peace has dominated the direction of Scots law in this area and to a certain extent, also in England. The misuse of alcohol is seen as a threat to the maintenance of public order. It is in the context of this that numerous assumptions have been used by judges to justify outcomes that favour the public’s well-being before that of the accused. In Majewski, Lord Elwyn-Jones stated that:

Self induced alcoholic intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause has added a new dimension to the old problem with which the courts have had to deal in their endeavour to maintain
order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law.\textsuperscript{136}

It is with this ultimate goal in mind that the Scottish and English criminal courts have dealt with the intoxicated offender. Prior to the nineteenth century, intoxication was seen as an aggravation of the offence rather than a mitigating factor.\textsuperscript{137} The notion of drunkenness as something that may reduce culpability surfaced during a gradual relaxation of the law throughout the nineteenth century.\textsuperscript{138} Despite this relaxation, the courts in England were careful not to allow a complete defence because they believed "... that there would be no safety for human life if it were law".\textsuperscript{139} The amount of respect and credence given to the belief that the public needs protection from violent, drunken individuals has been governed by a number of distinct but related beliefs as to the role of alcohol in crime and its effect on the individual.

\textbf{(a) Alcohol and Violence}

In particular courts have been swayed by the argument that there exists a strong link between alcohol abuse and violence. Thus judges have very often relied on the assertion that the ingestion of alcohol in enough quantity can itself lead to aggressive behaviour and violent conduct. Lord Salmon averred that "[a] man who by voluntarily taking drink and

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{136}] Supra note 4 at 469.
\item[\textsuperscript{137}] Beard, supra note 3 at 494.
\item[\textsuperscript{138}] Ibid. at 495.
\item[\textsuperscript{139}] Ibid.
\end{enumerate}
\end{footnotesize}
drugs gets himself into an **aggressive state** in which he does not know what he is doing and then makes a **vicious assault** can hardly say with any plausibility that what he did was a pure accident which should render him immune from criminal liability.”¹⁴⁰

The English courts have taken this belief and used it to deny any defence of intoxication for basic intent offences.¹⁴¹ Escalating violent crime coupled with the more worrying aspect of drug induced intoxication were accorded great importance in *Majewski*. Scottish courts, however, have taken this one step further and used this apparent link between violence and alcohol as part of the justification for denying a defence based on intoxication to any criminal charge at all.

In Scotland the notion that extreme intoxication can negate criminal responsibility was not viewed favourably by the Court. In delivering the opinion of the Court, Lord Justice General Emslie gave a damning indictment of the state of violence in society and the pivotal role played by alcohol. In doing so, self-induced intoxication was ruled out as a defence in all cases. It was stated that “*[s]elf induced intoxication is itself a continuing element and therefore an integral part of any crime of violence*, including murder, the other part being the evidence of the actings of the accused who uses force against his victim.”¹⁴² It was felt in *Brennan* that the dangers to society posed by alcohol were so

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¹⁴⁰ *Majewski*, supra note 4 at 482 [emphasis added].

¹⁴¹ Chapter 1, *supra* at 5.

¹⁴² *Brennan*, supra note 7 at 51 [emphasis added].
great as to completely outweigh any possibility of a defence based on the principle of fairness for the accused.

If the link between alcohol and violent crime can be upheld then it stands as a strong argument in favour of denying intoxication as a defence. However those who favour allowing the defence also rely on this assertion. It is argued, by the opponents of this strict approach, that the link between alcohol and crime explains why the accused acted as he did. The Scottish and English approach to the link between alcohol abuse and violent crime rests on the notion of foreseeability. It is felt that the dangers of over indulging in alcohol are sufficiently well known to allow for criminal sanctions to apply to drunken individuals who commit acts of violence. Thus, particularly in Scotland, the courts have relied upon this assumption that alcohol abuse can lead ultimately to violent crime.

This belief that alcohol and violence are inextricably linked does not stand alone as an argument in favour of a strict application of the criminal law. The High Court of Justiciary in Scotland relied on a number of other factors to hold that evidence of self-induced intoxication could not be used to cast doubt over the existence of mens rea.

(b) Evidential Matters

The position in Scotland was strengthened by the fact that the courts have been sceptical as to the veracity and reliability of the evidence put forward to substantiate the claims of extreme intoxication. The Scottish judges felt that evidence from both eye witnesses and medical experts could do nothing to allay their scepticism concerning intoxication as a
defence. Once again this view was based on the judges' opinions of the physical nature of alcohol as a drug.

It is often the case that the accused and the victim will be the only two witnesses available as happened in Daviault. Evidence given at the trial by an expert witness was to the effect that "if" the accused had consumed the amount of alcohol that he claimed to have consumed he would not have been able to form even the minimal intent necessary for the sexual assault. The expert witness could not be more specific than this because he was not there at the time of the offence. Even the victim could not confirm that Daviault had finished the bottle of brandy by himself as she was already asleep. This evidential problem becomes even more acute when the offence is one of murder. In many cases the only other potential witness has been eliminated. Even when other people are around the evidence might still not be entirely reliable. The environment in which alcohol is usually consumed will influence this. In the case of Majewski the assault took place in a crowded bar. Thus one would expect to find enough witnesses to corroborate or refute the claims put forward on behalf of the accused. However one must bear in mind that most of these individuals will also be intoxicated to a certain degree and will therefore very often not be the most reliable witnesses.

This sceptical stance becomes more believable when one considers how easily drunkenness can be feigned. Someone in the position of Daviault could just as easily have poured the

\[143\text{ Supra note 17 at 27.}\]
brandy away and claimed that he had in fact consumed the alcohol. Alternatively, where no other witnesses are available, it would be very easy for the accused to commit an offence while sober, and then become intoxicated before the action was discovered by a third party. In violent crimes when the accused claims to have been drunk at the time of the offence it could be used as another means to fake intoxication and attempt to justify his actions. Even the courts that have allowed consideration of intoxication as a defence have been aware of these concerns and have repeatedly said, where the defence has been allowed, that only very rarely will it succeed.\(^{144}\)

It may be some time before anyone else becomes aware of the crime, especially where the victim has been killed or incapacitated. This will be particularly relevant in cases of domestic violence. A time delay, however, is consistent with the accused’s claims of drunkenness. If the intoxication was extreme and the accused claims he lacked intent for the offence, then he is unlikely to be able to appreciate what he has done and be able to coherently inform the appropriate authorities. An accused who had informed the police immediately after the incident would seem less than credible. This however presents a further problem in accepting the defence of intoxication. Obviously with the passage of time alcohol leaves the body. In *Brennan*, the Scottish High Court distanced the defence of insanity from intoxication for numerous reasons. One of these factors is the fact that in drunkenness cases you cannot examine the accused after the offence in order to ascertain

\(^{144}\) *O’Connor*, *supra* note 5 at 355.
his state of mind at the time of the offence. Unlike legal insanity, acute alcohol intoxication is always a transitory condition.

These inaccuracies caused great concern for the Scottish bench in the *Brennan* case. Lord Emslie quoted Hume with approval:

> How are the different degrees of ebriety to be distinguished or the real ebriety to be discerned from that which is affected; or what protection could we have, if this were the law, against the attempts of such who might inflame themselves with liquor on purpose to gain courage to indulge their malice, and an opportunity to do it safely?\(^{145}\)

Lord Emslie went on to say that Hume's views, despite being two hundred years old, still accurately represented the law of Scotland. Thus the modern courts approved of Hume's fears as to the difficulty of identifying someone who fakes drunkenness to serve his own ends.

Furthermore, as Hume has asked, how do we tell which accused got drunk and committed an act of violence from someone who gets drunk to give himself the courage to commit such an act? Only the accused himself will know this and therefore to allow any defence of intoxication would fail to protect society from such a person. It was stated in *Beard* that “... in the case of a drunken man, there can never be any evidence of what was in his mind.”\(^{146}\) Again it is the uncertainty surrounding alcohol abuse that is used as justification for limiting its availability as a defence.

\(^{145}\) *Brennan*, supra note 7 at 43.

\(^{146}\) Per Sir Richard Muir, *Beard*, supra note 3 at 489.
These concerns relating to the inherent unreliability of both medical and lay testimony, based on the assertions that intoxication is too uncertain a concept, helped to bring about the result in Scots Law that intoxication could never be used as a defence to any criminal charge. The courts have taken these assumptions concerning the inherent uncertainties surrounding the evidence of intoxication and reached the conclusion that there is nothing surrounding drunkenness that can create a reasonable doubt as to the guilt of the accused.

(c) Quantification of Intoxication

Hume's concern for the court's ability to separate degrees of intoxication is yet another reason for the Scottish courts' strict stance. While English Law makes the distinction between someone who is extremely intoxicated and someone who is merely 'under the influence' with regards to specific intent offences, the Scottish courts have avoided drawing such fine lines. Hume's views, expressed earlier, show a dislike of such an operation. In Scotland it was felt that the concept of drunkenness could not be divided up in such a manner. As will be discussed below, the other jurisdictions which permit a defence of intoxication to some extent, all feel confident that they can differentiate between someone who is extremely intoxicated and someone who is only slightly drunk.

The net effect of these various factors has been the elimination of the defence of intoxication in Scotland, and its restriction in England and Canada. The extent to which medicine supports such a public protectionist stance will be examined in Part B, after a
consideration of the issues that influenced the more relaxed decisions taken in Australia, New Zealand and at least by the courts in Canada.

(2) Fairness for the Accused

In upholding public order the courts must also exercise justice fairly. To do otherwise would be self defeating in their quest for public order. Punishment of the innocent would undermine the efficacy of the courts through the loss of public support and respect for the judicial system. The consideration of this competing factor has led some jurisdictions to allow the defence of intoxication, either partially, as in England and Canada, or completely as in Australia and New Zealand. Thus judicial concerns for the rights of the accused have tipped the balance away from protecting the public from violent, drunken individuals.

Much of the judicial reasoning used to justify such a shift has been based on criticising the strict aspect of an outright or partial ban on the use of the defence. The High Court in Australia argued at great length that the House of Lords did not go far enough in Majewski to protect the rights of the accused to a fair trial.\textsuperscript{147} Such criticisms have been based largely on the fact that it is illogical to admit that intoxication can detract from criminal intent in some cases but not in others. Nevertheless judicial interpretation of medical matters has contributed to the debate.

\textsuperscript{147} O'Connor, supra note 5. See especially the discussion of English law by Barwick C.J. at 350 - 358.
The reasons in favour of extending the defence of intoxication that stem from judicial interpretation of medical knowledge are relatively short when compared to the opposing arguments. Nevertheless they have found favour in Australia, New Zealand and, for a limited length of time, amongst the judiciary in Canada.

(a) Negation of Intent

The underlying principle, which the courts have striven to uphold is that of *actus non facit reum nisi mens sit rea*. No crime can be committed unless the guilty intent to do so is present. Without this guilty state of mind, the *actus reus* of the actual incident will not by itself justify criminal sanctions. This fundamental concept of criminal law has led some courts to hold in favour of an accused who was intoxicated at the time of the 'offence'. Some judges have accepted arguments that the state of intoxication in extreme cases precludes an individual from forming the requisite intent for the offence, regardless of the nature of the offence.

Thus Barwick, C.J., in *O'Connor*, spelled out his objections to the illogical English position with the words:

Thus, if evidence of intoxication is sufficient to raise a *doubt as to voluntariness or as to the presence of requisite intent*, I can see no logical ground for determining its admissibility upon a distinction between a crime which specifies only the immediate result of the proscribed act and a crime which in addition requires a further result dependant on purpose.\(^\text{148}\)

\(^{148}\) *Ibid.* at 357 [emphasis added].
Stephen J. went further in underlying the interests of the accused in the words, “I regard it as *unfair and unjust* that an accused, *robbed of his faculties* by resultant intoxication should be deprived of the opportunity of having the evidence of the absence of the mental elements of the crime with which he is charged left to the jury.”

This loss of intent is not accepted lightly by the courts. One generally cannot evade criminal responsibility after just one drink. As such the courts have accepted evidence that alcohol only lowers inhibitions in the early stages of intoxication. In such a state a person may become more boisterous or even aggressive and commit acts that they would not have committed, but for the alcohol. However a ‘but for’ test has never seriously been considered and it is accepted that such people are every bit as guilty of the offence as if they had they been completely sober. The required intent was present, albeit the judgement impaired to a certain degree.

(b) Quantification of Intoxication

To allow the defence of intoxication only in extreme cases raises further questions. Again it assumes that those involved in administering the criminal justice system can easily and consistently differentiate between degrees of intoxication. Although the same issue arose in *Majewski*, as mentioned above, the problem is more acute in relation to a complete defence as a person’s liberty is at stake. In England the accused would normally still be punished when a defence of intoxication was successfully pled in response to a charge of a

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149 *Ibid.* at 363 [emphasis added].
specific intent crime. In Australia and New Zealand the need for accuracy becomes much more important in light of the stark contrast between conviction and complete acquittal.

Despite the onerous nature of this task some judges feel confident in their own ability and the ability of the jurors to accurately quantify degrees of intoxication. It was averred by Barwick C.J. that "[t]he state of drunkenness or intoxication can vary greatly in degree."\(^{150}\) He then describes various lesser degrees of intoxication that failed to affect mens rea and that consequently were "...clearly irrelevant to a consideration of the accused's criminal culpability."\(^{151}\)

It would seem that this ability to distinguish between partial and complete intoxication extends to include the ability to identify those charged with offences who formed the intent prior to becoming drunk. Barwick C.J. confidently averred that "...the formation of the requisite intent and the deliberate induction of a state of intoxication for the performance of the charged act understandably makes that act when done in a desired state of intoxication both a voluntary act and an act done with the requisite intent."\(^{152}\) From this it is obvious that the courts believe that they can deal with such issues from a purely subjective standpoint. McCarthy P., spelled this out in the main New Zealand case of R. v. Kamipeli, with the words "[i]t is the fact of intent rather than the capacity to form

\(^{150}\) Ibid. at 352.

\(^{151}\) Ibid.

\(^{152}\) Ibid.
intent which must be the subject matter of the inquiry.” An assumption that this differentiation can be made underpins all the systems under consideration, except Scotland. It is arguably the most important factor in the whole debate. Without this belief, the courts could not proceed to deal with the different degrees of intoxication.

(c) Intoxication and Automatism

The courts have however gone further when allowing the defence of intoxication. Not only do some judges accept that intoxication can negate intent but they also feel that in extreme cases it can even result in a state of automatism.

In Daviault the Supreme Court of Canada relied heavily on evidence given that extreme intoxication may lead an individual to act in an involuntary manner in a state akin to automatism. For Sopinka J., in dissent, the sole point in issue was whether or not “...evidence of extreme self induced intoxication, tantamount to automatism, constitute[d] a defence...”. Similar views were expressed in O’Connor when Barwick, C.J., averred that “...the state of intoxication may, though perhaps only rarely, divorce the will from the movements of the body so that they are truly involuntary.”

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153 Supra note 6 at 616 [emphasis added].

154 Supra note 17 at 25, per Lamer, C.J.

155 Ibid. at 28.

156 Supra note 5 at 352.
From these two brief summaries of the conflicting viewpoints one can see clearly the essence of the problem faced by modern criminal courts. Conflict in this area of law has arisen due to the competing rights of the public and those of the accused. Differing views as to the weight that ought to be given to these rights has resulted in the varying opinions on how to dispose of someone who commits violent crimes while intoxicated. In balancing these opposing interests the courts have considered the extent to which alcohol has had an impact on public safety and the extent to which alcohol affects the individual. The underlying assumptions concerning alcohol have contribute to an almost irreconcilable conflict. To what extent ought one view be dominated by the other? Where should the line be drawn to ensure protection for the public without denying fairness and justice for the accused?

In an attempt to answer such questions I have undertaken a limited study of medical reports and papers which have examined the issues free from the constraints of the adversarial court system and the outcome of a particular case. From the data collected by the various tests and experiments I hope to demonstrate that the courts have very often been incorrect in their assessments of the role of alcohol in crime.

Part B - Medical Opinion

A comprehensive review of medical studies concerning alcohol intoxication would be a lifetime’s work. The following papers represent only a fraction of the material available and have mainly been taken from journals that specifically deal with the medical and legal
problems surrounding alcohol misuse. It will be argued that current medical thinking suggests that restricting or denying the defence of intoxication is scientifically justifiable.

Medical discussions invariably begin with the assertion that alcohol, obviously, is a drug. It is the physiological actions of ethanol on the human body that are especially relevant here. In particular it acts as a cortical depressant thus affecting the operation of the central nervous system. The cerebral functions affected first are those controlling our behaviour and how we interact in social settings. Thus lower doses of alcohol often result in minor breaches of the criminal law as inhibitions are removed. This is entirely compatible with judicial views that lower doses of alcohol can result in unlawful behaviour yet cannot excuse it. There is no current controversy as to the status of partial intoxication. It is widely accepted that in cases where the intoxication is not complete then mens rea is still present as the capacity to form intent has not been materially affected. The interaction between medicine and the law, and alcohol and crime, becomes much more complex as the intoxication becomes more extreme. It is in these circumstances that the confusion arises. This confusion, I would argue, is a direct result of some of the judicial assertions discussed above as to the scientific nature of drunkenness. Adversarial courtroom debates have contributed to this confusion. It is submitted that an independent evaluation of medical

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157 The specialist journals were discovered using the U.B.C. Library database. Only those with accessible indices were used. Several secondary sources were found from footnotes.


159 O’Connor, *supra* note 5 at 352.
literature might help clarify the true nature of intoxication. It is hoped that medical reviews are not conditioned by the partisan influences that underlie the expert witness system.

(a) Alcohol and Automatism

If it can be shown that in the most extreme cases, involving the levels of intoxication described in Daviault and Brennan, that alcohol does affect the individual to such an extent that they cannot even be said to be acting voluntarily, then the Australian and New Zealand approach might seem to be the logical extension of the defence of automatism in this area of criminal law, at least in jurisdictions that permit self induced intoxication to be considered in relation to mens rea.

Evidence given in the aftermath of Daviault casts some doubt as to the possibility of this. Dr. P. Kendall, President and CEO of the Addiction Research Centre in Ontario, testified as to the possibility of this to the Standing Committee on Justice and Legal Affairs in Canada on 13th June 1995. He stated that “[a]fter consultation with a number of our experts and others in the field, it would be our opinion that alcohol, in itself, could not induce a state akin to automatism.”\(^{160}\) This was backed up by a similar conclusion from Dr. H. Kalant from the Department of Pharmacology, University of Toronto.\(^{161}\) Both doctors described how alcohol affects consciousness and the ability to move voluntarily simultaneously. Thus consciousness will only be lost when co-ordinated movement ceases;

\(^{160}\) Presentation to the Standing Committee on Justice and Legal Affairs on Bill C-72, in Minutes, supra note 13 at 112A: 75 [emphasis in original].

\(^{161}\) Ibid., at 112A: 85.
i.e. when the individual passes out. This in effect means that when an intoxicated individual is capable of "...reasonably complex co-ordinated movements" then it indicates that the person has not yet an automaton in the legal sense. If this opinion is widely accepted amongst the medical profession, as the witnesses claimed, then it severely restricts the notion of intoxication as a defence. An earlier work by Professor Mitchell, of Ottawa University, would seem to back this up. He stated that:

Drug consumption causes involuntary effects such as dizziness, slurred speech, vomiting, and hangover but these are hardly relevant in criminal law apart from nuisance offences and impaired driving. Neither alcohol nor other drugs compel users to perform goal-directed damaging actions. ..... I could find no genuine case where intoxication caused an automatic or involuntary act.  

At the very least, this rules out using intoxication as an excuse for crimes of strict liability. In such offences the need for the Crown to prove mens rea as a constituent part of the crime has been done away with, normally by statute. Thus, in the absence of a plea based on automatism, a defence based solely on a lack of mens rea would fail.

(b) Negation of Intent

The fact that alcohol induced automatism cannot occur does not, however, affect the right of the defence to cast a reasonable doubt over the existence of mens rea. If alcohol intoxication can indeed affect one's ability to form the requisite intent, then a prima facie case exists for allowing evidence to be led in favour of the accused.

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162 Ibid.

163 C. Mitchell, "The Intoxicates Offender - Refuting the Legal and Medical Myths" (1988) 11 Int'l J. Law & Psych. 77 at 94.
The same two doctors who testified that automatism cannot be caused solely by alcohol believed that intoxication could impair consciousness. Quoting from an earlier report, Dr. Kalant stated “[d]runkenness produces impaired judgement, reduction of controls over behaviour and paranoid misrepresentation of the environment.”\textsuperscript{164} It is this existence of impaired judgement that has been used to support arguments in favour of allowing the defence of intoxication in whole or in part. The connection is made between limited cognition and an inability to form the requisite criminal intent. While issues regarding what is and what is not \textit{mens rea} are clearly legal issues, notions concerning cognitive ability are medical matters. The impairment of cognitive abilities stem from the fact that alcohol, as stated above\textsuperscript{165}, is a depressant of the central nervous system. This accounts for the “...disruptive effect on psychological aspects of behaviour and performance.”\textsuperscript{166}

Thus it can be seen that objective medical opinion establishes a \textit{prima facie} case for the proposition that alcohol can, in large enough doses, affect the individual’s capacity to reason and form the necessary intent to perform complex actions. The division between specific intent and basic intent is a purely legal issue. None of the medical papers examined

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{164} \textit{Supra} note 160 at 112A: 88.
  \item \textsuperscript{165} Mason, \textit{supra} note 158.
  \item \textsuperscript{166} I. Hindmarch, J.S. Kerr & N. Sherwood, “Effects of Alcohol and Other Drugs on Psychomotor Performance and Cognitive Function” (1991) 26:1 Alcohol and Alcoholism 71 at 71 [hereinafter Hindmarch].
\end{enumerate}
\end{footnotesize}
made any qualification when discussing these issues. Specific and basic intent are not medical terms.

(c) Quantification of Intoxication

However such information is, by itself, useless. While one can argue that intoxication can lead to a negation of intent, the level at which this occurs has not yet been established. Several of the reports addressed this issue. Alcohol levels in the body can be measured accurately through an examination of either blood, breath or urine. Blood is the preferred medium and levels are expressed as mg of alcohol per 100ml of blood. These methods of measuring alcohol consumption, however, were formulated to deal with the problem of drunk driving and experience has shown that they are not readily transferable to other crimes.

The main difficulty is neither medical nor legal but practical. Unlike most impaired driving offences, where drivers are caught in the act and tested on the spot, it may be some time before the authorities are notified of violent crimes. Moreover it may be some time before a suspect is apprehended. The longer the delay the less alcohol will be present in the accused’s body. Depending on the amount ingested and the time elapsed there may be no alcohol left to measure. On average alcohol metabolises at a rate of 15mg/100ml of blood per hour.¹⁶⁷

Even in situations where a level can be measured and back counted it will be wildly inaccurate. Although the average rate of metabolism is 15mg/100ml per hour this can vary between 9mg and 27mg. This problem is relatively academic however. Medical opinion considers blood alcohol levels to be meaningless with respect to cognitive ability and thus they bear no relation to criminal intent. There are so many external factors that make even accurate measurement useless. Tolerance is the main concern of the medical profession. The habitual alcoholic will be able to function normally at extremely high blood alcohol levels which in a novice drinker could result in coma or even death.\textsuperscript{168}

These complications become even more acute when other factors are taken into account. The same individual taking the same dosage will react differently depending on several different external factors.\textsuperscript{169} No generalisations can be made. The setting will be important. Alcohol abuse in a domestic environment results in violence more often than when alcohol is consumed away from the home.\textsuperscript{170} The composition of the company present will also influence reactions. Food intake, or more importantly lack of it, will also affect how one functions after a certain dose of alcohol. A threatening environment has been shown to


\textsuperscript{169} Hindmarch, \textit{supra} note 166.

\textsuperscript{170} T. Myers, "An Analysis of Context and Alcohol Consumption in a Group of Criminal Events" (1986) 21:3 Alcohol and Alcoholism 389.
increase the likelihood of violence.\textsuperscript{171} Clearly such variables suggest that it is inappropriate to draw any conclusions from blood alcohol levels. In the instances where blood alcohol levels have been used in evidence the courts have tended to accept figures as evidence of lack of intent.\textsuperscript{172} The medical evidence suggests that it is impossible to differentiate between levels of intoxication. As stated above the medical profession believe that alcohol levels and levels of intoxication do not necessarily coincide. The courts however have based their decisions on the lack of intent on the amount of alcohol consumed. The medical evidence does not support such an approach. Thus it is impossible to comment on the state of the accused's mind from the amount of alcohol consumed.

(d) Alcohol and Violence

It cannot be purely coincidental that most of the medico-legal texts dealing with the issue of intoxication concentrate on the problem of alcohol and violent crime. At the very least this shows concern amongst the medical establishment regarding the occurrence of drunken violence. All of the medical reports that looked at the problem of the incidence of violent behaviour whilst intoxicated refused to conclude that the relationship was simply one of cause and effect. Despite a vagueness as to the exact link between alcohol and violence, it is readily admitted that the two obviously co-exist and that there is some correlation between alcohol and violent crime. Research has underlined the importance to the equation of factors such as personality, situation, company, cultural expectations and


\textsuperscript{172} See discussion of recent Canadian cases by Dr. Kalant, supra note 160 at 112A:81.
education. Brian Hore of the Alcoholism Treatment Unit and Detoxification Centre, Withington Hospital, Manchester, bluntly stated that “[t]he link between alcohol and crime has been recognised for many years.” He too pointed out the importance of numerous factors that included the individual’s personality. It seems somewhat strange that the voluntary ingestion of a foreign substance which has been shown to coexist with violence, and is thought to react according to the individual’s own characteristics, can be used as an excuse. It seems even more incredible to argue, as was done in O’Connor, that the link between alcohol and violent crime is not strong enough to justify holding the accused responsible for his actions, yet use it as a reason to explain why the individual acted violently.

The statistics quoted in chapter 1 would seem to support the assertions that link alcohol with violent conduct. A purely statistical analysis led Norton and Morgan to conclude that “[a]lcohol is, therefore, likely to be a causal factor in mortality and morbidity from interpersonal violence in Great Britain.” It is the existence of such data that led one commentator to state that “[t]here is overwhelming empirical evidence that alcohol ingestion may be correlated with changes in the incidences and intensities of behaviours

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174 Supra note 171 at 435.

175 Supra note 5 at 363.

176 From the Academic Department of Medicine at the Royal Free Hospital and School of Medicine.

177 “Role of Alcohol in Mortality and Morbidity from Interpersonal Violence” (1989) 24:6 Alcohol and Alcoholism 565 at 574.
that receive the label 'aggression'.”178 These views show at the very least a concern held by part of the medical profession that there is a definite, albeit evasive, link between alcohol abuse and violence.

As stated above the link is not thought to be one of simple cause and effect. It is felt that human behaviour is too complex to be pigeon-holed into finite parameters. Rather it is influenced by several factors, both internal to the individual and external. Thus the more recent medical studies dealing with drunken violence have reached rather tentative and vague conclusions as to the possible nature of this relationship. Beliefs as to what this link is are numerous and, not surprisingly, varied.

In 1978 Speiker and Sarver wrote that “[t]here is a general acknowledgement that alcohol is a factor, although not the only one, in criminal behaviour.”179 The notion of alcohol as one of many causal factors also gained credence, more recently, with Norton and Morgan180 who stated that this was so despite most of the evidence being anecdotal. Dr. Brain, in a 1982 paper which critically examined the notion that alcohol causes aggression, concluded that we could say no more than “[i]t should be recognised that alcohol does not cause aggression but it may produce changes altering the probability of generating


180 Supra note 177 at 565.
behaviour deserving this label."¹⁸¹ Four years later Brain wrote that there was no simple causal connection between violence and the abuse of alcohol.¹⁸² One could only state that there was a correlation between the two practices. He concluded that the existence of too many variables prevented a more definite answer.

While there is nothing conclusive in the figures to offer a concrete or universally acceptable answer, it does suggest that the flippant manner in which Stephen J. in O’Connor brushed aside concerns regarding public safety were somewhat premature.¹⁸³ The statistics clearly show that there is at the very least a strong correlation between alcohol abuse and violence. The fact that it has not been proved that alcohol abuse can directly cause violence ought not to be important. As Isabel Grant stated “...it should not be necessary to establish that alcohol causes violence in order to justify limiting the defence of intoxication. Statistics back up the facilitating the effect of alcohol on violence and the fact that violence is more extreme when the perpetrator is intoxicated.”¹⁸⁴ When taken together this information goes some way to vindicate the approach taken in Scotland and the countries that allow only a partial defence in certain circumstances. The levels of alcohol related violence indicate that a defence based solely on drunkenness is undesirable. To provide such a defence to crimes of violence based on the idea that the

¹⁸¹ Supra note 178 at 44.
¹⁸³ O’Connor, supra note 5 at 363.
¹⁸⁴ Supra note 19 at 252.
link between alcohol and violence is unfounded denies the importance of the general statistics yet claims that the individual act is attributable to the alcohol.

When one considers the admittedly vague link between alcohol and violence in conjunction with the above conclusions as to the impossibility of alcohol induced automatism and the difficulties involved in the quantification of intoxication, it becomes apparent that any defence of intoxication is both unworkable and unfounded in science. Thus it can be seen, from even a limited review of medical papers that the law concerning intoxication is very much confused by its application and appreciation of medical matters. This need not be so. Dr. Kalant was of the opinion that these issues "...should be resolvable by the consensus of scientific evidence." If an acceptance of the consensus is to be successful than objectivity must prevail. I would submit that the courts themselves might not be the best place to debate scientific evidence. Opposing sides will have opposing expert witnesses who give opposing views. The Crown and the defence witnesses cannot both be right as to the presence of automatism or criminal intent. One commentator has written that "[m]edical testimony about intoxication is biased, inaccurate, harmful and unnecessary."^186

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185 Supra note 160 at 112A: 81.

186 Mitchell, supra note 163 at 100.
Chapter 4 - The Antipodean Alternative: Australia and New Zealand

In chapter 3 the scientific assumptions used by Australian and New Zealand judges to justify outright acquittals were tested against medical research papers and found to be somewhat unconvincing. As in the other jurisdictions however, the realities of alcohol as a drug have taken a back seat to the legal discourse employed to justify a particular result. I now propose to address the judicial and academic arguments put forward in defence of the decisions taken in O'Connor and Kamipeli. These decisions represent another common law alternative to the Beard rule, one which has added importance in Canada. Although the reasoning in Daviault differed slightly, the end result sought was clearly a move in the direction of Australian law. It is submitted that such a move is undesirable and thus chapter 4 will attempt to discredit the idea that self induced intoxication can negate intent, and thus culpability, for any type of crime requiring intent.

In stark contrast to Scots law, Australia and New Zealand abandoned the Beard rule and moved in the opposite direction, holding that where extreme intoxication prevented

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187 Infra chapter 5.

188 The O'Connor decision represents the law only for the non-codified states in Australia. Those states which are governed by codes, namely Queensland, Western Australia and Tasmania, retained a codified version of the Beard rule which will not be considered here.

189 As Kamipeli was decided two years earlier, the decision of Majewski has not yet been reviewed. Despite suggestions that the position is still open (see R. v. Roulston [1976] 2 N.Z.L.R. 644 (C.A.)), "the courts in New Zealand seem to be following Kamipeli rather than Majewski". (see L.C.C.P. No. 127, supra note 94 at 61).
the Crown from proving the existence of the necessary criminal intent, an outright acquittal could follow, regardless of whether the crime was one of specific or basic intent. The essential basis for this view of intoxication can be seen in the words of Stephen J.:

I would regard it as unfair and unjust that an accused, robbed of his faculties by resultant intoxication should be deprived of the opportunity of having the evidence of the absence of the mental elements of crime with which he is charged left to the jury.\textsuperscript{190}

Once again, a sense of fairness is being used as guidance for the criminal law. Unlike Scotland, however, Australia and New Zealand “put principle before expediency”.\textsuperscript{191} Not surprisingly Barwick C.J., the presiding judge in \textit{O'Connor}, criticised the random and uncertain classification of crimes into those of specific intent and those of basic intent.\textsuperscript{192} This premise will not be questioned as it is widely accepted, even in Scotland.\textsuperscript{193} The remaining reasons for the Australian High Court’s ‘principled’ decision are however open to serious criticism. The court averred that self induced intoxication was not of itself morally reprehensible\textsuperscript{194}; that a conviction of a basic intent offence without subjective

\textsuperscript{190} \textit{O'Connor}, supra note 5 at 363.


\textsuperscript{192} \textit{O'Connor}, supra note 5 at 356 where Barwick, C.J. stated:

In my respectful opinion, the distinction between basic and specific intent is unhelpful as a basis for distinction of crimes by reference to \textit{mens rea}...I think his Lordship [in \textit{Beard}] probably realized how anomalous it would be, as I think undoubtedly it is, that an accused could not be convicted of what is there called a graver offence if he lacks the requisite intent but could be convicted of a lesser offence without the requisite intent.

In New Zealand the Court of Appeal declared that Lord Birkenhead in \textit{Beard} could not have meant to deny the defence for crimes of basic intent (\textit{Kamipeli, supra} note 6 at 614 per McCarthy, P.).

\textsuperscript{193} \textit{Brennan, supra} note 7 at 51.

\textsuperscript{194} \textit{O'Connor, supra} note 5 at 350.
intent was an affront to criminal law theory\textsuperscript{195}; and that public safety would not in any way be compromised by abandoning the \textit{Beard} rule.\textsuperscript{196} Each of these justifications will be examined in turn.

Firstly the assertion was made, in \textit{O'Connor}, that "[t]he voluntary nature of a self induced intoxication (whether by drugs or by alcohol), whether deliberate or reckless, [does] not of itself satisfy the requirements of \textit{mens rea} for the commission of an offence...".\textsuperscript{197} This establishes that the Australian courts see nothing wrong with the mental condition of voluntary intoxication in relation to violence. Such behaviour is seen as morally neutral. In contrast to the Scottish approach, it is argued that it is wrong for the courts to make a moral judgement as to the nature of drunkenness. This criticism has already been levelled at the \textit{Brennan} decision in Scotland.\textsuperscript{198}

To counter this, I would argue that the Scottish courts never intended to make such an assertion. Drunkenness in itself is not a crime in most circumstances. Rather the Scottish courts were passing moral judgement on drunken violence, which clearly is a different state of affairs. Sistare wrote that "[t]hose charged with evaluation must resist inventing

\begin{itemize}
\item \textsuperscript{195} \textit{Ibid.} at 355. The much more concise decision of \textit{Kamipeli} concentrates on this aspect to the exclusion of all other issues.
\item \textsuperscript{196} \textit{Ibid.}
\item \textsuperscript{197} \textit{Ibid.} at 350.
\item \textsuperscript{198} Ferguson, \textit{supra} note 55 at 382 where the author states that ".. the decision comes uncomfortably close to equating voluntary intoxication with wickedness, an equiperation surely at odds with the \textit{mores} of millions of Scots."\
\end{itemize}
fanciful standards which they, themselves, could not meet in a like situation." Thus the idea of introducing a crime of criminal intoxication has never been taken too seriously. The Scottish position makes no judgement regarding intoxication itself. To do so would be pointless and self defeating. Drinking to excess is a private affair which is in general beyond the scope of the police and the criminal law. It is only when harm materialises, in the shape of violence towards others, that the criminal law takes an interest. The Australian and New Zealand courts have taken what I believe to be an artificial step in dividing the intoxication from the violence. The importance of analysing the entire issue can be seen in the words of Lord Simon of Glaisdale, speaking in Majewski:

Mens rea is therefore on ultimate analysis the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence. There is no juristic reason why mental incapacity,... brought about by self-induced intoxication, to realise what one is doing or its probable consequences should not be such a state of mind stigmatised as wrongful by the criminal law; and there is every practical reason why it should be.

To claim that the amoral nature of the intoxication thus renders any future violent action similarly neutral ignores the harm caused by the violence itself. For John Stuart Mill, the

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199 Sistare, supra note 134 at 85.

200 Recommendations put forward by the Butler Committee, the Law Commission in England and the Criminal Law Review Committee have so far floundered. The New Zealand Criminal Law Reform Committee in Report on Intoxication as a Defence to Criminal Charge (Wellington: The Committee, 1984) at 53, concluded that the status quo was preferable to legislative interference.

201 Supra note 4 at 478 [emphasis added].

202 See On Liberty (London: Everyman edition, 1948) at 73 where the author writes “[t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant...”.

occurrence of harm was the essence of criminal punishment. He believed that only when our conduct harmed others should we impose punishment. Even this morally neutral stance, I would argue, allows for the punishment of intoxicated and violent offenders.

The problems of drink driving are in many ways analogous to the issue of intoxicated violence. It is universally accepted that drinking and driving is an activity that society has an interest in preventing. The harm that it causes is well documented. In the U.K., largely through government initiatives and public campaigns, it has come to be seen as an immoral act separating it from other motoring offences. Society’s disapproval is so strong as to punish drunken drivers regardless of whether or not they cause an accident. Indeed in Scotland, as in many countries, it is an offence to be “drunk in charge of a motor vehicle” without actually driving at all. Society’s outrage combined with scientific knowledge that alcohol impairs driving to a dangerous extent, allows for such behaviour to be quite properly labelled *mala in se*. It is the foreseeable increased risk to society that enabled Gusfield to conclude that driving under the influence had “... special immorality vis a vis other motoring offences.”\(^{203}\) Drunken violence ought also to be placed in a special category of immorality vis a vis normal drunkenness. While there may be no conclusive medical or scientific evidence as to the exact link between alcohol and violence, the law should not be worried with absolute certainty with regards to causation. Statistics and probability discourse are meaningless in relation to prosecution for violent acts. As the violence has occurred, the risk has materialised. Thus, in Scotland, with regards to cases

that are prosecuted, the correlation between alcohol and violence is 100%. The Scottish approach involves no second guessing and passes no judgement regarding drunkenness in itself.

Sistare points out that where the risk has materialised, it can be punished depending on the nature and gravity of the harm. Brennan killed his father. Daviault sexually assaulted an elderly neighbour with a disability. Beard raped and killed a young woman. O’Connor stabbed a police officer. Kamipeli killed a man outside a pub. It is one thing to claim that the condition of drunkenness is morally neutral. It is quite another to label the above acts as blameless just because the individual who carried out the acts was drunk at the time.

Secondly, the courts in Australia and New Zealand averred that to hold an individual responsible for a crime without subjective intent was an infringement of basic criminal law theory. In O’Connor Barwick C.J. stated:

Thus, if evidence of intoxication is sufficient to raise a doubt as to voluntariness or as to the presence of requisite intent, I can see no logical ground for determining its admissibility upon a distinction between a crime which specifies only the immediate result of the proscribed act and a crime which in addition requires a further result dependant on purpose.

\[204\text{ Supra note 134 at 127.}\]

\[205\text{ O’Connor, supra note 5 at 357.}\]
The Court of Appeal in New Zealand held similarly that "... if drunkenness is truly raised by the evidence, the jury must be left free to decide whether intent has been established on all the evidence, including that of intoxication."\(^{206}\)

To say that criminal law theory in general, and the issue of subjective \textit{mens rea} in particular, ought to be followed unquestionably is, I would submit, the most objectionable argument used to justify the outright acquittal of violent drunks. By dismissing all considerations of public policy, which were accorded great significance in \textit{Majewski}\(^{207}\) and \textit{Brennan}\(^{208}\), the Australian and New Zealand judges underlined their appreciation of the problem of intoxicated violence as being in a vacuum; distinct from social and other legal issues.

Criminal law theory is not constrained by itself and has traditionally been open to the consideration of external factors. This is also true of the doctrine of \textit{actus non facit reum nisi mens sit rea}. Subjective notions of criminal intent are not always required, even in the subjective English sense of \textit{mens rea}. The notion that \textit{mens rea} is not an absolute is demonstrated by the principle of \textit{ignoratia juris neminem excusat}. Thus an individual can be convicted of a crime despite being ignorant of the law where subjectively it could be said that the individual lacked the intent to break the law. In England the House of Lords

\(^{206}\) \textit{Kamipeli, supra} note 6 at 619.

\(^{207}\) \textit{Supra} note 4 at 469.

\(^{208}\) \textit{Supra} note 7 at 51.
has described the principle as "fundamental". The Supreme Court of Canada upheld the application of *ignoratia juris neminem excusat* in *R. v. Theroux*. Australia, New Zealand and Scotland also apply the rule similarly. The reasoning behind its use is of crucial importance in the intoxication debate.

Fears have been expressed that to hold otherwise might actually encourage ignorance of the law. If ignorance permitted acquittal then there would be no incentive to acquaint oneself with the law. In such circumstances "...the administration of the criminal law would be extremely difficult if it could only be enforced against those who knew it." Thus the doctrine operates to prevent an individual raising themselves above the law on account of their own lack of knowledge. The administration of the criminal law would be equally difficult if it applied only to the sober. To narrow the scope of the criminal law and exclude a group of individuals who are members of that group on account of their own actions defies all logic. Public policy has always controlled the development and extent of excuses and mitigatory factors. In particular it has traditionally ignored the account given

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214 Smith & Hogan, *supra* note 15 at 81.

215 Gordon, *supra* note 66 at 337.
by an accused where this conflicts with the standard of the reasonable person. Gordon labels this the ‘principle of disfacilitation’ and bases it on the need to maintain the deterrent effect of the criminal law. He writes that to ensure this “[i]t must therefore discourage the acceptance of easy excuses...”. Where a potential excuse, such as ignorance or intoxication, lies wholly within the control of the accused then the criminal law would lose its control over the individual were it to accept such an excuse. Ignorance of the law is not entertained as a defence on account of the ease with which it can be feigned. David Hume writes that:

The law, which cannot know the truth of the excuse, and which perceives the advantage that might be taken of such gross pretences, for the indulgence of malice, presumes his knowledge of that which he is not excusable for being ignorant of, and judges him accordingly.

The situation with intoxication is exactly the same. Chapter 3 discussed in greater detail the problems of differentiating between genuine and feigned intoxication and between complete and partial intoxication. If Australian and New Zealand courts are denying the use of ignorance of law as a defence but permitting the intoxicated individual to go free then they are demonstrating a lack of consistency in the application of criminal justice by applying double standards in like situations.

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216 Ibid. at 248.
217 Ibid. at 249.
218 Supra note 65 at i, 26.
Finally the court in *O'Connor* was of the opinion that Australia was not in any need of the law's protection from violent, drunken individuals. Obviously the laws of different jurisdictions need not tackle similar problems in identical ways if local considerations allow for a more lenient approach.\(^{219}\) Barwick CJ. and Stephen J.,\(^{220}\) both argued for the allowing of a complete acquittal in light of circumstances in Victoria and New South Wales which suggested that the occurrence of a successful defence would be very rare. The 'floodgates' argument was dismissed as fictitious.

While the judicial reasoning and eventual outcome of the decision in *O'Connor* represents the polar opposites of Scots law in this area, it would seem that public opinion in Australia, at least as voiced in the media, is remarkably similar to much of the Scottish thinking. The decision in *O'Connor* was handed down on Friday the 20th of June, 1980. Newspaper articles the following Monday expressed disbelief at the apparent disregard for public opinion. Under the title “Drunken Charter?”, the *Sydney Morning Herald* stated:

> The Chief Justice, who was in the majority on the decision expressly raised the issue of whether the ruling would open the 'floodgates' and allow 'hordes of guilty men' to descend upon the community. He argued that this would not be the result of the ruling. Whether he is right or not remains to be seen..... The ruling will undoubtedly be welcomed by advocates and by people given to becoming intoxicated but there will be much disquiet among the community.... Judges are not bound to express the current wisdom on social policy. Nor should

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\(^{220}\) Supra note 5 at 355 and 363, respectively.
they ignore it especially in a way that seems on the face of it, to be at variance with commonsense and common sensibility.\textsuperscript{221}

A similar opinion was voiced the very same day in the \textit{Sydney Sun}.\textsuperscript{222}

Two studies undertaken in Australia in the aftermath of \textit{O'Connor} purport to uphold the claim that the fear of numerous acquittals is unfounded. District court criminal trials in New South Wales were evaluated for approximately ten months\textsuperscript{223}, a length of time similar to the lifespan of Daviault, from the date of the \textit{O'Conner} decision. Judge George Smith found that:

\ldots a 'defence' of intoxication which could not have been relied upon pre-\textit{O'Connor} was raised in eleven cases or 2.16 per cent of the total. Acquittals followed in three cases or 0.59 per cent of the total, but in only one case or 0.2 percent of the total could it be said with any certainty that the issue of intoxication was the factor that brought about the acquittal.\ldots Certainly my enquiries would indicate that the decision in \textit{O'Connor}'s case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap.\textsuperscript{224}

In 1986 the Law Reform Commission of Victoria reported that:

\ldots evidence of intoxication is rarely such that the accused is acquitted because there is doubt whether the proscribed act was done voluntarily or intentionally.\ldots About thirty cases were discovered in which the accused was totally acquitted, apparently due to a lack of voluntariness or intent by reason of gross intoxication. Most were in the magistrates' courts. The cases were generally minor but that was not always so. For example they included charges of assault with a weapon, infliction of grievous bodily harm, theft, assault, wilful

\textsuperscript{221} Taken from G. Smith, "Footnote to O'Connor's Case" [1981] Crim.L.J. 270 at 270.

\textsuperscript{222} "Making life easier for drunken criminals seems an astounding way for the High Court to demonstrate its independence. That independence of Privy Council decisions in London is no longer in doubt. But the wisdom of the High Court's latest ruling certainly is. It will be greeted with alarm by a public already disturbed by an apparent imbalance of law in favour of wrong doers over the interests of their victims."

\textsuperscript{223} June 1980 to May 1981.

\textsuperscript{224} \textit{Supra} note 221 at 277.
damage and resisting arrest... In another case, the accused was acquitted of rape in the County Court.\textsuperscript{225}

I would submit that this statistical approach to intoxication and violence is at best inappropriate and misleading and at worst potentially dangerous. Firstly the number of those who may be acquitted ought to be irrelevant. One must look to the nature of the behaviour. Unfortunately Smith fails to recognise this. He bases his conclusion as to the ‘occasional drip’ on the number of acquittals alone. It is meaningless to argue that only one or two people might avoid punishment when they have committed heinous acts of violence. Of more concern is the fact that Smith disregards anecdotal evidence from his colleagues that the ‘defence’ of intoxication has become more popular. He describes this trend rather optimistically as a “...passing fashion...”.\textsuperscript{226} Unfortunately this is not borne out by the 1986 figures. One cannot say that thirty acquittals, including rape, GBH and assault with a weapon, in one state alone, represents only “…an occasional drip... from the tap”.\textsuperscript{227}

Recent Scottish experience in other areas of criminal law shows that it only takes one bad case to bring the entire legal system into disrepute.\textsuperscript{228} As Gusfield noted “…numbers alone

\textsuperscript{225} “Criminal Responsibility: Intention and Gross Intoxication” - quote taken from L.C.C.P. No. 127, \textit{supra} note 94 at 60.
\textsuperscript{226} \textit{Supra} note 221 at 277.
\textsuperscript{227} \textit{Ibid}.
\textsuperscript{228} The murder of Amanda Duffy in 1993 and the subsequent acquittal of Francis Auld on a “not proven” verdict provoked public outrage at what was seen as an anachronistic loophole, despite being only one of many such decisions using the “Scottish Verdict”.

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\textsuperscript{225} “Criminal Responsibility: Intention and Gross Intoxication” - quote taken from L.C.C.P. No. 127, \textit{supra} note 94 at 60.
\textsuperscript{226} \textit{Supra} note 221 at 277.
\textsuperscript{227} \textit{Ibid}.
\textsuperscript{228} The murder of Amanda Duffy in 1993 and the subsequent acquittal of Francis Auld on a “not proven” verdict provoked public outrage at what was seen as an anachronistic loophole, despite being only one of many such decisions using the “Scottish Verdict”.
do not generate significance...". The use of statistics may be an important factor in the shaping of public policy, but it cannot and must not be seen in a vacuum. The numbers involved must be considered in light of the circumstances, nature and gravity of the conduct in question. In general the most serious offences occur less frequently anyway. Levels of incidence bear no relationship to the seriousness of the conduct.

Moreover the figures themselves cannot be trusted. Statistics quoted earlier, show that the incidence of alcohol related violence is as high in Australia as Scotland. By allowing for exculpation in extreme cases, the courts effectively tell society that such behaviour is acceptable. Cardinal Daly of Ireland writes:

... what is legally permissible rapidly comes to be seen as morally acceptable. Laws are, among other things, statements of what society regards as acceptable behaviour, and what is socially acceptable tends to become regarded as morally acceptable.

When the public see the courts acquit individuals charged with violent offences because they were drunk, then the public will stop reporting such incidents. The police will no longer investigate such claims and the prosecution will see no point in laying charges. To allow a ‘defence’ of intoxication effectively sweeps the problem under the carpet and out of sight. To use numbers as part of the justification for the defence displays a worrying

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229 Supra note 203 at 120.

230 Supra at 5-6.


232 See Sheehy, supra note 13 at 112A:11, where the author refers to this as the ‘chilling effect’.
disregard for the consequences. As Winston Churchill once said "[t]here are lies, damn lies and statistics."
Chapter 6 - Conclusion: Canada at the Crossroads

Of all the countries under consideration here, it is Canada that has had to endure the most recent resurfacing of the intoxication debate. While Scots law and Australian law share no substantive similarities, they are at least fairly entrenched with a good number of years of consistent application. Recent Canadian history, however, can be contrasted sharply with this. Continuing uncertainty in the legal system, especially in the criminal law, does nothing to aid the administration of justice. It is submitted here that should the Supreme Court of Canada be required to review the current law relating to intoxication, then it would benefit from a consideration of *Brennan*.

Present controversies in Canada can be attributed to the Supreme Court’s decision in *Daviault*. In this instance, the accused had been charged with the basic intent offence of sexual assault, following an incident with an elderly neighbour. Evidence was given at the trial that Daviault had consumed eight bottles of beer earlier in the afternoon and then most of a 40 oz. bottle of brandy on the evening of the attack. In the opinion of an expert witness Daviault’s blood/alcohol level would have been between 400 mg. and 600 mg. per 100ml of blood. The court of first instance acquitted the accused on account of a reasonable doubt as to whether or not “... the accused by virtue of his extreme intoxication possessed the minimal intent necessary to commit the offence of sexual

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233 Supra note 17.

234 Ibid. at 22.

235 Ibid. For the significance of this see chapter 3, supra.
assault.\footnote{Ibid.} An appeal by the Crown led to a conviction. Daviault then appealed the decision of the Quebec Court of Appeal to the Supreme Court. It is the latter court's six to three majority decision that has stimulated so much discussion in Canada over the last three years.

The majority, led by Cory, J., held that where intoxication was so extreme that it could be described as akin to automatism then it could be used to cast doubt over the existence of \textit{mens rea}, even in crimes of basic intent. In such circumstances the onus would be on the accused to demonstrate his lack of intent on the balance of probabilities.\footnote{Ibid. at 68.} The widening of the scope of the 'defence' of intoxication clearly represents a move towards the Australian rules despite obiter to the contrary.\footnote{Ibid. at 57.} As such the decision can be criticised on a number of fronts, some of which have already been discussed above.\footnote{See generally chapter 4.}

Cory, J., places a great deal of weight on the statistics\footnote{Daviault, supra note 17 at 66-67.} from the Australian study undertaken in the aftermath of \textit{O'Connor} by Smith. Despite the fact that Smith's study relies to a certain extent on anecdotal evidence from colleagues\footnote{Supra note 221 at 267-277.}, concerned only a ten
month period and concentrated on only one Australian state, Cory J. stated rather emphatically that "...that study **clearly** indicates that the *O'Connor* decision has not had an effect of any significance on trials or on the number of acquittals arising from evidence of severe intoxication."\(^\text{242}\)

Such a view, it is submitted, is untenable. One must wonder why Cory J. concentrated on Smith's Study to the complete exclusion of the 1986 report published by the Law Reform Commission of Victoria which discovered around thirty acquittals, including rape and assault with a weapon, for one year alone in a single state. This rather selective use of statistics is all the more worrying when one considers the fact that Cory J. uses L.C.C.P. No. 127\(^\text{243}\) as his primary source in which both sets of figures are published side by side. In the nine months in which Daviault represented the law of Canada there were five acquittals. Five other acquittals preceded the Supreme Court's confirmation of the *Daviault* decision.\(^\text{244}\) Of these ten cases, eight involved violence towards women. The dismissal of the floodgates argument has already been criticised for its disregard for the seriousness of the case involved.\(^\text{245}\) The Canadian figures display a worrying trend similar to that seen in the Australian state of Victoria in 1986.\(^\text{246}\)

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\(^\text{242}\) Daviault, *supra* note 17 at 67 [emphasis added].

\(^\text{243}\) *Supra* note 94 at 60.

\(^\text{244}\) Sheehy, *supra* note 13 at 112A:9.

\(^\text{245}\) See generally chapter 4.

\(^\text{246}\) *Supra* at 86.
The notion that drunkenness could not be equated with *mens rea* was also seen as significant by Cory J. He perpetuates the erroneous view that the blame is attached to the intoxication in the abstract with the words “[v]oluntary intoxication is not yet a crime.”

Such a meaningless and obvious assertion adds nothing to the debate. The public are not concerned and have nothing to fear from harmless drunks. When the drinker becomes violent however it is of no comfort to the victim to shrug one’s shoulders and say that there is nothing wrong in being drunk. Ironically Cory J. recognised “... the understandable desire to ensure that accused persons should not escape criminal responsibility by the consumption of alcohol.”

This erroneous belief is linked to Cory J.’s earlier statement that “... *mens rea* for a crime is so well recognised that to eliminate the mental element, an integral part of the crime, would be to deprive an accused of fundamental justice.” As was discussed earlier in relation to the rule of *ignoratia juris neminem excusat*, *mens rea* cannot be seen as an absolute and sacrosanct rule. Quite apart from this specific example of an exception to the idea that *mens rea* is absolute, there is judicial opinion from the Supreme Court of Canada that the *mens rea* doctrine was never intended to be free from exceptions. When discussing possible Charter violations due to the specific/basic intent rule Sopinka J., in his

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247 Daviault, *supra* note 17 at 61.


249 *Ibid.* at 60.
dissenting opinion in Daviault, observed that this "...objection is based on the assumption that a particular mens rea, namely, the intent to perform the actus reus, is a constitutionally required element of the offence of sexual assault." Sopinka J. reviewed Supreme Court case law on this topic and concluded that "[t]he majority of this court has, therefore, authoritatively determined that the general rule that the mental fault element of a crime must extend to the actus reus, including consequences forming part thereof, is subject to exceptions."  

Criminal law must be developed and shaped in order to respond to the practicalities and realities of social interaction. Society cannot be held to ransom by doctrines that are centuries old. Theory must be developed to adapt to current social problems. Alcohol and violence is one such social problem that cannot be ignored lightly or allowed to be subservient to abstract legal theory on account of the serious consequences involved in the cases discussed in this paper. The doctrine must be altered to fit the problem, not the other way round. Cory J.'s attempt to reconcile the issue of alcohol and violence within the framework of classical Anglo mens rea has since been proved to be unacceptable by

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250 Ibid. at 34.

251 Of particular relevance are the words of McLachlin J. R. v. Creighton (1993), 83 C.C.C. (3d) 346 (S.C.C.) at 378-379:

... our criminal law contains important exceptions to this ideal of perfect symmetry [between mens rea and the actus reus]. The presence of these exceptions suggests that the rule symmetry is just that - a rule- to which there are exceptions. If this is so, then the rule cannot be elevated to the status of a principle of fundamental justice, which must, by definition, have universal application.

252 Daviault, supra note 17 at 36.
Canadian society, which clearly demonstrates that the power of the public is indeed greater than that of the law.

In any event, the judicial reasoning in *Daviault* is, for the time being, of purely historical significance in relation to crimes of violence. The Canadian Parliament acted swiftly with legislative change in light of overwhelming public outcry to ensure that an individual, such as Daviault, could not be allowed to go free after committing a basic intent offence of violence on account of self-induced intoxication. The Code now states that:

33.1.(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 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 with or threat of interference with the bodily integrity of another person. 1995, c.32, s.1.

Unfortunately this swift response (*Daviault* represented the law of Canada for only nine months) does nothing to simplify the situation. By failing to expressly overturn the effect of *Daviault* Canadian law currently allows for the exculpation of specific intent crimes and basic intent crimes that fall outside subsection (3). The confusion and conflict arising out of *Beard* has regrettably been reinstated. It is the jurisdictions with such complex two tier

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253 *Infra* at 97.
models that have had to endure calls for reform over the last twenty years. The new legislative provisions, it is thought, will not be the last word on intoxication in Canada. Opinions have been expressed that a Charter challenge to s.33.1. is inevitable.\textsuperscript{254} Such a challenge would argue that the new provisions contravene ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

Section 7 provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11(d) provides that:

Any person charged with an offence has the right.... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Should such a challenge arise, it ought not to be entertained by the Supreme Court. In truth the Charter provisions do no more than enshrine the common law principles of fairness with regards to criminal prosecution. The exercise of fairness involves a balancing act between justice for the individual and safety for the community. It is submitted that a denial of a defence of intoxication or the prevention of its use to cast doubt over the existence of \textit{mens rea} would do nothing to violate these notions of fairness. Sopinka J.'s dissenting judgement\textsuperscript{255}, and the general acceptance of the rule that ignorance of the law is no defence, demonstrate the artificiality of demanding a complete and blind adherence to

\textsuperscript{254} Supra note 19.

\textsuperscript{255} Daviault, supra note 17 at 34-39.
the maxim *actus non facit reum nisi mens sit rea*. Moreover, notwithstanding the problems of the partial or complete defence, it is submitted that there are positive reasons for adopting the strict, yet clear and easily applicable, Scottish approach.

Firstly, and perhaps most importantly, there is strong evidence that public opinion in Canada as to the culpability of violent drunks is not dissimilar to the Scottish feelings that allowed for a complete disregard of intoxication in relation to the question of guilt. Parliament in Canada has stated that extreme intoxication represents a marked departure “.... from the standard of reasonable care generally recognized in Canadian society.”

Assuming that Parliament has considered the available options and taken account of various viewpoints it could be argued that this statement is indicative of a widespread belief in Canada that the commission of crimes of violence while drunk is unacceptable and worthy of criminal sanctions.

Several academic writers in Canada have expressed sentiments supporting the notion that drunken violence cannot be said to be morally neutral. The essence of the debate is captured by Patrick Healy of McGill University who wrote in the immediate aftermath of *Daviault* that:

> If there is proven harm done by a person, but no proof of a voluntary act or fault in the ordinary sense, does it follow that there is nothing wrong in such conduct? Perhaps. But might there not be some notion of moral guilt in such conduct that is relevant to the concept of criminal responsibility? Perhaps.

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256 S.33.1.(2).

Much of the academic response to Daviault suggested that the latter question ought to be answered in the affirmative. Isabel Grant expressed fears that the Daviault decision demonstrates a belief “...that one who commits a crime while totally incapacitated by drugs or alcohol is not only less blameworthy but morally blameless.”\(^{258}\) The author goes on to describe such an outcome as “...an extraordinary decision...”.\(^{259}\) By the time Parliament came to question the future of Daviault feelings of moral outrage were still very much in evidence. In a brief given to the Standing Committee of Justice and Legal Affairs, from the National Association of Women and the Law, Elizabeth Sheehy, a Canadian feminist legal scholar, stated that “... there were compelling reasons for imposing criminal responsibility upon intoxicated offenders...”.\(^{260}\) These reasons included a fear that such a defence would label drunken and violent individuals as being “...morally innocent...”.\(^{261}\)

Sopinka J. categorically dismissed the moral innocence of the intoxicated and violent individual with the words:

> Sexual assault is a heinous crime of violence. Those found guilty of committing the offence are rightfully submitted to a significant degree of moral opprobrium. That opprobrium is not misplaced in the case of the intoxicated offender. Such individuals deserve to be stigmatized. Their moral blameworthiness is similar to that of anyone else who commits the offence of sexual assault...\(^{262}\)

\(^{258}\) "The Limits of Daviault" (1995), 33 C.R. (4th) 277 at 282 [emphasis in original].

\(^{259}\) Ibid. at 282.

\(^{260}\) Supra note 13 at 112A:26.

\(^{261}\) Ibid. at 112A:11.

\(^{262}\) Daviault, supra note 17 at 38.
Even Cory J. thought that it was "... difficult if not impossible to present [Daviault] in a sympathetic light" and took note of the "... understandable desire to ensure that accused persons should not escape criminal responsibility by the consumption of alcohol." It would seem therefore that Cory J. viewed a complete acquittal as something that was not entirely desirable, especially in light of the nature of the crime alleged in Daviault’s case.

The Supreme Court’s decision sparked a highly critical response from some of Canada’s national press. While the outrage expressed, fuelled by the nature of Daviault’s offence, might be regarded as sensationalist and perhaps not an altogether realistic view of the judgement based on Cory J.’s restrictions on the defence, it nonetheless indicates a dissatisfaction with the judgement that extends beyond the legal profession to the public at large. The majority of the general public would take their information from newspaper headlines rather than from a detailed examination of the case.

263 Ibid. at 68.

264 Ibid. at 65.

265 E.g. “Drunkeness Can’t be Excuse for Rape” The Toronto Star (11th October 1994) where the editorial declared that “Canada’s highest court has declared open season on women” at A22; “Drunks who Rape and Go Free; Top Court Ruling Means Law Should Be Changed” The Montreal Gazette (4th October 1994) at B2; “Drinking Ruled a Rape Defence Feminists Outraged at Supreme Court Decision” The Toronto Star (1st October 1994) at A1; “A Licence to Rape? Ruling Tells Men Sexual Assault Is OK So Long as They Are Drunk” The Toronto Star (27th October 1994) at E1.

266 In particular, placing the onus of proof on the accused, undoubtedly restricts the defence to a certain degree. Although he need only prove intoxication on the balance of probabilities he must nonetheless convince the jury as to the veracity of his claims.
Taken together, the views of Parliament, the press, legal academics and a minority of the Supreme Court, collectively reveal a relatively widespread view that someone in the position of Daviault cannot properly be labelled as morally innocent. If that were not the case then there would have been no good reason for Parliament to step in and limit the effects of Daviault. If one accepts that the criminal law of the state represents community notions of what is right and wrong, whether this be through legislation or through the courts, then it follows that when society expresses such opinions the criminal law cannot be bound by contradictory doctrines that are centuries old to the complete disregard for the needs of the present day community. Section 33.1 represents Parliament's attempt to reflect community values in this area of the law. It does, however, maintain a dichotomous system very similar to the Beard rule. If community values hold that a drunken sexual assault is nonetheless still a morally culpable sexual assault worthy of conviction then any act which would ordinarily be seen as criminal should still be considered criminal even in cases of extreme intoxication.

Public opinion in Scotland has allowed such a line of thinking to be followed without controversy. Admittedly it is very difficult to predict whether or not the Scottish approach to intoxication would be accepted in Canada. Certainly the system responsible for the Brennan judgement and the thinking behind it could not be transposed directly across

267 The concept of dole and the widespread common law powers of the High Court of Justiciary are just two examples of Scottish practices that would not transfer well to a larger and more culturally diverse country such as Canada.
the Atlantic. An acceptance of the actual decision, however, that intoxication provides no
defence to any criminal charge might not be met with too much resistance.

The moral outrage that followed from Daviault was undoubtedly escalated by the facts of
the case. The effects of violence against women have long been recognised as a factor
contributing to a gender imbalance in society. If the protection of society is indeed the
primary role of the criminal law\textsuperscript{268} then the exclusion of any section of society detracts
from the overall value of the entire criminal justice system. Thus rights pertaining to the
freedom of speech are curtailed by the need to protect racial minorities. Parents’ rights to
raise their children as they see fit are limited due to concerns for the physical and moral
well-being of their children. It is not uncommon for the criminal law to make exceptions to
underlying principles where there is a clear need to protect the vulnerable from more
dominant sections of society.

The significance of alcohol in relation to violence against women is well recognised.
Sheehy writes that “[e]xtreme intoxication as a defence works to reinforce and excuse
male violence against women by attributing the blame to alcohol...”.\textsuperscript{269} To allow this to
happen would be an institutionalised acceptance of not only the practise of alcohol abuse
but also male violence. As noted earlier, the leading cases in Scotland, England, Australia,
New Zealand and Canada all involved men accused of serious crimes of violence. In

\textsuperscript{268} See e.g. Majewski, supra note 4 at 459.

\textsuperscript{269} Supra, note 13 at 112A:11.
Canada one study concluded that as many basic intent offences involved violence against women, including manslaughter, it was more important to condemn the violence than to provide a defence based on intoxication.\(^{270}\)

Despite the overwhelming male dominance of the Scottish High Court of Justiciary it has avoided any serious feminist criticism on account of its continued protection of the vulnerable, including women and children, at the expense of expanding criminal theory in the area of defences. The convictions in \textit{Stallard}\(^{271}\) and \textit{Khaliq}\(^{272}\) are indicative of a wider approach to criminal law that looks beyond the abstract theory to the ultimate consequences in the community for disadvantaged groups. Had the Supreme Court of Canada adopted a similar viewpoint when tackling the issue of intoxicated violence then Canada might have been able to avoid the controversy that arose out of the \textit{Daviault} decision.

If the Canadian public opinion is as condemnatory of alcohol related violence as the above evidence suggests then a following of \textit{Brennan} might raise far fewer problems than arose as a direct result of \textit{Daviault}. Quite clearly this is nothing more than complete speculation.

There is sufficient judicial and academic opinion in Canada arguing for a theoretically pure

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\begin{itemize}
  \item[\(^{271}\)] \textit{Supra} note 66.
  \item[\(^{272}\)] \textit{Supra} note 72.
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}
application of the *mens rea* doctrine in a fashion similar to the law of New Zealand and the common law states of Australia to ensure that an adoption of a rule similar to Scots law would result in greater academic discussion than has been seen in Scotland. If Parliament were however to enact such a rule based on its perception of public opinion then I would argue that a small minority of academics, representing a minute proportion of the population, would at least be obliged to observe the rule in practice before coming to any conclusion as to its legal validity. In Daviault and O'Connor a great deal of weight was placed on the assumption that although the defence may seem to be on the face of it a threat to public safety this would not in fact occur in practice. The results of this wait and see policy have already been criticised. It is submitted that if the same attitude was applied to the Brennan ruling the perceived danger of convictions of the 'morally innocent' would not occur. Indeed even under the more liberal laws of England and New Zealand, Beard, Majewski and Kamipeli were all convicted for their offences. The defence of intoxication appears to be nothing more than a futile attempt at abstract theory.
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