Intoxication and Criminal Responsibility under the Queensland Code

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The effect of intoxication or stupefaction by drink or drugs upon criminal responsibility for offences against Queensland law is generally clear. Section 28, which is the section of the Criminal Code specifically dealing with the matter, has been considered and explained in many cases. However two sorts of obscurities remain, those which relate to the terms of s. 28 itself and those which relate to other sections of the Code which themselves have an impact on s. 28. This article expounds the relevant case law and suggests answers to questions of interpretation which have not yet been authoritatively answered by the courts.

The Structure and Context of Section 28

S. 28 provides as follows:

> "The provisions of the last preceding section apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by any other means.
>
> They do not apply to the case of a person who has intentionally caused himself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not.
>
> When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

The last preceding section referred to is s. 27 which sets out the defence of insanity as follows:

> A person is not criminally responsible for an act or ommission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.
>
> A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist."

Thus s. 28 makes intoxication a defence only when it is unintentional and is such as to deprive the accused of one of the three capacities specified in the insanity defence. Furthermore the third paragraph of s. 28 acknowledges the relevance of evidence of intoxication, whether unintentional or intentional, when the offence charged is one including the element of intention to cause a specific result.

It should also be noted that s. 28 is one of the various excusatory provisions

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set out in Chapter V of the Code and that by virtue of s. 36 it applies to all offences against the statute law of Queensland including, of course, the offences defined in the Code itself. Furthermore some of the other defences set out in Chapter V, such as involuntariness (s. 23) and mistake of fact (s. 24) may be relevant in determining the criminal liability of an intoxicated accused and therefore the impact of these sections upon the interpretation of s. 28 must be considered.

Intoxication and Insanity

Intoxication may induce a mental disease such as delirium tremens in which case insanity under s. 27 is the relevant defence. By virtue of s. 26 a person is presumed to be of sound mind until the contrary is proved so that the onus of proof of insanity is on the accused.[1] If he discharges the onus the jury returns a special verdict under s. 647 of not guilty on the ground of insanity and he is ordered to be detained in a mental institution during Her Majesty's pleasure.

In this type of case intoxication is relevant only as the inducing cause of insanity not as a defence itself. S. 28 does not apply and it matters not whether the intoxication leading to the onset of the mental disease is intentional or unintentional.[2] However in neither case is the accused entitled to an absolute acquittal.

One interesting problem, not yet resolved under the Code, concerns the relationship between intoxication and insanity when the defence is founded on a mental disease which is not, like delirium tremens, of a kind produced by drink. The problem is illustrated by the common law case of *A–G for Northern Ireland* v. *Gallagher*[3] in which a psychopath who when, his mental disease was quiescent had formed an intention to kill his wife and having taken drink to nerve himself had actually killed her after the drink had reactivated the disease. Thus he was sober and sane at the time the intention to kill was formed but drunk and insane at the time the deed was done.

The House of Lords took the view that while the time of doing the act which caused death was the relevant time for the determination of criminal responsibility regard should also be had to the circumstances at the earlier time when the accused formed the intention to kill. As he was sane at that time the defence of insanity based on the later return of his psychopathic condition after the consumption of alcohol failed.

Lord Denning made the additional point that the mental disease in this case was not of the sort induced by drink and that the common law exception to the rule that voluntary intoxication is no defence did not apply to such diseases.[4] There seems to be nothing in the Code to support a similar qualification but it is submitted that a Queensland court would probably follow the common sense approach of the House of Lords on the other point i.e. that in considering the availability of a defence of insanity when mental disease has been induced by drink it is pertinent to look to the time the accused began to drink as

1. The standard of proof is on the balance of probabilities. This common law rule applies under the Code. See, e.g., *Armanasco* (1951) 52 W.A.L.R. 78, *Marinone* [1915] St.R.Qd.14, and *Thomas* (1960) 102 C.L.R. 584.
2. See *Corbett* [1903] St.R.Qd.246, and *Dearnley* [1947] St.R.Qd.51, at p.61, per Philp J.
3. [1963] A.C. 349.
4. *Id.*, at pp. 381, 382.

well as to the time the act of killing was done.[5]

Unintentional Intoxication

The first paragraph of s. 28 refers to "a person whose mind is disordered by intoxication or stupefaction caused without intention on his part" and relieves such a person from criminal responsibility as if he were insane under s. 27. Thus the general effect of the paragraph is clear. It makes unintentional intoxication a defence when at the relevant time it deprived the accused of capacity to understand what he was doing, capacity to control his actions or capacity to know he ought not to do the act or make the omission.

However the use of the word "intention" and the elliptical reference to section 27 create problems of interpretation not all of which have been resolved by the courts.

(a) Without Intention on His Part

Firstly, the Code elsewhere draws a clear distinction between intention and voluntariness. S. 23 provides that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will and then goes on to say that the result intended is immaterial to criminal responsibility unless intention to cause a particular result is expressly declared to be an element of the offence. In other words the concept of voluntariness relates to acts or omissions and the concept of intention to the results of such acts or omissions. An intended result would on this analysis be one the accused sought to accomplish. If a man drank in order to become drunk the resulting intoxication could (following Code terminology) be described as *intentional.* If, however, he drank in order to be convivial but not with the object of becoming drunk the resulting intoxication would be *unintentional* and the first paragraph of section 28 would, it might appear, be available to him as a defence to a criminal charge. Such an interpretation is consistent with the scheme of the Code but it does not accord with the common law which the draftsman of the Code, Sir Samuel Griffith, sought to reproduce in section 28.[6] At common law self-induced intoxication whether induced with the intention of becoming intoxicated or not is no defence[7] and in 1903 Sir Samuel in his judicial capacity interpreted section 28 in accordance with the common law. In charging the jury in *Corbett*[8] he said one question they had to consider was "did the prisoner become intoxicated without any intention on his part, i.e. under circumstances for which he could not be fairly held responsible?"[9] This formulation suggests cases where intoxication is induced by co-ercion or mistake as to the nature of the drink or drug taken. Cases where the intoxicant was taken knowingly and voluntarily but without the object of becoming intoxicated would be outside the defence because in those cases the accused could fairly be held responsible.

5. For a Queensland case in which a similar approach was taken to the relevant time principle see *Scarth* [1945] St.R.Qd.38. The matter is fully discussed in Howard, *Australian Criminal Law,* 2nd ed. (Melbourne, Law Book Co., 1970) pp. 13–17.
6. Sir Samuel Griffith's marginal note to s. 30 of his draft Code (enacted as s. 28) is "Probably common law." *Queensland Parliamentary Papers* C.A. 89–1897, 15.
7. *D.P.P.* v. *Beard* [1920] A.C. 479, *Lipman* [1970] 1 Q.B. 152, and *D.P.P.* v. *Majewski* [1976] 2 W.L.R. 623.
8. [1903] St.R.Qd. 246.
9. *Id.,* at p. 249.

Philp J. writing in this Journal[10] has suggested that the test as enunciated in *Corbett*[11] is too vague as it might suggest to a jury that a defence is available to a person who became intoxicated because he had "a weak head" or "can't refuse a drink" or "was led into it."[12] Certainly there is this danger and a more specific direction may be necessary to indicate clearly that such a person has no defence. However the importance of Griffith C.J.'s test is that it is couched not in terms of intention alone but in the more general terms of responsibility to which notion the concepts of voluntariness and mistake are obviously relevant.

(b) The Onus of Proof and the Verdict

The provisions of the insanity section are expressed to apply to the case of a person unintentionally intoxicated. This raises two questions. Does he, like the person relying on insanity itself, bear the onus of proving his defence and if successful in making out his defence is he entitled to an absolute acquittal or merely to a verdict of not guilty on the ground of insanity?

There is some *obiter dicta* in the judgment of Philp J. in *Dearnley*[13] which suggest that the answer to the first question should be yes. That case was concerned with the operation of the third paragraph only of section 28 but in the course of some observations on the effect of the section generally and its relationship to ss. 26 and 27 Philp J. said:

> "I think that the presumption of soundness of mind spoken of in s. 26 is a presumption of sanity as that word is usually understood and it is only where unsoundness of mind in the proper sense (and probably also in its extended sense, based on unintentional intoxication) arises for consideration that the onus is shifted to the accused."[14]

Philp J. did not, however, indicate why this would be so. There appear to be two arguments for this interpretation. One is that the unqualified application of section 27 to the first paragraph of s. 28 means that the latter defence is only available on the same terms as the former and, of course, one of these terms is that the accused has the onus of proof. The other argument, which it is submitted is much less cogent, is that a "disordered" mind within the meaning of s. 28 is not a "sound" mind within the meaning of s. 28. The Court of Criminal Appeal considered both arguments in 1949 in *Smith*[15] when answering the second question—what is the appropriate verdict when the accused has successfully relied on unintentional intoxication?

On a charge of dangerous driving the jury found Smith guilty while temporarily of unsound mind. On being questioned by the trial judge the foreman said the jury were satisfied that at the relevant time the accused was of unsound mind suffering from a temporary disorder of the mind caused without intention on his part by drugs or intoxicating liquor. The judge accepted this verdict as one of not guilty on the ground of temporary insanity and reserved for the Court of Criminal Appeal the question whether s. 647 applied to the case. The Court held that as the defence set up on behalf of

10. "Criminal Responsibility at Common Law and under the Criminal Code—Some Comparisons." (1950) 1 U.Q.L.J. (No. 2) 1.
11. [1903] St.R.Qd. 246.
12. *Op. cit.*, at pp. 9, 10.
13. [1947] St.R.Qd. 51.
14. *Id.*, at p. 62.
15. [1949] St.R.Qd. 126.

the accused was one of insanity and as he had been acquitted on that ground he was not a person convicted and accordingly therefore the trial judge had no power to reserve the question.

The significance of the decision is that it proceeds upon the basis that successful reliance on unintentional intoxication means a verdict under s. 647. Macrossan C.J. (with whom Brennan and Stanley JJ. agreed) argued as follows:

> "The first paragraph of s. 28 in very plain language applies the provisions of s. 27 to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by any other means. The effect of this is the same as if there were inserted in s. 27 after the words 'natural mental infirmity' the words 'or his mind is so disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by any other means.'
>
> A person whose mind is so disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor or by any other means is a person who is of unsound mind while that condition continues.
>
> Common dictionary meanings of 'disorder' are 'derangement', 'malady', 'disease' ".[16]

Macrossan C.J. further supported his argument by relying on certain observations in Griffith C.J.'s charge to the jury in *Corbett*.[17] Griffith C.J. had said in that case:

> "No one can escape liability merely because he is intoxicated. If you come to the conclusion that the prisoner was so intoxicated that his mind was absolutely disordered, and he was thus deprived of capacity to understand what he was doing, or of capacity to control his actions or of capacity to know that he ought not to do the act with which he is charged, you may be able to find him not guilty on the ground of insanity. But if he intentionally caused himself to become intoxicated, that defence is not open to him. It is however a defence if his mind was so disordered as to be unsound within the meaning of s. 27 of *The Criminal Code*, and if this condition was caused by intoxication which arose without any intention on his part."[18]

This passage suggests that Griffith C.J. may have been referring to delirium tremens which, of course, does "absolutely" disorder the mind and is a mental disease in the strict sense. However there was no evidence of delirium tremens in the case and it appears from the context that Griffith C.J. did take the view that successful reliance on unintentional intoxication would in all circumstances entitle the accused only to a special verdict.

Griffith C.J. gave no reason for this conclusion. This is not surprising as he was directing the jury not giving a considered judgment on a point of law. It is submitted that the reasons given by Macrossan C.J. in *Smith*[19] are not persuasive. Firstly it does not follow from the terms of s. 27 itself that s. 647 applies to unintentional intoxication. Rather the effect of the first mentioned section is merely to excuse the accused as if he were insane but not to define him as insane.[20] Secondly although the word "disorder" may sometimes be a synonym of the word "disease" it also has a less serious connotation. It is apt to cover a condition of disturbance or discomfort falling short of disease.

16. *Id.*, at p. 130.
17. [1903] St.R.Qd. 246.
18. *Id.*, at p. 249.
19. [1949] St.R.Qd. 126.
20. This was the view of Philp J., *op. cit*, at p. 11.

Thus a person's mind may properly be described as disordered (whether by intoxicating liquor or other cause) without being diseased. Macrossan C.J.'s argument does not acknowledge this distinction. Certainly it leads to an unjust conclusion in the case of an accused who is unintentionally and temporarily intoxicated because the consequence is his indefinite detention in a mental institution.

However *Smith*[21] has never been re-considered by the Court of Criminal Appeal and it therefore remains authority for the two propositions that the onus of proof of unintentional intoxication is upon the accused and that if the defence succeeds the verdict should be not guilty on the ground of insanity.

Intentional Intoxication

According to the second paragraph of s. 28 intentional intoxication affords no defence. This accords with the English common law which has recently been expounded by the House of Lords in *D.P.P.* v. *Majewski*.[22] However in the Australian common law jurisdictions there are cases which suggest that even where the accused did the criminal act in a state of self-induced intoxication he will not be held responsible unless the act is shown to have been done voluntarily. For instance in *Haywood*[23] a youth shortly after taking a number of valium tablets broke into a house and consumed a quantity of whisky. There he found a rifle and ammunition and fired a number of shots some of which went beyond the house. One of them struck and killed a woman. On his trial for murder psychiatric evidence was adduced to the effect that his acts of firing the shots were or might have been performed in a state of automatism. It was therefore argued that he was not criminally responsible even for manslaughter because his act of firing the fatal shot may have been done involuntarily. Crockett J. ruled that involuntariness although brought about by self-induced intoxication would be available as a defence and directed the jury accordingly.

If this reasoning were to be applied in Queensland it would mean that a defence of involuntariness would apply under s. 23 despite the terms of the second paragraph of s. 28. It is submitted that whatever the position at common law Crockett J.'s conclusion would not be correct under the Code. S. 23 is a general provision dealing with the effect of involuntariness on criminal responsibility whereas s. 28 is a specific provision relating to the exculpatory effect of intoxication only. In accordance with the usual rule of statutory interpretation s. 28 should prevail and thus except from the operation of s. 23 involuntariness induced by intoxication. *Generalia specialibus non derogant*.[24] Therefore, it is submitted that in this respect s. 28 corresponds to the English common law and intentional intoxication (even where it results in involuntary conduct) is no defence.

21. [1949] St.R.Qd. 126.
22. [1976] 2 W.L.R. 623.
23. [1971] V.R. 755. See also *Keogh* [1964] V.R. 400.
24. For an example of the application of the maxim to resolve internal conflicts between sections of an Act see *White* v. *Mason* [1958] V.R. 79 and the discussion thereon in Pearce, *Statutory Interpretation in Australia* (Sydney, Butterworths, 1974), para 50. This was the approach of Prentice J. in the Papua New Guinea case of *Allan Evi* [1975] P.N.G.L.R. 30. His Honour concluded that s. 23 would not apply.

Intoxication and Intention to Cause a Specific Result

The final paragraph of s. 28 has a very different purpose from the preceding paragraphs. It is concerned not with the operation of intoxication as a defence but with its relevance as a matter of evidence. However, this provision is confined to cases in which "an intention to cause a specific result is an element of an offence" and it is necessary first to consider what these words mean.

(a) Offences of Basic and Specific Intent

All offences, apart from those of absolute liability, involve an element of intent. But there is a distinction between specific and general or basic intent. Lord Simon of Glaisdale in analysing the matter in *D.P.P.* v. *Majewski*[25] adopted the formulation of a Canadian judge, Fateux J. who had said in *George*:[26]

> "In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be in addition to that general intent, a specific intent attending the purpose for the commission of the act."[27]

And Lord Simon added:

> "In short, where the crime is one of 'specific intent' the prosecution must in general prove that the purpose for the commission of the act extends to the intent expressed or implied in the definition of the crime."[28]

An offence of specific intent as explained by Lord Simon would be in the terminology of s. 28 an offence of which "an intention to cause a specific result is an element." Thus intoxication whether self-induced or not is relevant to such offences under the Code as murder contrary to s. 302(1)[29] and stealing.[30] These are defined to include intent to cause a particular result as an element of the offence. However, there are many offences in the Code not so defined and thus the final paragraph has no application to them. They are offences of general not specific intent. For instance, it has been held in Queensland that incest[31] and unlawfully using a motor vehicle without the consent of the owner[32] are such offences. The distinction between the two sorts of offences is generally clear enough but problems of categorisation have occurred with respect to three groups of offences: attempts, rape and unlawful assaults.

(i) Attempts

In the Western Australian case of *Parker*[33] the Court of Criminal Appeal

25. [1976] 2 W.L.R. 623.
26. (1960) 128 Can.C.C. 289.
27. *Id.*, at p. 301.
28. [1976] 2 W.L.R. 623 at p. 637.
29. See *Herligy* [1956] St.R.Qd. 18, *Nicholson* [1956] St.R.Qd. 520, *Crump* [1966] Qd. R. 340 and *Tonkin and Montgomery* [1975] Qd.R.1.
30. See *Dearnley* [1947] St.R.Qd. 51. The relevant charge in this case was attempted robbery which involves an intent to steal. See Code S.412. The same reasoning applies to robbery itself. See *Kaminski* [1975] W.A.R. 143.
31. See *O'Regan* [1961] Qd.R. 78.
32. See *Kaesar* [1961] Q.W.N. 11.
33. (1915) 17 W.A.L.R. 96.

held that evidence of intoxication was irrelevant on a charge of attempted rape. This, according to McMillan C.J. who delivered the judgment of the Court, was not an offence in which an intention to cause a specific result is an element. It is submitted that this conclusion is incorrect. Apparently it was reached without reference to or consideration of s. 4 of the Code. That section defines an attempt as involving, *inter alia*, an intention to commit an offence. In other words one element of an attempt is an intention to cause a specific result i.e. to commit the offence. Thus evidence of intoxication would be material on a charge of an attempted offence.

This proposition has not yet been authoritatively determined in any Queensland case. However it was approved *obiter* by Mack J. in *O'Regan*[34] where the charge was incest and by Philp J. in his article in this Journal[35] It is submitted that a Queensland court would regard *Parker*[36] as decided *per incuriam* and prefer the opinion of the two local judges.

(ii) Rape

There are passages in the famous judgment of Lord Birkenhead L.C. in *D.P.P.* v. *Beard*[37] which suggest that rape is an offence of specific intent and that therefore voluntary intoxication may operate as a defence by negativing such intent. However, the House of Lords has recently made it clear in *obiter dicta* in *D.P.P.* v. *Majewski*[38] that this is not the way Lord Birkenhead's observations should be interpreted.

Similarly under the Code the weight of authority supports the same conclusion. In the Western Australian case of *Holman*[39] in which the Court of Criminal Appeal allowed an appeal against a conviction for rape Jackson C.J. discussed the effect of intoxication as follows:

> ". . . his Honour's direction is in line with what has been accepted in this State as the law in accordance with the provisions of s. 28 of the Criminal Code, namely that intoxication resulting from voluntary drinking is relevant only when the crime alleged has as one of its elements an intention to cause a specific result, and that rape is not such a crime."[40]

Furthermore, the Queensland Court of Criminal Appeal in *Thompson*[41] had earlier reached the same conclusion. The relevant ground of appeal related to a charge of attempted rape not rape but Stable J. in delivering the judgment of the Court approved *obiter* the direction of the trial judge that there is no element of specific intent in rape.[42] Philp J. had also expressed the same opinion in the article to which reference has been made.[43] Thus it now seems to be firmly established under the Code as at common law, that evidence of voluntary intoxication does not bear upon criminal responsibility for rape.

34. [1961] Qd.R. 78, at p. 88.
35. *op. cit*, at p. 12. The same conclusion has been reached in Papua New Guinea in *Bena Forepe* [1965–66] P.N.G.L.R. 329 (Attempting unlawfully to kill contrary to s. 306).
36. (1915) 17 W.A.L.R. 96.
37. [1920] A.C. 479, at pp. 504, 507.
38. [1976] 2 W.L.R. 623, at pp. 632, 637, 641 and 656.
39. [1970] W.A.R. 2.
40. *Id.*, at p. 6.
41. [1961] Qd.R. 503.
42. *Id.*, at p. 516.
43. *op. cit.*, at p. 12.

(iii) Unlawful assaults

In *D.P.P.* v. *Majewski*[44] the House of Lords decided that an unlawful assault is not an offence of specific intent. Under the Code the matter is not so clear. Certainly the term assault is not defined in s. 245 as including an element of intention to cause a specific result. The definition covers an actual application of force and an attempted or threatened application of force by any bodily act or gesture. According to Macrossan S.P.J. in *McIver*[45] assault implies intention.[46] In other words the actual application of force must be accompanied by an intention to apply it. This is a general intent, i.e. it does not, to use Lord Simon's terminology again, extend beyond the purpose for the commission of the act.

However, is the same analysis appropriate when there is an assault constituted by an act or gesture amounting to an attempt or threat to apply force? In this case there seem to be two intents—the general intent accompanying the accused's conduct and the further intent to achieve the specific result of applying force to the victim. If this is correct then evidence of intoxication would be relevant to a charge of assault founded on threats of force but not to a charge of assault when actual force is alleged to have been used.

This conclusion seems logical but as a practical matter rather incongruous. Perhaps therefore a court might interpret the third paragraph of s. 28 as applying only when an intention to cause a specific result is an *express* element of the offence. In the definition of assault such an intention is only implied. This interpretation accords with the interpretation of the word "element" elsewhere in the Code[47] and would mean that in no case of assault would evidence of voluntary intoxication be relevant. In *Dearnley*[48] Philp J. expressed the view that the offence of assault occasioning bodily harm was not one of specific intent.[49]

(b) Complete or Partial Intoxication

The final paragraph of s. 28 declares that where the offence charged is one involving an intention to cause a specific result as an element intoxication whether complete or partial may be regarded in deciding whether *in fact* such intention existed. The first close analysis of this proposition in a Queensland case was given by Stanley J. in *Herlihy*[50] when the learned judge said:

> "In my opinion s. 28 recognises that while the capacity to form a guilty intention existed, intoxication, complete or partial, may lead a man to do many very foolish things which in a sober man might justify a finding that he had a very different intention from what might reasonably be attributed to a drunken man. The onus of proving intention is on the Crown. While far short of providing an excuse in law, the accused's drunkenness may be an important factor in assessing the evidence.
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> Suppose, e.g., that a good pistol shot in his cups boasts of his prowess, saying he can shoot the ash off the cigar in his friend's mouth, and fires a shot which kills his friend. A jury might well think that the natural and probable consequences of his act would be to kill his friend. But who can deny the relation of his drunkenness to the actual intent in his mind. Section 28 entitles the jury to consider his

44. [1976] 2. W.L.R. 623.
45. (1928) 22 Q.J.P.R. 173.
46. *Id.*, at p. 174.
47. In s. 268. See *Kaparonovski* (1973) 47 A.L.J.R. 472.
48. [1047] St.R.Qd. 51.
49. *Id.*, at p. 63.
50. [1956] St.R.Qd. 18.

intoxication, complete or partial, in ascertaining whether or not *in fact* he had a guilty intent to kill or do grievous bodily harm. The section does not contemplate that a drunken intent to kill or do grievous bodily harm will be an excuse reducing a major to a lesser crime.

Or suppose a partially intoxicated man insists on attempting to shave himself with an open blade razor and does what is a natural result in the circumstances, severely gashes his throat. If he were charged with attempted suicide, who would say that a jury could not rightly have regard to his drunken state under s. 28. Although the resulting injury was a natural consequence of his acts, who could say that simply for that reason he must be found guilty of a crime?"[51]

Stanley J.'s examples are couched in terms of the now discredited maxim that a person is presumed to intend the natural and probable consequences of his acts.[52] However they do make it clear that drunkenness may prevent the formation of the relevant intent and thus prevent the Crown from proving an element of the offence beyond reasonable doubt. In this context drunkenness as such is not a defence. A drunken intent is no different in this respect from a sober one but if through drunkenness the requisite intent has not been formed then the accused is not guilty of the offence charged although he may be guilty of another offence which does not involve this element of intent.

It will be noted that s. 28 refers to both complete and partial intoxication and the Queensland cases since *Herlihy*[53] establish that where there is evidence of intoxication a clear direction on both degrees of drunkenness must be given. It is insufficient to direct only by reference to the accused's capacity to form an intent. A partially intoxicated person may well have retained the capacity to form an intent but as Mack C.J. said in *Crump*,[54] the question the jury must decide is "not . . . whether he was capable but whether he did in fact form the specific intent."[55]

(c) The Onus of Proof

The third paragraph of s. 28 does not, as has been indicated, set out a defence of intoxication. Rather it affirms the materiality of evidence of intoxication in trials for certain offences. Such evidence merely operates to deny the element of specific intent which the Crown must prove beyond reasonable doubt. Thus there is no persuasive onus on the accused. His onus is evidentiary only. Philp J. explained this is *Dearnley*:[56]

"In a restricted sense an onus in relation to intoxication does rest upon the accused. Since a jury may decide the question of intent only upon the evidence adduced, they cannot consider intoxication unless there be evidence of it. It is incumbent, then, on the accused to have before the jury, either from the Crown witnesses or aliunde such evidence of intoxication as may cause a reasonable man to have at least a doubt as to the existence of the intent alleged. It is only in this sense that any burden rests on the accused. If he adduces no proper evidence of drunkenness,

51. *Id.*, at p. 33.
52. It was suggested by the House of Lords in *D.P.P.* v. *Smith* [1961] A.C. 290 that this was a presumption of law. However the High Court of Australia expressly disapproved this suggestion in *Parker* (1963) 111 C.L.R. 610, at pp. 632–633.
53. [1956] St.R.Qd. 18.
54. [1966] Qd.R. 340.
55. *Id.*, at p. 343. See also *Nicholson* [1956] St.R.Qd. 520, at p. 524, *Crozier* [1965] Qd.R. 133 and *Thomas* (1960) 102 C.L.R. 585, *per* Fullagar J., at p. 597. For the corresponding common law rules see *Sheehan* [1975] 1 W.L.R. 739.
56. [1947] St.R.Qd. 51.

> then the jury will consider the question of intent without reference to drunkenness; but, if proper evidence of drunkenness be adduced, either from the Crown witnesses or aliunde, the jury must consider that evidence not separately, but together with all the other evidence, and if at the end of their consideration they be left in reasonable doubt whether the intent existed they must acquit."[57]

Philp J. added that the sufficiency of evidence of intoxication to raise an issue of specific intent under the third paragraph of s. 28 is a matter of law and therefore to be determined by the judge.[58]

Intoxication and Mistake

In his article in this Journal[59] Philp J. contrasted the relationship between intoxication and mistake at common law and under the Code as follows:

> "By the common law mistake induced by drunkenness is operative in self-defence, and in provocation reducing murder to manslaughter and is even said to be operative generally. Thus a man may because of his drunken state mistakenly think he is about to be seriously assaulted and an act done by him under such a mistake may amount to self-defence or be regarded as being provoked; but under s. 24 of the Code the mistake must be 'reasonable' so that a drunken mistake would be inoperative generally. The special provisions of the Code covering self-defence also require of the accused reasonableness . . .: "[60]

Thus s. 24 would not apply as a defence in this context. However, it should be added that evidence of a drunken and unreasonable mistake may still be highly relevant where the offence charged is one involving a specific intent. The fact that the mistake was made may go to show that the accused did not form the requisite intent.[61]

Intoxication and Provocation

As indicated in the preceding discussion a mistaken belief induced by drunkenness cannot afford the accused a defence of mistake of fact or provocation because such a belief is unreasonable. It is also important to note that where the drunkenness induces not a mistaken apprehension of the facts but a reduction in the accused's capacity for self-control the defence of provocation is again not available. This was decided by the Court of Criminal Appeal in *Rose*[62] in which the Court approved an observation of Philp J. in *Young*[63] that for the purpose of the objective test in provocation "the hypothetical reasonable man is one who is sober and of ordinary power of self-control."[64]

57. *Id.*, at p. 62. See also *Nicholson* [1956] St.R.Qd. 520, at p. 525, *per* Philp J.
58. *Ibid.*
59. *op. cit.*
60. *Id.*, at p. 7.
61. Two examples quoted by Lord Denning in *A-G for Northern Ireland* v. *Gallagher* [1963] A.C. 349, at p. 381, are (1) where a nurse got so drunk at a christening that she put the baby on the fire in mistake for a log of wood ((1748) 18 *Gentleman's Magazine* 570) and (2) where a drunken man thought his friend, lying in bed, was a theatrical dummy and stabbed him to death ((1951) *The Times*, January 13).
62. [1967] Qd.R. 186.
63. [1957] St.R.Qd. 599.
64. *Id.*, at p. 602. Hanger J. concurred in the judgment of Philp J.

Intoxication and Diminished Responsibility

The one remaining defence under the Code to which intoxication may be relevant is diminished responsibility which, so far as material, is set out in s. 304A as follows:

> "(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder or manslaughter, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only"

In *Di Duca*[65] the Court of Criminal Appeal in England when interpreting the corresponding provision of the *Homicide Act* 1957[66] inclined to the view that the toxic but transient effect of drink on the brain would not be an "injury" within the meaning of the section. Presumably, however, a permanent injury to the brain would be although in any such case it might still be difficult to decide whether it was the drink or the injury it caused which actually brought about a substantial impairment of one or other of the three relevant capacities. Of course, if it were the drink only there would be no defence under s. 304A or, in cases of voluntary intoxication, under s. 28 either.[67]

The matter has been considered in one Queensland case and then only incidentally. In *Kuzmenko*[68] one ground of appeal was that the trial judge wrongfully failed to direct the jury as to the possible application of a defence of diminished responsibility. The Court of Criminal Appeal held that there was not a title of evidence to show that the trial judge should have put s. 304A to the jury and dismissed the appeal. However the interest of the case in this context is the remark in the judgment of Mack C.J. (with whom the other judges agreed) concerning the relationship between intoxication and diminished responsibility. Having said that the only evidence of abnormality of mind suffered by the appellant arose through intoxication Mack C.J. added.

> "In other words, there may have been a defence under s. 28 which relates to intoxication but certainly none under s. 304A which deals with diminished responsibility."[69]

The suggestion in this passage is that abnormality of mind induced by intoxication is not within the scope of s. 304A and accordingly, if the intoxication be voluntary, there is no defence at all.

If, as has been argued in this article, insanity induced by intoxication may operate as a defence there seems no reason why diminished responsibility

65. (1959) 43 Cr. App.R. 167.
66. S. 2. The only significant difference in wording is that s. 2 speaks of substantial impairment of mental responsibility whereas Code s. 304A specifies the three relevant mental capacities.
67. Substantial impairment of one or other of the relevant capacities might also be brought about by the combined effect of abnormality and drink. The question whether a defence of diminished responsibility would be available in these circumstances was deliberately left open in *Clarke and King* [1962] Crim. L.R. 836 but has now been answered in the negative by the Court of Appeal in *Fenton* (1975) 61 Cr.App.R. 261. The Court, however, conceded that a defence might be available where the accused proves such a craving for drink as to produce in itself an abnormality of mind.
68. [1968] Q.W.N. 24.
69. *Ibid.*

similarly induced, should not also operate as a defence. *Kuzmenko*[70] is some authority to the contrary but the point both at common law and under the Code still awaits authoritative determination.

70. *Ibid.*