Should the law on voluntary intoxication and criminal liability be reformed in Hong Kong?

0. Introduction

Intoxication poses a dilemma for criminal law. On the one hand, people are prone to become unpredictable and aggressive after consuming alcohol. Public policy requires that the society be protected from intoxicated offending. On the other hand, intoxication is also known to temporarily impair people's consciousness and ability to perceive risks. Basic principles of criminal law require that liability of a crime should not attach if the defendant ("D") was so intoxicated that he did not have the culpable state of mind.

The current law on voluntary intoxication resolves this tension between policy and principle with a halfway house, allowing intoxication as a defence to certain crimes requiring specific intent but not to other crimes. This pragmatic compromise is, however, unsatisfactory not only because case law has since categorised crimes into the two categories in a haphazard way. There is also a more fundamental question that has been eschewed: on what grounds does the court disallow evidence of intoxication relevant to the inference of criminal intent when the statute clearly requires otherwise?

This essay will elaborate the current law and some of its problems and recommend a statutory reform. It will be structured as follows. Section 1 summaries the current state of the law on voluntary intoxication. Section 2 discusses major problems with the current law and its application. Section 3 reviews the rules governing voluntary intoxication in some other common law jurisdictions. Section 4 makes a proposal to statutorily reform the law. Section 5 concludes.

1. Current state of the law

Voluntary intoxication

Intoxication is the taking, either voluntarily or involuntarily, of alcohol, drugs, or other intoxicants "such as to alter the mood, perception, or judgment" of D[1]. The so-called defence of intoxication applies where D was so intoxicated that he did not form the culpable state of mind. D has no defence if he is nevertheless found to have formed the *mens rea*; a drunken intent was still an intent (*Sheehan*[2]; *Yeung Ka Wah*[3]). In practice, though, evidence of intoxication,

[1] *Oxford Dictionary of Law* (7th ed, 2013).
[2] [1975] 1 WLR 739.

especially extreme intoxication, makes it more difficult for the prosecution to prove beyond reasonable doubt that D formed the *mens rea* required for the offence charged. As such, whether the law allows such evidence to be taken into account in determining D's state of mind is critical.

Majewski[4] affirmed the rule that voluntary intoxication is irrelevant as a defence to "crimes of basic intent" (e.g. assault occasioning actual bodily harm, one of the crimes Majewski was charged with). In such circumstances, the judge or jury must consider whether D would have formed the *mens rea* had he been sober[5]. As it is almost always recklessness that is required by such crimes, the hypothetical question one needs to ask is whether D would have been aware of the relevant risk had he not been drinking or taking drugs. The *Majewski* rule effectively gives the prosecution an easy way out where the *mens rea* required by the offence charged could not be proved to the criminal standard and operates to impute the *mens rea* to D.

The abovementioned rule carves out certain "crimes of specific intent", for which intoxication *is* relevant so the tribunal of fact must take into account evidence of it in determining whether D formed the specific intent required by the crime charged. The distinction between the two types of crimes is an elusive one. Lord Elwyn-Jones LC justified it in *Majewski* by the different mental elements required. D's recklessness in bringing himself into an intoxicated state whereby he "cast off the restraints of reason and conscience" is thought to be morally equivalent to the recklessness required in a crime of basic intent. For crimes of specific intent, no such moral equivalence can be said to exist since the required *mens rea* is usually over and above recklessness. As will be seen, this explanation cannot explain all classifications, nor can several other rationales that have since been proposed.

Voluntary intoxication is never a defence to any crime if D, having formed the intent to commit a crime, partakes of intoxicants to give himself "Dutch courage" and under the ensuing intoxicated state carries out the physical elements of the crime. D will be convicted despite the lack of contemporaneity between the *actus reus* and *mens rea*[6].

As early as 1986, the Hong Kong Court of Appeal has recognised "the well-established principles in relation to self-induced intoxication"[7]. The Hong Kong courts have almost invariably followed English authorities in this aspect,

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[3] [1992] HKCA 97.
[4] [1977] AC 443.
[5] *Richardson and Irwin* [1998] EWCA Crim 3269.
[6] *Gallagher* [1963] AC 349.
[7] *Choi Wah Hang* [1987] 1 HKC 104 (CA), in which the court rejected counsel's invitation to reconsider "those basic principles".

including the classification of a crime as basic or specific intent whose statutory definition is substantially similar to that in England.

Involuntary intoxication

Intoxication arises involuntarily where D is unaware he is taking an intoxicant (e.g. a spiked drink) or is taking drugs on medical advice. Evidence of D's involuntary intoxication is allowed in determining the existence of *mens rea* regardless of the type of crime charged. Where D took a drug not generally known to cause unpredictability or aggressiveness but an intoxicated state ensued and D committed a crime in that state, it has been held that the relevant question becomes whether the taking of the drug was itself reckless[8].

Basic and specific intent offences

It is strictly speaking a misnomer to talk about *crimes* of basic or specific intent. Many crimes are capable of being both as they can be proved with alternative mental states. Instead, it is the specific form of the crime as charged that should be so classified. This essay will continue to adopt those labels with necessary notes to avoid ambiguity.

In England and Hong Kong, case law alone determines whether a crime is basic or specific intent. Crimes of specific intent usually require as *mens rea* intention, knowledge or dishonesty. Examples of offences that Hong Kong courts have classified as specific intent are provided below, grouped by the *mens rea* required[9].

Intention as to a consequence[10]

- Murder (*Fung Chun-Wai* [1982] HKCA 26)
- Inflicting grievous bodily harm ("GBH") with intent (*Ip Chong Fun* [1996] HKCA 315)
- Criminal damage with intent (and/or with intent to endanger life) (*Caldwell* [1982] AC 341)
- Blackmail[11] (*Mo Sze Lung Thomson* [2003] HKCA 35)

Knowledge

[8] *Hardie* [1985] 1 WLR 64 (CA).
[9] English authorities are provided if Hong Kong decisions cannot be found.
[10] This is different from intention as to conduct or "volition", which is part of *actus reus*.
[11] Theft Ordinance, s23. The requisite *mens rea* is "a view to gain for himself or another or with intent to cause loss to another".

- Possession of arms or ammunition without licence[12] (*俞國威* [2016] HKCFI 1168)
- Possession of offensive weapon with intent[13] (*呂敬仁* [2013] HKCFI 1368)
- Incest[14] (*YCK* [2019] HKCFI 1053)

Dishonesty[15]

- Theft (*羅浩麟* [2017] HKCFI 2261)
- Robbery (*Yeung Ka Wah* [1992] HKCA 97[16])
- Burglary (*Siu Ismail* [2013] HKEC 1013 (DC))

In contrast, crimes of basic intent typically require the *mens rea* of recklessness or require no particular *mens rea* at all.

Recklessness

- Rape being reckless as to V's consent (*Woods* (1981) 74 Cr App R 312)
- Malicious wounding (*Tang Ho Cho* DCCC 724/2014)
- Criminal damage being reckless as to whether property would be damaged or destroyed (and being reckless as to whether life would be endangered) (*Tang Yuk Wah* [2007] HKCA 236)

No particular mens rea *required*

- Tampering with motor vehicles[17] (*Choi Wah Hang*)
- Making a telephone call of a menacing character[18] (*Chan Ping Kwan* [2005] HKCU 765 (CFI))
- Indecent assault where the circumstances are undoubtedly indecent [19] (*Michael Karl Corbin* [2010] HKCU 1671 (CFI))

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[12] Arms and Ammunition Ordinance, s13. The concept of possession requires knowledge; see *Archbold Hong Kong* (2020) 25-24.
[13] Summary Offences Ordinance ("SOO"), s17.
[14] The statutory definition in Crimes Ordinance, s47 requires D's knowledge that the victim ("V") is his granddaughter, daughter, sister or mother.
[15] The *Ghosh* test for dishonesty requires, inter alia, D's knowledge that his act was one that an ordinary decent person would consider dishonest. This knowledge element means that dishonesty is a specific intent.
[16] The theft-based crimes also require an intention permanently to deprive V's property, which is an intention as to a consequence.
[17] Road Traffic Ordinance, s49.
[18] SOO, s20(a).
[19] In contrast, where the circumstances are ambiguous and it must be proved that D intended his conduct to be indecent in nature, it has been argued that voluntary intoxication can be used to negate the indecent intention (*Kingston* [1995] 2 AC 355).

Some problematic cases will be dealt with in Section 2.

Intoxicated mistakes

If a (sober) D pleads mistake of fact to deny *mens rea*, he is entitled to be judged based on what he honestly believed the facts to be[20]. This changes when the alleged mistake and therefore lack of *mens rea* was attributable to voluntary intoxication. In such circumstances, the *Majewski* rule applies such that D can rely on an intoxicated mistake to negate *mens rea* in a crime of specific intent but not one of basic intent[21].

D can also rely on a mistake of fact to support a plea of self-defence provided that D genuinely believed he was under attack and the force used was reasonable in the circumstances which he genuinely believed to exist[22]. However, self-defence will fail where D's mistake as to the circumstances justifying the use and degree of force was due to self-induced intoxication; this is so in both crimes of basic intent[23] and specific intent[24]. This principle has now been enacted in England[25].

This gives rise to an anomaly with respect to a specific intent crime. For example, when charged with murder, D can rely on an intoxicated mistake to negate *mens rea* (e.g. he mistook V for a mannequin) but not to justify self-defence (e.g. he thought V was attacking him viciously). This is but a manifestation of the problems with classifying crimes into basic and specific intent for one purpose but not another.

2. Problems with the current law

Difficulty in distinguishing basic and specific intent crimes

Courts and commentators have provided various rationales for the division of crimes into basic and specific intent, none of which is capable of explaining all cases. Some common explanations are summarised below with respective problems noted.

[20] *Morgan* [1976] AC 182.
[21] *Fotheringham* (1988) 88 Cr App R 206.
[22] *Williams* [1987] All ER 411 (CA).
[23] *O'Grady* [1987] QB 995 (manslaughter); *Lam Kin Chung* [2009] HKCFI 428 (assaulting a police officer in the execution of his duty).
[24] *O'Connor* [1991] Crim LR 135 (murder).
[25] Criminal Justice and Immigration Act 2008, s76(5).

- A crime of specific intent is one that includes a purposive element desired by D. This was the view of Lord Simon in *Majewski* and Fauteux J in *George*[26]. However, whether a crime requires such a purposive element cannot be readily known until litigated. This view also cannot explain possession offences requiring knowledge which have been held to be crimes of specific intent.

- Crimes of specific intent are those where D, were he to be acquitted because of intoxication, could be convicted of some lesser offence of basic intent. This is certainly true for many offences against the person, e.g. wounding with intent (malicious wounding as fallback) and murder (manslaughter as fallback). However, many specific intent property crimes have no basic intent alternatives, e.g. theft.

- Specific intent crimes require an ulterior intent which goes beyond the *actus reus* (supported by Lord Elwyn-Jones LC in *Majewski*). Theft as a specific intent crime fits into this paradigm as the intention permanently to deprive goes beyond the *actus reus* of appropriation. However, D can be convicted of aggravated criminal damage if he recklessly destroyed property being reckless as to whether life would be endangered. The second recklessness element clearly goes beyond the requisite *actus reus* but this specific form of the offence has been held to be basic intent[27].

- Basic intent crimes are those that may be committed recklessly (adopted in the American Model Penal Code and supported by Lord Diplock in *Caldwell*). For completeness, one would need to add that offences that may be committed negligently or without any *mens rea* at all are also basic intent crimes. The latter group of offences is problematic. Where the statute is silent on *mens rea*, the court may decide that some mental element is implied (e.g. knowledge in some possession offences), rendering the situation uncertain[28]. Even if the statutory definition expressly uses the word "intentionally", the court may decide that that by itself does not turn an offence into one of specific intent[29].

The following offers some further examples to elaborate the difficulty of classification.

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[26] [1960] SCR 871.
[27] *Bennett* [1995] Crim LR 877 (CA); *Tang Yuk Wah*.
[28] In contrast, assault on a police officer in the execution of his duty is basic intent (*Majewski*; *Kirkham Mark Edward* [2016] HKCFI 1234) because D's knowledge that the person assaulted was a police officer or that that the officer was in the execution of his duty is held to be not necessary; see *Archbold Hong Kong* (2020) 20-285.
[29] *Heard* [2007] EWCA Crim 125 held that "intentionally" in the statutory offence of sexual assault in England requires nothing more than proof that D's conduct was non-accidental.

Manslaughter in all its forms has been established as crime of basic intent[30]. It is uncontroversial that the gross negligence and reckless forms are basic intent[31]. However, manslaughter by unlawful act requires that D must have intended to commit the unlawful act. If the unlawful act D engaged in requires specific intent (e.g. robbery), the intention to commit that unlawful act cannot logically be called a "basic intent".

Attempt is also difficult to classify. The statutory definition requires the *intention* to commit the full offence, but it would be wrong to conclude that attempt to commit any crime is specific intent. In England, attempted murder[32] and attempted GBH with intent [33] are held to be specific intent; this is presumably because the full offences require specific intent. On the other hand, if the full offence requires only recklessness as to a circumstance, it is submitted that an attempt to commit that offence should be basic intent. For example, recklessness as to V's consent is sufficient for rape (*Woods*) and attempted rape (*Khan* [1990] 91 Cr App R 29); as such, attempted rape should also be basic intent[34].

The lack of clear guidance on classification may lead to the court classifying a new crime incorrectly. This is arguably the case in *Hua Huy Hoang*[35] where the District Court judge held that making to another a threat to destroy property contrary to Crimes Ordinance, s61 was basic intent. This cannot be right because the offence requires the *mens rea* of "intending that that other would fear it would be carried out". This clearly requires intention as to a consequence/circumstance (or knowledge) which cannot be satisfied by recklessness. In another case *Leung Kin Ming* DCCC 475/2010 the judge declared that self-induced intoxication is no defence to assault with intent to rob, which is almost certainly wrong.

The classification of a crime as basic or specific intent often means the difference between conviction and acquittal. The unsatisfactory state of the law in principle and in practice calls for reform.

<u>Jury directions and evidential burden</u>

[30] *Lipman* [1970] 1 QB 152.
[31] e.g. *Dennis Chiu Tat-Shing* [1984] HKCA 98 (manslaughter by reckless driving).
[32] *Coley* [2013] EWCA Crim 223.
[33] *Press & Thompson* [2013] EWCA Crim 1849.
[34] *Mohammad Hussain* [1993] 1 HKCLR 1 (CA) has so held without discussion.
[35] [2016] HKDC 862 at [24].

Improper treatment of evidence of intoxication has been the ground of many criminal appeals in Hong Kong[36]. There are diverging views on when the judge must direct the jury on the matter of intoxication and when he must remove it from their consideration in a crime requiring specific intent. This is related to the question of the evidential burden that D must discharge before intoxication becomes a live matter. One view, based on *McKnight* [2000] All ER (D) 764, is that the judge must direct the jury only when the evidence of intoxication, taken at its height, may raise a doubt as to the existence of *mens rea*. A different view, supported by *Archbold Hong Kong (2020)* at 16-75, is that where intent is in issue and there is evidence of drunkenness, the direction in *Sheehan* should routinely be given. It is unclear which view should be preferred.

It is submitted that with the current state of law the judge may be minded to dismiss borderline evidence of voluntary intoxication in order to secure D's conviction in deserving cases, especially in specific intent crimes with no fall-back offences. This is not to suggest judicial partiality; it is merely a reflection of the lack of confidence in the jury's ability to reject intoxication in all but a handful of worthy cases, which arguably motivated the decision in *Majewski* in the first place. This problem can be partly mitigated by the creation of a new statutory fall-back offence which will be discussed in Section 4.

<u>The statutory and constitutional objections</u>

The *Majewski* rule disallowing evidence of intoxication to negate *mens rea* in basic intent crimes is at odds with s65A, Criminal Procedures Ordinance. That section provides that a court or jury should determine criminal intent "by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances." The response to this objection given in *Majewski* was that "all the evidence" means all the *relevant* evidence; the common law rule upheld in *Majewski* is a substantive rule of law that renders the factor of intoxication *irrelevant* in crimes of basic intent ([476]). With respect, a rule of law that effectively excludes certain evidence from the inference of criminal intent engages the statutory provision and needs to be compatible with it; calling it "substantive" doesn't change that fact.

The *Majewski* rule may also run counter to the principle of presumption of innocence enshrined in Art. 11(1) of the Hong Kong Bill of Rights. This is because D may be convicted of a basic intent crime without proof of the requisite *mens rea* which is a long recognised fundamental element for finding criminal liability. Common law jurisdictions that have not adopted or otherwise

[36] See e.g. *Yeung Kin Sun* [2004] HKCA 305 (murder upheld); *Tang Yuk Wah* (reckless arson upheld but see Stock JA's dissent); *呂敬仁* [2013] HKCFI 1368 (conviction for possession of offensive weapon quashed).

departed from the *Majewski* rule have done so partly on this basis[37]. Any attempt to enact the common law rule will only heighten the constitutional issue.

3. Comparative perspective

Most of the common law jurisdictions reviewed in this section have limited the defence of self-induced intoxication to a subset of offences, either at common law or by statute. Where the distinction between crimes of basic and specific intents has been enacted, various definitional approaches have been adopted.

England

The Hong Kong law on intoxication largely follows the English law. In 2009, the UK Law Commission published a report[38] calling for the codification of the common law on intoxication. Its recommendations on voluntary intoxication include the following:

- The *Majewski* rule should be codified as a general rule that would apply when D is charged with an offence not requiring an "integral fault element".
- There should be a non-exhaustive statutory list of integral fault elements which must always be proved by the prosecution. The list would include intention as to a consequence; knowledge (except as to a risk); belief (equivalent to knowledge); fraud; and dishonesty.
- D should not be able to rely on a mistake of fact arising from self-induced intoxication in support of a defence to which D's state of mind is relevant, regardless of the nature of the fault alleged.

The UK Government has decided not to implement the recommendations in the report[39]. While recognising that the proposals may resolve some uncertainty surrounding the distinction between offences of specific and basic intent, the government considered that the reforms may also increase the complexity of the law. In fact, it might also have the perverse effect of the court framing the *mens rea* of a new offence in a way to fit or avoid an integral fault element so as to achieve the desired classification.

Canada

The Canadian common law also distinguishes between specific and general intent crimes such that the defence of voluntary intoxication (short of automatism) is available only to the former group of crimes. The test laid down

[37] See the discussions about the common law positions in Canada and Australia in Section 3.
[38] *Intoxication and Criminal Liability* (2009), Law Com No 314.
[39] Ministry of Justice, *Report on the implementation of Law Commission proposals* (March 2012).

in *Daviault*[40] requires the court, in determining if an offence is specific or general intent, to consider first the importance of the mental element[41] and, if that is indeterminate, the role of policy.

Daviault also departed from the English position by giving D a valid defence to a general intent crime on the basis of self-induced intoxication if he can prove on the balance of probabilities that he was in a state of extreme intoxication akin to automatism. The court reasoned that disallowing the defence in such circumstances would be convicting D without proof of volition and fault and would be incompatible with the Canadian Charter of Rights and Freedoms.

Faced with the backlash that followed the decision, the Canadian Parliament amended the Criminal Code and overturned *Daviault* with respect to general intent crimes involving an element of assault. When charged with such crimes, D cannot claim lack of intent on the basis of self-induced automatism. The Supreme Court of Canada has recently granted leave to appeal[42] against a ruling by the Court of Appeal for Ontario that the provisions in the Criminal Code are unconstitutional.

Australia

At common law, the High Court decided by a majority in *O'Connor*[43] that self-induced intoxication can be relied on to negate the fault element of *any* offence. The Court found the distinction between specific and basic intent crimes illogical. Also, to convict D who was so intoxicated as to lack the mental element would be to create a new offence; that should best be left to the Parliament.

Some states and territories have not followed *O'Connor* and retained the *Majewski* rule. Various statutory definitions have been adopted to distinguish basic and specific intent crimes. For example, s8.2 of the Commonwealth Criminal Code defines basic intent as "a fault element of intention for a physical element that consists only of conduct" (but not a fault element of intention with respect to a circumstance or with respect to a result); s428B of the Crimes Act 1900 of New South Wales chooses to defines offence of specific intent, which it defines as "an offence of which an intention to cause a specific result is an element" – it goes on to list over 90 specific examples of such offences.

[40] (1994) 93 CCC (3d) 21; clarified in *Tatton*, 2015 SCC 33.
[41] Specific intent offences contain a heightened mental element (e.g. an ulterior purpose, actual knowledge, intent to bring about certain consequences); general intent offences require very little mental acuity; see *Tatton* [39] et seq.
[42] *Sullivan* [2020] SCCA 232.
[43] [1980] HCA 17.

Singapore

Section 86(2) of the Penal Code of Singapore provides that intoxication shall be taken into account in determining whether D "had formed any intention or had any knowledge or belief, specific or otherwise" for any offence charged. Knowledge and belief were newly added to this provision in 2019 but rashness/recklessness was left out. It should be noted that in Singapore intoxication is a defence that D has to prove on the balance of probabilities; "any evidence of intoxication does not affect the prosecution's case"[44]. Placing a probative burden of proof on D makes it difficult to successfully raise a intoxication defence in practice, not to mention that it also derogates from the principle that the prosecution must prove *mens rea* to the criminal standard.

4. Recommendation

It is recommended that the *Majewski* rule should be abolished and there should be created a statutory offence of "committing crime X while voluntarily intoxicated", where crime X is any statutory or common law offence[45]. D will be convicted of the new offence if he carried out the *actus reus* of crime X in circumstances where his lack of *mens rea* was attributable to voluntary intoxication. The maximum sentence for the new offence would be the same as that for crime X; in sentencing the judge could take into account D's lack of *mens rea* for the full offence.

Where D is charged with the full offence of crime X and/or the alternative offence of committing crime X while intoxicated, after being convinced that D committed the *actus reus* of crime X, the jury/judge will consider the following questions:
(1) Did D have the *mens rea* for the full offence?[46]
(2) Would D have had that *mens rea* had he been sober?[47]

A positive answer to (1) leads to conviction for the full offence. If (1) is answered negatively, the tribunal of fact goes on to consider the hypothetical question in (2). If it decides that, for example, D would not have realised the consequence of his action or foreseen the risk involved or would have had a

[44] *Juma'at bin Samad* [1993] 3 SLR(R) 338 (HC) at 345.
[45] This proposal is based on Williams, "Voluntary intoxication - a lost cause?" (2013) 129 LQR 264 with modifications.
[46] With *Majewski* abolished, intoxication should be considered regardless of the crime charged.
[47] Effectively, it asks the jury/judge to disregard evidence of intoxication and reconsider the question of *mens rea*. It is the same question as in *Richardson and Irwin*; the UK Law Commission found in its 1995 report (Law Com No 229) that "juries have no difficulty with this hypothetical question."

good defence even if he had been sober, (2) will be answered negatively. In such circumstances, D is not blameworthy because there was no causal link between intoxication and what he did. If, on the other hand, D would have had the *mens rea* had he been sober, D will be convicted (only) of committing crime X while intoxicated. D's lack of *mens rea* for the full offence was attributable to his intoxicated state; coupled with the proscribed act/harm done this means that he should be criminally liable.

As mentioned above, the current law on intoxicated mistake operates differently as regards mistake negating *mens rea* and mistake supporting self-defence. The instant proposal adopts a unified approach to intoxicated mistake. Essentially, a similar set of questions to those above will be asked when D denies liability on the ground of mistake:

(1) Did D in fact hold the mistaken belief?
- If not, D will be guilty of the full offence.
- If yes, consider (2).

(2) Would D have held the mistaken belief had he been sober?
- If yes, D will be completely acquitted.
- If not, D will be convicted only of committing crime X while intoxicated.

It may be desirable that the new proposed offence should not extend to attempt as the underlying offence, i.e. D cannot be convicted of committing while intoxicated an attempt to commit crime X. Attaching criminal liability when D has neither carried out the full *actus reus* nor had the requisite *mens rea* would seem overly harsh. As such, D will only be found liable for an attempt if D is proved to have formed the *mens rea* despite being intoxicated.

The proposal has the following benefits. First, with the *Majewski* rule abolished, the tribunal of fact will be able to take into account all relevant evidence including intoxication in determining *mens rea* for any crime, which, as argued above, is what s65A of the Criminal Procedures Ordinance requires. Second, the haphazard categorisation of crimes into basic and specific intent is jettisoned, and the pitfalls of classifying a new crime avoided. Third, the policy underlying *Majewski* that intoxicated offending should be discouraged and deterred is recognised. Fourth, this is done not on the dubious ground of moral equivalence as in *Majewski* but by expressly criminalising intoxication. Fifth, the new offence, which is in fact a series of derivative offences, suitably labels the perpetrator according to the act/harm done. In contrast, a single, general offence of dangerous/criminal intoxication would fail to achieve proper labelling.

An objection to the proposal is that it might lead to the problem of "split juries". However, juries are often required to deal with alternative offences; the likelihood of split juries might not be so high. In addition, verdicts can be either

unanimous or by a majority in Hong Kong[48], which arguably mitigates the problem.

5. Conclusion

The current law on voluntary intoxication and criminal liability in Hong Kong represents an unsatisfactory compromise between policy and principle[49]. Different substantive rules of *mens rea* apply depending on whether a crime is "basic intent" or "specific intent". No consistent approach supported by principle has emerged from the case law to guide the categorisation of a new crime. The withdrawal of the defence of intoxication in basic intent crimes also cannot satisfactorily contend with objections on the statutory and constitutional level. However, a comparative review of the laws in other common law jurisdictions has not revealed an approach suitable for adopting by Hong Kong. This essay has therefore argued for the creation of a new statutory offence which dispenses with artificial distinction of crimes and properly criminalises intoxication when coupled with the *actus reus* of a crime.

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[48] Jury Ordinance, s24.

[49] This essay has not dealt with the role of intoxication in sentencing and inchoate and secondary liability (except for attempts).