

Intoxication, Addiction and the Criminal Law

Conference Position Document

On 13-14th January 2018, the Sussex Crime Research Centre (CRC) and Sussex Addiction Research and Intervention Centre (SARIC) hosted a major conference titled [Intoxication, Addiction and the Criminal Law](#). The conference brought together international experts from across law, philosophy and neuroscience to discuss intoxicated and/or addicted offenders. In particular, the aims of the conference were 2-fold: 1) to consider and critique existing laws relating to intoxicated defendants (Ds) who cause harm, but lack criminal ‘mental fault’ at the time they cause harm due to their state of intoxication, and 2) to explore and evaluate potential routes to law reform in this area. The following ‘position document’ focuses on the legal questions relating to intoxicated harm-causing. The aim of the document is to reflect discussions and debates from the conference and to highlight points of consensus.

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1. The Current Law: Outline and Critique

Discussion at the conference focused on the approach to intoxication outlined in *Majewski*,¹ developed in England and Wales, and applied (with some variation) across much of the common law world, including parts of Australia, Canada and USA. The current law operates in the following manner:

Example of intoxicated harms	Approach within the current law
I. D commits a criminal offence, with the appropriate mental fault (such as intention or recklessness), but claims she only did so because of her intoxicated state.	D's intoxication is irrelevant to her liability (but may be relevant at sentencing). This is the case regardless of whether her intoxication is voluntary or involuntary. ²
II. D becomes intoxicated in order to commit an offence (eg, murder). At the point of completing the physical element of the offence (eg, killing) D lacks an element of mental fault (eg, intention to kill) due to intoxication.	D will be liable for the offence (eg, murder) regardless of the missing mental element. This will be the case whether the offence is legally classified as one of basic/general intent or specific intent. ³
III. D becomes intoxicated involuntarily, or through the voluntary consumption of a non-dangerous drug. ⁴ D then completes the physical element of an offence (eg, killing) without the mental element (eg, intention or recklessness).	D will not be liable for any offence for which she lacks a mental element.
IV. D becomes voluntarily intoxicated with a dangerous drug (eg, alcohol). D then completes the physical element of an offence (eg, killing) without the mental element (eg, intention or recklessness).	The law distinguishes between offences of basic/general intent (eg, manslaughter) and specific intent (eg, murder): <i>Specific Intent:</i> D will not be liable for the offence (eg, murder) for which she lacks a mental element; <i>Basic Intent:</i> D will be liable for the offence (eg, manslaughter) regardless of a missing mental element.

Criticisms were highlighted and discussed as to almost every aspect of the current law. With reference to the separate cases above, these include:

¹ [1977] AC 443.

² *Kingston* [1994] 3 All ER 353.

³ *AG for NI v Gallagher* [1963] AC 349.

⁴ Where D consumes a drug that the court considers non-dangerous (eg, sleeping pills) but suffers an unexpected reaction leading to harmful conduct, the intoxication will be treated (in effect) as if it were involuntary.

- I. Potential overcriminalisation – particularly where D’s intoxication is involuntary and does not demonstrate a defect of will (as was arguably the case in *Kingston*).⁵
- II. ‘Special’ intoxication rules may not be necessary – where D becomes intoxicated in order to commit an offence, it may be possible to identify the conduct element of the offence in her act of becoming intoxicated, linking this to the later harms through standard causation principles. The same may be possible where D is reckless as to losing capacity and committing a recklessness-based offence.⁶
- III. Voluntary/Involuntary and Dangerous/Non-Dangerous distinctions are problematic – both from legal and neuroscientific perspectives.
- IV. It is here that the intoxication rules become most problematic, first because there is no settled distinction between offences of basic/general and specific intent,⁷ and second because there is no agreed conceptualisation of how the intoxication rules apply to find liability in the context of basic/general intent offences.
 - The intoxication rules do not apply as a defence, although this is the most common label employed by courts and within codes. Where D commits all elements of an offence (Example I), the rules are irrelevant to liability; they only become relevant as an inculpatory tool for the prosecution where mental fault is otherwise absent (Example IV).⁸ Inaccurate labelling here can impact substantive outcomes.⁹
 - Describing the intoxication rules as evidential is also problematic. If this were the case, in the context of basic intent offences, we would need to justify rules of evidence that allow a jury to find the presence of mental fault beyond reasonable doubt despite the court knowing that such fault was absent.¹⁰
 - Describing the intoxication rules as substantively inculpatory for basic/general intent offences has become more common within academia. However, understood in this way, the rules are difficult to justify. How can we say that a decision to become intoxicated at time 1 (t1), which may be no worse than negligent, is equivalent to missing (subjective) mental fault when causing harms at time 2 (t2)?¹¹ The current rules therefore risk considerable over-criminalisation and/or inappropriate labelling and punishment.

Conference Position: It is agreed that the current law is in need of review and reform.

⁵ [1994] 3 All ER 353. See, Husak, ‘Intoxication and Culpability’ (2012) *Crim L & Phil* 363.

⁶ Robinson, ‘Causing the Conditions of One’s Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine’ (1985) *Vir LR* 1; Child, ‘Prior Fault: Blocking Defences or Constructing Crimes’ in Reed and Bohlander (eds), *General Defences* (2014) 37.

⁷ Law Commission, *Intoxication and Criminal Liability* (Law Com 314, 2009).

⁸ Dimock, ‘What are Intoxicated Defendants Responsible For? The “Intoxication Defense” Re-Examined’ (2010) *Crim L & Phil* 1; Simester, ‘Intoxication is Never a Defence’ [2009] *Crim LR* 3.

⁹ Shain & Higgins, ‘The Intoxication Defense and Theories of Criminal Liability: A Praxeological Approach’ (1997) *Contemporary Drug Problems* 731.

¹⁰ Simester, ‘Intoxication is Never a Defence’ [2009] *Crim LR* 3.

¹¹ For one of the few attempts to justify this, in proposals that were rejected by Government, see Law Commission, *Intoxication and Criminal Liability* (Law Com 314, 2009); Child, ‘Drink, Drugs and Law Reform’ [2009] *Crim LR* 488.

2. Alternative Approaches

Several alternatives to the current intoxication rules were discussed. These included:

Abolition without replacement: Under this approach D would only be liable for an offence where she acts with both physical and coinciding mental fault. Where mental fault is lacking, even when due to voluntary intoxication, no liability can follow. This accords with basic criminal law principles, but may be perceived as unduly lenient on those who cause serious harms when intoxicated.¹²

Focus on fault at t2: This approach recognises that D does not have subjective mental fault (due to intoxication) when causing the external harms at t2, but asks whether and to what extent those harms nevertheless demonstrate a potentially criminal defect of will.¹³ Locating fault at t2 avoids considerably complexities and problems with tracing or substituting fault from t1 (when D becomes intoxicated), but the central role of ‘defect of will’ requires precise elucidation – an elucidation that does not derive from conduct or fault at t1.

Focus on fault at t1: This approach bases potential criminal liability on D’s decision to become intoxicated, foreseeing the risk of future harms, where such harms arise in fact. This includes subjective foresight of future harms, as well as potentially objective foresight (that a ‘reasonable person’ would have foreseen the harms) or a rebuttable presumption of foresight.¹⁴ Focusing on t1 allows us to assess D’s mental fault at a time she is not affected by intoxication, but depending on what fault is required the approach risks over-criminalising (where objective fault substitutes for missing subjective fault) and/or under-criminalising (where D does not have foresight, but later causes considerable harms).

A new intoxication offence: This approach abolishes the current intoxication rules and replaces them with a new offence of voluntary intoxication + harm. The new offence can be designed to target only certain serious intoxicated harms and will allow for more accurate labelling and punishment.¹⁵ However, any new offence must still locate and clarify requirements across t1 and t2, as well as explain a rational (perhaps causal) relationship between them. The offence must also be drafted in a manner that is clear and practical for court application.¹⁶

Conference Position: It is agreed that a review of intoxication and the criminal law should take place across two stages – (1) Identifying cases that may be dealt with using current criminal offences, and exploring rules of causation, coincidence and/or other devices to make this possible; and (2) Identifying possible cases that fall outside this group, but should nevertheless face criminalisation through a potential new offence.

¹² Mackay, ‘The Taint of Intoxication’ (1990) *Int J Law & Psy* 37; Gough, ‘Surviving Without *Majewski*’ (2000) *Crim LR* 719.

¹³ Husak, ‘Intoxication and Culpability’ (2012) *Crim L & Phil* 363.

¹⁴ Robinson, ‘Causing the Conditions of One’s Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine’ (1985) *Vir LR* 1; Dimock, ‘What are Intoxicated Defendants Responsible For? The “Intoxication Defense” Re-Examined’ (2010) *Crim L & Phil* 1; Dimock, ‘Actio Libera in Causa’ (2013) *Crim L & Phil* 549.

¹⁵ Law Commission, *Intoxication and Criminal Liability* (Consultation 127, 1993); Child, ‘Prior Fault: Blocking Defences or Constructing Crimes’ in Reed and Bohlander (eds), *General Defences* (2014) 37.

¹⁶ Having been proposed in their 1993 CP (*ibid*), this approach was rejected in Law Commission, *Intoxication and Criminal Liability* (Law Com 229, 1995).

3. Areas for Further Study

For the law in this area to be usefully reformed, it was *agreed* that the following questions require particular attention and/or further study:

- Can/Should we ever construct fault on the basis of popular perceptions, and often misconceptions, about drugs and/or intoxication? This may arise, for example, where it is popularly believed that a certain drug will lead to a risk of uncontrolled violence, but this is not supported by the scientific evidence. Should/Could scientific knowledge about underlying mechanisms of drug actions on neurobiology, cognition and/or behaviour (ie, *how* drugs affect function) provide better (causal) understanding of the relationship(s) between drugs, intoxication and criminal offending, beyond mere population-level, correlational evidence?
- How (if at all) does scientific understanding of how drug intoxication and addiction affect behaviour and cognition¹⁷ translate to legally relevant constructs, specifically in relation to determinations of criminal liability?
- Can (neuro)scientific understanding provide a basis for legal distinctions between dangerous and non-dangerous drugs, or voluntary and involuntary intoxication? What is the relevance of drug-drug interactions, medicinal and diverted drug use, impact of co-morbid disease conditions?¹⁸
- If D is to be held liable for a crime of recklessness at t2 (when D was not aware of the relevant risk of harm), on the basis of her awareness of the risks in becoming voluntarily intoxicated at t1, what kind of awareness should be required? Must D have been aware at t1 of a risk that she might cause the very kind of harm that he in fact caused at t2?
- If fault is to be ascribed to D at t1 in the absence of subjective foresight of future dangers/harms, what objective criteria can/should be employed to identify that fault? For example, the statistical likelihood of harm resulting; the common knowledge of such risks; the level or circumstances of intoxication; or a combination of these factors?¹⁹
- Where potential liability is constructed across conduct and fault at both t1 and t2, how can we understand and demonstrate the connection between these two points in time? Must we, for example, prove that D's conduct at t1 *caused* her conduct at t2?
- What difference (if any) does/should it make if D's intoxication arises partly as a result of addiction? In cases of this kind, we could conclude that the addiction mitigates D's 'choice' to become intoxicated (but if so, we need to know *how* such mitigation would operate), or that a blameworthy choice can be traced back to the origins of D's addiction (but if so, we need to know how closely such origins will be investigated). Is there scientific consensus about how drug abuse and addiction could affect 'choice' in becoming intoxicated and wider decision making in relation to criminal offending? How do we consider genetic and phenotypic predispositions (e.g. impulsivity) to addiction and

¹⁷ Sanchez-Roige, Stephens, and Duka, 'Heightened impulsivity: associated with family history of alcohol misuse, and a consequence of alcohol intake' (2016) *Alcohol Clin Exp Res* 40(10); Curran, Freeman, Mokrysz, Lewis, Morgan, Parsons, 'Keep off the grass? Cannabis, cognition and addiction' (2016) *Nat Rev Neurosci* 17(5); van Oorsouw, Merckelbach and Smeets, 'Alcohol intoxication impairs memory and increases suggestibility for a mock crime: a field study' (2015) *Appl Cogn Psychol*, 29(4).

¹⁸ Curran, Freeman, Mokrysz, Lewis, Morgan and Parsons, 'Keep off the grass? Cannabis, cognition and addiction' (2016) *Nat Rev Neurosci* 17(5).

¹⁹ Dingwall, *Alcohol and Crime* (Devon, Willan Publishing, 2006).

the complex interactions of ‘set and setting’ in determining drug intoxication and addiction susceptibility?²⁰

- What are the main difficulties faced by advocates applying the current intoxication rules, and what problems arise from law reform? This is particularly important in the context of a potential intoxication offence, where previous reform proposals have faced considerable opposition from the profession.
- What is the judicial attitude toward intoxicated harm-causers, and towards the current legal response? Research in the area of diminished responsibility may be useful here.
- How do members of the public understand intoxication and the criminal law, and what is their attitude to liability? This question is relevant to the communicative function of the criminal law (are current potential liabilities known?), as well as its normative future (when do people think that intoxicated harm-causing should become a criminal wrong?).
- To what extent do/should the same prior-fault principles at play in relation to intoxication also operate in relation to automatism and certain cases of insanity? Where we see overlap, should we explore the potential for a consistent and/or single approach to reform?²¹
- What can we learn from approaches to intoxicated harms in other countries, particularly from civil law jurisdictions? Civil codes often include intoxication offences for example.²²

Note: The conference and this position document are feeding into a reform focused project to be taken forward by conference organisers John Child and Hans Crombag with Rudi Fortson QC. For more information on this project and/or to share your views, please contact H.Crombag@sussex.ac.uk and/or J.J.Child@sussex.ac.uk.

²⁰ Jupp and Dalley, ‘Behavioral endophenotypes of drug addiction: etiological insights from neuroimaging studies’ (2014) *Neuropharm* 76; Badiani, ‘Substance-specific environmental influences on drug use and drug preference in animals and humans’ (2013) *Curr Opin Neurobiol* 2.

²¹ Mackay, ‘The Taint of Intoxication’ (1990) *Int J Law & Psy* 37; Child & Reed, ‘Automatism is Never a Defence’ (2014) *NILQ* 167; Child & Sullivan, ‘When Does the Insanity Defence Apply? Some Recent Cases’ [2014] *Crim LR* 787.

²² Gur-Arye, *Actio Libera in Causa in Criminal Law* (Jerusalem, 1984).