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29 April 2005

Tasmania Law Reform Institute
Private Bag 89
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Attention: Professor Kate Warner

Dear Kate

Intoxication and Criminal Responsibility

Thank you for providing the Institute's seventh issues paper for comment.

I have reviewed your letter dated the 18th of March 2005 and the questions raised therein and discussed them with several other practitioners.

I think a distinction needs to be drawn between intoxication as a defence and intoxication being used to negate criminal responsibility.

In terms of intoxication being used as a defence I was unable to find any practitioner who had actually used intoxication as a defence in any criminal matter, in recent times.

On the other hand, intoxication is often used as an explanation to criminal conduct. For instance, explaining why a person not normally prone to criminal activity becomes involved in a crime as their resolve is lessened by alcohol consumption. This can include any number of crimes from property offences, offences of violence to sexual offences.

Intoxication is usually used as mitigation and therefore it is implicit that it does not bring about an acquittal.

I do not believe that intoxication is a factor used by prosecution authorities to determine whether a person should be charged or what charges are to be laid.

I think one of the problems with raising intoxication as a defence is proving it. It is very easy to say I was drunk and I can not remember, but proving intoxication is another matter entirely. Any accused, due to their intoxication, will never be able to say how much alcohol they consumed; people with them are usually equally intoxicated and bar staff do not keep count and couldn't give evidence of intoxication levels.

Unlike mental disease, intoxication wears off so it is impossible to have an accused assessed as to how their thought processes are impaired by alcohol.

In terms of self defence, given the subjective component of circumstances as the accused believes them to be I would argue that how that belief comes about is irrelevant. The belief might be mistaken, but what causes that belief is of little note. Whether the mistake is due to intoxication, drug, use, delusions or simply a misinterpretation of the facts is not relevant to raising the defence in the first place.

In summary, if given a choice I would adopt options 4 and 6. Option 4 would allow self-induced intoxication to be relevant to all offences which necessitate the proof of a mental element. However, as indicated, the opportunity for it to be raised is extremely remote. Option 6 should be introduced to allow for a separate defence of involuntary intoxication. It seems a basic principle of fairness that an individual who for example, has had their drink spike, should not be criminally or civilly responsible for what they do later.

I hope these comments have been of assistance.

Yours faithfully
Butler McIntyre & Butler

Per:

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