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Should the law on voluntary intoxication and criminal liability be reformed in Hong Kong? If so, why and how? If not, why not?

1. Introduction

The law on voluntary intoxication and criminal liability has long been the subject of heated debate. The law in the UK, on which the HK position is largely developed, displays courts' efforts in finding a balance between the logical application of criminal law, and broader considerations of public policy, which hence caused the law to be gravely uncertain. Lord Mustill in **R v Kingston** described the law on voluntary intoxication and criminal liability as:

‘controversial, as regards the content of the rules, their intellectual foundations, and their capacity to furnish a practical and just solution.’¹

Hence, this essay seeks to argue that the law on voluntary intoxication and criminal liability in HK should be reformed. This essay will first lay out the historical development and current position of the law in HK, then discuss the problems with the current law, and then propose possible reform recommendations with reference to the approach in other jurisdictions.

2. Historical Development

Before the early Nineteenth century, the law regarding voluntary intoxication in England was harsh². Then, when the judgment of **R v Beard**³ was handed down, voluntary intoxication due to voluntary consumption of alcohol was allowed to be raised as a defence. In **Beard**, the House of Lords introduced the novel distinction between ‘specific’ and ‘basic’ intent offences, which was soon developed to become the major principle governing the relevance of voluntary intoxication with criminal liability. **R v Lipman**⁴ then adopted the rule in **Beard**, and extended the rule to include intoxication caused by voluntary consumption of drugs. Then, in 1976, the case of **DPP v Majewski**⁵ affirmed

¹ [1995] 2 AC 355, 369

² Michael Jackson, ‘*Criminal Law in Hong Kong*’ (2003) at p. 258

³ [1920] AC 479

⁴ [1970] 1 QB 152

⁵ [1977] A.C. 443

the above line of cases, and emphasised the role of judicial policy in the approach.⁶ **Majewski** has then become the leading authority regarding this area of law, the details of which will be examined in further detail in the following sections.

Regarding the position of Hong Kong, the case of **HKSAR v Tang Yuk Wah**⁷ has adopted **Majewski**, hence affirming the position of HK law. However, it should be noted that the appellant's appeal to the Court of Final Appeal was allowed, where Mr Justice Bokhary PJ mentioned that:

‘We certify the involvement of two points of law of great and general importance. And the second point is the one raised by the question whether [an accused's drug or drink induced condition] is a defence where the accused has only himself to blame for its existence.’⁸

However, despite appeal being allowed, the appeal was not pursued, so the position of the law in HK remains the same.

3. Current Position of the Law

Although, as aforementioned, the law in this area is very uncertain, it can still be summarized into major principles according to case law, which will be elaborated in detail in this section.

3.1 Basic definitions

Intoxication refers to the mental and physical condition brought about by the consumption of alcohol or related substances where such that a person's cognitive faculties may be impaired, or a person's mood may be altered⁹. Meanwhile, voluntary intoxication refers to when an accused knowingly consumes or uses alcohol, drugs or other intoxicating substances¹⁰, even if he did not know the precise nature, strength, or likely effect of the intoxicating substance¹¹.

⁶ See Michael Jackson (n. 2 above) at p.259

⁷ CACC 183/2006

⁸ FAMC 56/2007

⁹ See Michael Jackson (n. 2 above) at p. 255

¹⁰ See Michael Jackson (n. 2 above) at p. 257

¹¹ R v Allen (Kevin) [1988] Crim LR 698

3.2 Principles

Intoxication is never a defence. Its only effect is that it may negate the necessary *mens rea* of the offence so the Prosecution cannot prove the necessary intent for the offence, which *may* then lead to acquittals¹². Whether the defendant can rely on his state of voluntary intoxication depends on the following two principles, as developed from case law:

- (1) Voluntary intoxication prevents proof of criminal liability only if the subjective fault required by the definition of the offence is of ‘specific intent’¹³
- (2) Defendant may adduce evidence of voluntary intoxication where the intoxication is caused by consumption or use of something *other than* alcohol or dangerous drugs, except where the offence is a ‘basic intent’ or recklessness offence, and Prosecution has proved defendant’s recklessness in taking the intoxicant beyond reasonable doubt¹⁴

3.2.1 ‘Specific intent’ and ‘basic intent’

The differentiation between ‘specific intent’ and ‘basic intent’ offences originated from **Beard**, which was affirmed by subsequent cases, and eventually the case of **Majewski**. In **Majewski**, the House of Lords held that evidence of voluntary intoxication is *only relevant* in respect of specific intent offences, and is hence *irrelevant* in assessing liability for basic intent offences, holding that the UK equivalent of s.65A Criminal Procedure Ordinance (Cap. 221) has no application in such circumstances.

Lord Simon in **Majewski** then defined crimes of ‘specific intent’ as where ‘the Prosecution must in general prove that the *purpose* of the commission of the act extends to the intent expressed or implied in the definition of the crime’. Offences which require proof of an ulterior intent are commonly classified as ‘specific intent’ offences, but are not necessarily so, and only constitute one type of ‘specific intent’ offence.¹⁵

¹² See Michael Jackson (n. 2 above) at p.256

¹³ UK LC p.6

¹⁴ See Michael Jackson (n. 2 above) at p. 258

¹⁵ **Majewski** (n.5 above) at p. 478

Meanwhile, the definition of ‘basic intent’ offences can be found in **DPP v Morgan**¹⁶, which held crimes of ‘basic intent’ to be crimes ‘whose definition expresses or, more often, implies, a mens rea which does not go beyond the actus reus’.

By analysing the line of cases applying such designation of crimes, the following table summarises the list of offences defined as ‘specific intent’ and ‘basic intent’ offences respectively:

Basic Intent Offences (Authority)	Specific Intent Offences (Authority)
- Assault occasioning Actual Bodily Harm (‘ABH’) (<u>Majewski</u>) - Assault on a Police Officer in the execution of his duty (<u>Majewski</u>) - Arson (<u>Hardie</u>¹⁷) - Common assault (<u>Morgan</u>) - Criminal damage contrary to s.60(2) of Crimes Ordinance¹⁸ (<u>Jaggard v Dickinson</u>¹⁹) - Indecent Assault (<u>R v Heard</u>²⁰) - Manslaughter (<u>Lipman</u>) - Malicious wounding or inflicting Grievous Bodily Harm (‘GBH’) (<u>Majewski</u>); hence both offences against s.19 of the Offences Against the Person Ordinance (Cap.212)²¹ - Rape (<u>Grout</u>²²) and s.118(3)(b) of Crimes Ordinance (Cap.	- Aggravated arson (<u>Heard</u>) - Attempted suicide (<u>Majewski</u>) - Handling stolen goods (<u>Durante</u>²⁷) - Murder (<u>Beard</u>) - Theft (<u>Majewski</u>, <u>Ruse v Read</u>²⁸) - Wounding or inflicting GBH with intent (<u>Majewski</u>)

¹⁶ [1976] AC 182

¹⁷ [1985] 1 WLR 64

¹⁸ Specimen Direction 18

¹⁹ [1981] 2 W.L.R. 118

²⁰ [2007] EWCA Crim 125

²¹ Archbold at 16-77

²² [2011] EWCA Crim 299

200) ²³ and attempted rape (<u>Khan</u> ²⁴) - Sexual assault (<u>Heard</u>) - S.19 of the Offences Against the Person Ordinance (Cap. 212) ²⁵ - Taking conveyance without owner's authority, contrary to s.14(1) Theft Ordinance (Cap. 210) (<u>R v MacPherson</u> ²⁶)	
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Where the offence is a 'specific intent offence', then the principles found in Lord Lane's judgment in **R v Sheehan and Moore**²⁹ should be followed. According to Specimen Direction 14, for specific intent offences, Specimen Direction 52, which is based on the judgment in **Sheehan and Moore**, should be given, which is as follows:

'You must not convict unless you are sure that the defendant, when he did the act, intended [X]. In deciding whether he intended [X] you must take into account the evidence that he was [drunk][affected by drugs]. If you think that, because he was so [drunk][affected by drugs], he did not intend or may not have intended [X], then you must acquit him. But if you are sure that, despite his [drunkenness] [the effect of the drugs], he intended [X] then this part of the case is proved against him. A [drunken] [drugged] intent is still an intent. [What is more it is not a defence for the defendant to say that he would not have behaved in this way had he not been [drunk/affected by drugs.]]'

According to **R v McKnight**³⁰, the direction need not be given in every specific intent case where alcohol is involved, but need only be given 'where the

²⁷ [1972] 1 WLR 1612

²⁸ [1949] 1 KB 377

²³ Archbold at 16-77

²⁴ [1990] 1 WLR 813

²⁵ Archbold at 16-77

²⁶ [1973] RTR 157

²⁹ [1975] 60 Cr App R 308, 312

³⁰ [2000] All ER (D) 764

evidence, taken at its highest, justified the conclusion that the defendant might not have been able to form the necessary intention because of drink'³¹.

Meanwhile, the situation is different where the offence is of basic intent. In such a case, the jury should be directed that 'it is not a defence for the defendant to say [the defendant] would not have behaved in the way he did had he not been drunk, or failed to foresee the consequences of his act because he was drunk.'³² Hence, voluntary intoxication cannot be relied on to negate mens rea when the offence is one of 'basic intent'. According to Specimen Direction 14, Specimen Direction 52 should also be given, which is as follows:

'You must be sure that the defendant, when he did the act, either:

1. Realised that it might cause some injury [not necessarily serious injury or wounding] to some person or
2. Would have realised that his act might cause such injury had he not been [drinking] [taking drugs].

It is not a defence for the defendant to say that he would not have behaved in this way had he not been [drunk] [affected by drugs] or that he failed to foresee the consequences of his act because he was [drunk] [affected by drugs].'

All in all, once evidence of intoxication is admissible, the question is whether the prosecution has proved the relevant mens rea against Defendant, despite evidence of defendant's intoxication (**Ip Chong Fun**³³).

3.2.2 *Caldwell recklessness*

MPC v Caldwell³⁴ provided an alternative formulation of rules dealing with voluntary intoxication, introducing a distinction based on whether the offence may be proved by recklessness, rather than classifying them into 'specific' or 'basic' intent offences. This means that evidence of voluntary intoxication would be irrelevant if recklessness is sufficient to constitute the necessary mens rea for the offence, with the rationale being that 'recklessness' would refer to the defendant's 'recklessness' in making himself intoxicated. Lord Diplock in

³¹ Specimen Direction 52, Note 3

³² Specimen Direction 14

³³ [1996] 1 HKC 597

³⁴ [1982] AC 341

Caldwell reconciled itself with **Majewski** by describing this alternative formulation as an alternative to the **Majewski** rules.

3.2.3 Consumption of non-dangerous drugs

The situation with voluntary consumption of non-dangerous drugs is different. Where there is no evidence that the defendant knew, or that it was generally known, that the taking of a particular drug in the quantity taken by the defendant would be liable to render a person aggressive or incapable of appreciating risks to others or to have other side effects, the jury should be directed that if they concluded that the defendant, in taking the drug, was unable to appreciate the risks to persons and property resulting from his actions, they should consider whether the taking of the drug was itself reckless.³⁵ If the answer is positive, then they will have to decide whether the defendant would have been aware of the relevant risk had he not taken the drug.³⁶ It should be noted that recklessness refers to subjective recklessness.³⁷

3.3 Voluntary intoxication and other defences

3.3.1 Voluntary intoxication and mistake

According to **R v O'Grady**³⁸, where a mistaken belief as to fact was caused by voluntary intoxication, the defence of lawful self-defence should fail. However, the situation in mistake as to consent in rape is different, as can be seen from Specimen Direction 17.

3.3.2 Voluntary intoxication and 'Dutch Courage'

According to **Attorney General for Northern Ireland v Gallagher**³⁹, where a defendant had formed the necessary intention at an earlier stage, the defence of voluntary intoxication during the performance of the act should be rejected.

4. Problems with the current law

4.1 Uncertainties in classification of 'specific' and 'basic' intent offences

³⁵ **Hardie**

³⁶ Archbold 16-73

³⁷ See Michael Jackson (n.2 above) at p.268

³⁸ [1987] QB 995

³⁹ [1963] AC 349

As can be seen from the above, the rules governing voluntary intoxication and criminal liability are mainly based on different classifications, with the categorization of ‘specific’ and ‘basic’ intent offences being the skeleton of the application of rules. However, an array of problems exist with such categorization, with the definitions of ‘specific’ and ‘basic’ being problematic and open to different interpretations, and there being insufficient guidance from case law as to the test to be applied for the classification exercise.

4.1.1 Problematic definitions

The definitions of what constitute ‘specific’ or ‘basic’ intent had been problematic. Even in the leading case of **Majewski** itself, the law lords themselves, while unanimous on the existence of such distinction between ‘specific’ and ‘basic’ intent offences, failed to agree on a definition of the two intents.⁴⁰ The terms ‘specific intent’ and ‘basic intent’ offences have also been interpreted by different judges and academic writers to mean different things. In **Heard**, the Court of Appeal seemed to have recognized such uncertainties and stated there is

‘... no universally logical test for distinguishing between crimes in which voluntary intoxication can be advanced as a defence and those in which it cannot; there is a large element of policy; categorization is achieved on an offence by offence basis.’

While **Majewski** defined ‘specific intent’ offences as which require the Prosecution to prove the purpose of the commission of the act extends to the intent in the definition of the crime, the term ‘specific intent’ extends to states of mind including ‘knowledge or belief’ requirements (**Durante**⁴¹) and ‘dishonesty’⁴². With uncertain applications of such definitions, which will be elaborated below, it can be seen that the definitions are not only uncertain and an unhelpful guide to the application of law, but also create difficulties in execution.

4.1.2 Anomalous application

Despite the line of cases upholding this classification practice, the cases adopting the classification exercise do not sit comfortably among themselves,

⁴⁰ Williams, *Textbook of Criminal Law* (2nd Edition, 1983) at p. 471

⁴¹ [1972] 1 WLR 1612]

⁴² UKLRCR p.22

hence creating different anomalies in such classification practice. Examples of anomalies in application are as follows:

- (1) While the offence of murder requires a mens rea that corresponds exactly with the actus reus, i.e. intention to kill or cause GBH, hence satisfying the test for 'basic intent' offence, it was nevertheless categorised as a 'specific intent' offence in **Beard**.
- (2) Although rape requires a defendant to have 'intentionally' penetrated the vagina, anus or mouth of another person,⁴³ rape was held to be an offence of 'basic intent'. (**Grout**)
- (3) Despite the explicit wording of 'intentionally' in s.3 of the Sexual Offences Act 2003, **Heard** interpreted 'intentionally' as requiring nothing more than proof that the defendant's conduct was non-accidental and was not to be interpreted as a requirement of 'specific intent'.
- (4) Although 'allowing' as provided in s.1 Dangerous Dogs Act 1991 would usually be interpreted as containing an implicit element of knowledge or belief that something is happening or has happened, **DPP v Kellest**⁴⁴ held that the offence was one of 'basic intent'.
- (5) Though the offence of taking a conveyance without consent or other lawful authority, as contrary to s.12(1) of the Theft Act 1968, requires a 'purpose' for liability, it was held to be one of 'basic intent' in **MacPherson**.

As can be seen from the above, the definitions provided by leading case law are indeed contradictory to how the courts apply them in practice. Therefore, given the confusing principles and lack of help from the tests laid out in case law, some commentators believed the search for a theoretically sound distinction is illusory.⁴⁵ Smith and Hogan have suggested that:

'... the designation of crimes as requiring, or not requiring, specific intent is based on no principle but on policy. In order to know how a crime should be classified for this purpose we can look only to the decisions of the court.'⁴⁶

⁴³ s.1(a), UK Sexual Offences Act 2003

⁴⁴ (1994) 158 JP 1138

⁴⁵ See Michael Jackson (n. 2 above) at p. 263

⁴⁶ Smith and Hogan, '*Smith and Hogan's Criminal Law*', 9th Edition, at p. 222

5. Proposed reform

5.1 Whether the current position of law should be reformed

As laid out in the above, the current position of the law shows courts' attempt in balancing between policy considerations and logical application of criminal doctrines, where courts have evidently inclined towards the former. Though backed with sound reasons, such practice had led to uncertainties and hence flawed applications. This essay believes the **Majewski** rule should not be overruled or abolished for the following reasons:

First, though the fact that the same state of voluntary intoxication could create an all-or-nothing result, i.e. conviction for a 'basic intent' offences but acquittal for 'specific intent' offences, sounds illogical, a defendant who will not be held liable for a 'specific intent' offence would usually be liable for an alternative 'basic intent' offence in practice.⁴⁷

Second, the harshness imposed by holding states of voluntary intoxication irrelevant for 'basic intent' offences promotes and safeguards the law and order of the city by deterring excessive drinking habits of citizens.

Therefore, this essay argues that the **Majewski** rule should not be abolished, but should be reformed so that the position of the law on voluntary intoxication and criminal liability would be more certain and comprehensive in Hong Kong. But before elaborating the reform proposal, it is important to first examine the position of the law in other common law jurisdictions for comparative purposes.

5.2 Position in other countries

5.2.1 The United Kingdom

In 1993, the UK Law Reform Commission ('UKLRC') proposed to abolish the **Majewski** rule, so that states of intoxication would always be taken into account, together with the codification of an offence of 'criminal intoxication', which received strong oppositions from the legal community.⁴⁸ Reasons for opposition include the creation of more trials and more issues at trial, creation of lengthier trials, requirement of more time in enquiring into the extent of

⁴⁷ The Law Reform Commission, '*Intoxication and Criminal Liability*' (2007) at 2.39

⁴⁸ See the Law Reform Commission (n. 48 above) at p. 48

defendant's intake of intoxicants prior to the commission of the offence, creation of practical difficulties for prosecution regarding when the alternative count of criminal intoxication should be prosecuted, and the creation of a risk of defendant being held liable for a genuine accident which might have occurred even if he had been sober.⁴⁹ Together with the UKLRC's considerations regarding the absence of available replacement for the **Majewski** rule and the fact that tribunals of fact did not experience as much difficulty as expected by the Commission, the UKLRC decided to abandon their 1993 proposal, and instead, proposed to reform the **Majewski** rule instead of abolishing it, in their 2007 report. Recommendations in the 2007 report include:

- (1) The codification of the general rule that (1) if defendant is charged with having committed an offence as perpetrator, (2) the fault element of the offence is not an integral fault element ('specific intent' as understood under **Majewski**), and (3) defendant was voluntarily intoxicated at the material time, then in determining whether defendant is liable for the offence, defendant should be treated as having been aware at the material time of anything which defendant would then had been aware of but for the intoxication.
- (2) But where the subjective fault element in the offence is one which the justification for the **Majewski** rule cannot apply, then the prosecution should have to prove that the defendant acted with the relevant state of mind
- (3) The following subjective fault elements should be excluded from application of the general rule and should always be proved:
 - (a) intention as to a consequence;
 - (b) knowledge as to something;
 - (c) belief as to something (where the belief is equivalent to knowledge as to something);
 - (d) fraud; and
 - (e) dishonesty
- (4) Codification which disallows defendant to rely on genuine mistake of fact or 'honest belief' provisions arising from self-induced intoxication
- (5) Codification of the situation regarding secondary liability offences

⁴⁹ See the Law Reform Commission (n. 48 above) at p.49

All in all, the latest UKLRC paper on voluntary intoxication affirmed the exculpatory nature of voluntary intoxication by making the presumption of mens rea the general rule for situations of voluntary intoxication of offences which are not ‘an integral fault element’. It also affirmed the burden to be laid on Prosecution to prove the necessary mens rea where the offence has ‘an integral fault element’. The recommendations substituted the distinction between ‘basic intent’ and ‘specific intent’ offences with the exercise of viewing ‘integral fault elements’ in isolation. The most significant recommendation is the codification of fault elements which should always be proved by the Prosecution at all times, so as to reconcile the conflicting case laws and the confusion caused by the contradicting definitions of ‘basic’ and ‘specific’ intent and their application.

5.2.2 Canada

The case of Leary⁵⁰ applied Majewski. However, the Supreme Court in Daviault⁵¹ refused to follow Leary, believing such approach was incompatible with the Canadian Charter of Rights and Freedoms. Daviault established the new position which allowed the defendant to have a defence where it could be proved he was so intoxicated that ‘the very voluntariness or consciousness of committing the act may be put into question’.

The Canadian Criminal Code (‘CCC’) was amended after the judgment in Daviault was delivered, trying to reconcile Daviault and Leary. The amended CCC limits the Leary position to *only offences containing an element of assault*, while Daviault still applies to *non-assault related ‘general intent’* offences.

5.2.3 Australia

5.2.3.1 Federal jurisdiction

The common law position is that the rule in Majewski should be rejected⁵². The High Court in O’Connor held that evidence of voluntary intoxication should be relevant so long as it raises a reasonable doubt as to whether the defendant acted intentionally or voluntarily when committing the relevant act. Meanwhile, the Commonwealth Criminal Code Act 1995 (‘**CCCA 1995**’) and the Criminal Code 2002 (‘**CC 2002**’) of the Australian Capital Territory provided that self-induced intoxication ‘cannot be considered in determining whether a fault

⁵⁰ (1977) 33 CCC 2d 473

⁵¹ (1994) 93 CCC (3d) 21

⁵² O’Connor [1980] HCA 17

element of basic intent existed'⁵³, but evidence of voluntary intoxication can be considered in deciding whether defendant had mistaken belief as to facts⁵⁴

5.2.3.2 *New South Wales*

Rejected **O'Connor** through s.428H of the Crimes Act 1900. The Act upheld **Majewski** and listed out offences of specific intent for which evidence of voluntary intoxication may be considered.

5.2.3.3 *Queensland and Western Australia*

Rejected the application of **O'Connor**. According to the criminal codes, evidence of voluntary intoxication may be considered when deciding whether an intention existed for offences which has an element of 'intention to cause a specific result'⁵⁵, but not for offences which does not require proof of such intention.⁵⁶

5.2.3.4 *Tasmania*

Under the Criminal Code Act 1924, evidence of voluntary intoxication is relevant to offences of 'special intent', which is defined as the intention to bring about a specific result.⁵⁷ In common law, evidence of self-induced intoxication cannot negative the fault element of a 'basic intent' offence.⁵⁸

It should be noted that the Law Reform Institute of Tasmania proposed that 'evidence of intoxication be relevant to any mental element, including intention, knowledge (including whether the person ought to have known), foresight of the consequences, and whether the act was voluntary and intentional'.⁵⁹

5.2.3.5 *Victoria*

Victorian Courts continued applying **O'Connor**, in the absence of legislation suggesting otherwise. The Victorian Law Reform Commission recommended that the principles in **O'Connor** should continue to apply,⁶⁰ which was supported by the Victorian government.

⁵³ s.8.2(1) CCCA 1995 and s.31(1) CC 2002

⁵⁴ s.8.1(4) CCCA1995 and s.31(3) CC 2002

⁵⁵ s.28(3) Criminal Code Act 1899 (QLD)

⁵⁶ **Kusu** [1981] Qd R 136

⁵⁷ **Snow** [1963] Tas R 271

⁵⁸ **Palmer** [1985] Tas R 138

⁵⁹ Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, Final Report 7 (August 2006) p. 8

⁶⁰ *Inquiry into Criminal Liability for Actions Performed in a State of Self-induced Intoxication* (1999)

5.2.3.6 South Australia

The Criminal Consolidation Act 1935 follows **O'Connor**. The Act provides an alternative offence on criminal negligence where defendant's conduct resulted in serious harm but found not guilty of an offence due to voluntary intoxication.

5.2.3.7 Northern Territory

Follows **O'Connor**.

5.2.4 New Zealand

Kamipeli⁶¹, which rejected the distinction between 'basic' and 'specific' intent offences, was held to continue to apply in **Roulston**⁶². The New Zealand Law Reform Committee endorsed **Kamipeli** and proposed that the principles therein should be codified.⁶³

5.2.5 United states

In common law, evidence of voluntary intoxication is relevant in offences defined with requirements such as 'knowingly' or 'wilfully', intention or knowledge. The Modern Penal Code affirmed that voluntary intoxication is irrelevant to offences including recklessness as an element.

5.3 Summary

Country		Distinction between 'specific' and 'basic' intent offences (the <u>Majewski</u> rule)	Relevance of voluntary intoxication
Canada		Yes	Relevant to special intent offences and non-assault related basic intent offences
Australia	Federal	Yes	Relevant to specific intent offences, will be considered in basic intent offences in deciding whether defendant had mistaken belief as to facts
	New South	Yes	Relevant to special intent

⁶¹ [1975] 2 NZLR 610

⁶² (1976) 2 NZLR 644

⁶³ Report on Intoxication as a Defence to a Criminal Charge (1984)

	Wales		offences only
	Queensland and Western Australia	Yes	Relevant to special intent offences only
	Tasmania	Yes	Relevant to special intent offences only
	Victoria	No	Relevant so long as it raises a reasonable doubt as to mens rea
	South Australia	No	Relevant so long as it raises a reasonable doubt as to mens rea
	Northern Territory	No	Relevant so long as it raises a reasonable doubt as to mens rea
New Zealand		No	Relevant in determining whether defendant had the intention or recklessness required
United States		Yes	Relevant in certain types of offences with a requirement of intent and other specific requirements

5.4 Recommended Reform

In light of the above, this essay proposes the following reforms to the law on voluntary intoxication and criminal liability in Hong Kong, by way of codification:

- (1) Instead of classifying offences into those of ‘basic’ or ‘specific’ intent, only identify offences which are of ‘specific intent’, and follow the **Majewski** position therein.
- (2) List out the mental requirements which should be classified as of ‘specific intent’ for the avoidance of doubt
- (3) The **Caldwell** recklessness alternative should be enforced with **Majewski**, such that voluntary intoxication can be excluded if the mental requirement can be satisfied with recklessness

5.4.1 Recommendation One: the Majewski rule

This essay proposes that the default position would be that the defendant, who voluntarily intoxicated himself, would not be entitled to rely on evidence of voluntary intoxication to raise a reasonable doubt as to mens rea. The proposed codification is as follows, which is based on the recommendations by the UKLRC in their 2007 report, with modifications:

‘The general rule is that where:

- (1) There are proceedings against a person (‘D’) for an offence;
- (2) D’s liability for it requires proof of a fault element which depends upon D’s state of mind,
- (3) It is alleged that the fault element was present at any material time, and
- (4) At that time D was voluntarily intoxicated

Then, in determining whether or not D is liable for the offence, D should be treated as that when he did the act, he realized it might cause some injury, not necessarily serious injury or wounding to some person or, would have realized that his act might cause such injury had he not been drinking.’

The modifications are based on Specimen Direction 52 regarding offences of ‘basic intent’. It is hoped that this general rule can exclude the availability of voluntary intoxication as a defence at the outset, upholding the Majewski position.

5.4.2 Recommendation Two: Codifying mental requirements

As mentioned in the above, the major problem regarding the Majewski rule is its uncertain definition of ‘specific intent’ and hence problematic application exercise. This essay proposes that the following mental elements as to offences be codified such that the mens rea of all offences containing such mental requirement had to be proved beyond reasonable doubt by the Prosecution. The proposed legislation, based on the proposed model by the UKLRC 2007 Report, is as follows:

‘The general rule should not apply for the following cases: in these cases, evidence of defendant’s intoxication may be taken into account in determining whether the allegation has been proved. The cases include when the allegation is, in substance, that at the material time:

- (1) D intended a particular result (but this does not include intending to do the acts which constitute the conduct element of the offence);
- (2) D had any particular knowledge as to something (but this does not include knowledge as to risk),
- (3) D had a particular belief, amounting to certainty or near-certainty, that something was then, had been, or would in future be, the case,
- (4) D acted fraudulently or dishonestly'

5.4.3 **Caldwell** recklessness

This essay believes that the law on voluntary intoxication and criminal liability is still subject to uncertainties since it is still difficult to find a one-size-fits-all definition for specific intent mental requirements, given the complex policy considerations behind. Therefore, this essay believes courts should take the major role of dealing with new offences and factual matrixes with an incremental approach. The alternative definition of recklessness in **Caldwell** should co-exist with the **Majewski** rule, just like the situation in the US, given that recklessness is a concept that can easily be understood and hence less prone to creating uncertainties.

6. Conclusion

To conclude, this essay believes the law on voluntary intoxication and criminal liability should be kept but reformed and codified, as proposed above.