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The meaning of "intoxication" In Australian criminal cases: Origins and operation

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Abstract

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THE MEANING OF “INTOXICATION” IN AUSTRALIAN CRIMINAL CASES: ORIGINS AND OPERATION

Julia Quilter* and Luke McNamara**

Although alcohol and drug use features prominently in many areas of criminal offending, there has been limited investigation of how the effects of alcohol and other drugs are treated by criminal laws and the criminal justice system. This article examines the framing of judicial inquiries about “intoxication” in criminal cases in Australia. It illustrates the diverse types of evidence that may (or may not) be available to judges and juries when faced with the task of determining whether a person was relevantly “intoxicated.” It shows that in the absence of legislative guidance on how the task should be approached, courts tend to assign only a relatively marginal role to medical and scientific expert evidence, and frame the question as one that can be answered by applying common knowledge about the effects of alcohol and other drugs. The article examines the adequacy of this approach, given the weak foundation for assuming that the relationship between intoxication and the complex cognitive processes on which tribunals of fact are often required to reach conclusions (such as intent formation) is within the lay knowledge held by jurors and judges.

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Keywords: *Australian criminal law, intoxication, alcohol and other drugs, intoxication defense*

INTRODUCTION

Normative questions about what sorts of criminal law significance should be attached to intoxication continue to be debated in Australia—most visibly, in recent years, in the context of policy debates over how to reduce alcohol- (and drug-) fuelled violence.¹ These are important debates, but one of their features is a tendency to underappreciate that criminal courts, at all levels, are already required, on a daily basis, to consider the relevance of evidence that a person was intoxicated at the time of the alleged commission of a criminal offense. Little attention has been paid to how courts approach the decision making required in these cases, or how they conceive and define the concept of “intoxication,” on which a great deal can turn.²

Previous research by the authors has catalogued and analyzed *legislative* approaches to the concept of “intoxication.”³ Two of the findings of that review are relevant at the outset of this article. First, although the word “intoxication” has traditionally been associated with the effects of *alcohol* consumption, it is now routinely used more broadly in Australian criminal laws to refer to the effects of alcohol and a long list of other drugs.⁴

1. See, e.g., NSW SENT’G COUNCIL, ALCOHOL AND DRUG FUELLED VIOLENCE (Aug. 2015); also Julia Quilter, *One Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravating Factor: Implications for NSW Criminal Law*, 3(1) INT’L J. FOR CRIME, JUST. & SOC. DEMOCRACY 81 (2014).

2. This article is concerned with self-induced (or “voluntary”) intoxication, recognizing that “involuntary” intoxication is treated differently in Australia in criminal laws (see SIMON BRONITT & BERNADETTE MCSHERRY, *PRINCIPLES OF CRIMINAL LAW* 299 (4th ed. 2017)), as it is in many other jurisdictions (see, e.g., Model Penal Code, § 2.08(4); discussed in MARKUS D. DUBBER, *AN INTRODUCTION TO THE MODEL PENAL CODE* 73 (2nd ed. 2015)).

3. Julia Quilter, Luke McNamara, Kate Seear, & Robin Room, *Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of “Intoxication” Under Australian Legislation*, 39(3) U. N.S.W. L.J. 913 (2016).

4. For example, s 428A of the *Crimes Act 1900* (NSW) states: “‘intoxication’ means intoxication because of the influence of alcohol, a drug or any other substance,” and “drug” includes a drug within the meaning of the *Drug Misuse and Trafficking Act 1985* (NSW), and a poison, restricted substance, or drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act 1966* (NSW); see also Julia Quilter, Luke McNamara, Kate Seear, & Robin Room, *The Definition and Significance of “Intoxication” in Australian Criminal Law*:

Second, although the concept of “intoxication” is implicated in a large number and a broad range of criminal laws, there is a widespread pattern of underdefinition in Australian legislation.⁵ One of the inevitable consequences of the frequent failure of legislatures to provide guidance on context-appropriate criteria for assessing whether a person is relevantly “intoxicated” is that the burden falls on decision makers in the criminal justice system.

Australia is a federation, and under the Australian Constitution,⁶ criminal law and procedure is primarily the responsibility of the governments of states and territories rather than the federal government. To undertake a national assessment of the role being played by courts in criminal case decision making in relation to intoxication, coverage across all Australian jurisdictions was considered essential. This study involved collecting all decisions in which the intoxication of the accused, the victim, or a witness formed part of the evidence in the case—from the highest criminal appellate court in each state and territory,⁷ and the High Court of Australia, for the five-year period January 2010 to December 2014.

This article⁸ examines the resulting dataset of 327 appellate court decisions to investigate the following questions:

A Case Study of Queensland’s “Safe Night Out” Legislation, 16(2) QUEENSL. U. TECH. L. REV. 42, 47 (2016).

5. Quilter et al., *supra* note 3, at 935.

6. *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict., ch 12, s 9 (U.K.).

7. Australian Capital Territory (ACT) Court of Appeal, New South Wales (NSW) Court of Criminal Appeal, Northern Territory (NT) Court of Criminal Appeal, Queensland (Qld) Court of Appeal, South Australia (SA) Court of Criminal Appeal, Tasmanian (Tas) Court of Criminal Appeal, Victorian (Vic) Court of Appeal, Western Australia (WA) Court of Appeal.

8. Elsewhere, the authors (with others) have reported on what the dataset reveals about the major offense categories in which intoxication evidence is raised in Australian criminal courts, and the multiple purposes for which intoxication is considered—including the admissibility of police interviews, the credibility and reliability of witness testimony, adjudication on the criminal responsibility of the accused, and determination of sentence for convicted offenders: Luke McNamara, Julia Quilter, Kate Seear, & Robin Room, *Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects*, 43(1) MON. U.L. REV. 148 (2017). There, attention was drawn to the particular challenges posed by evidence of the complainant’s intoxication in sexual assault (rape) matters. It also demonstrated that, in the sentencing context, courts attempt to balance a “general rule” that offender intoxication should not be regarded as a mitigating factor,

1. How is “intoxication” defined in criminal court proceedings in Australia?
2. What evidence do Australian courts rely on to establish whether a person was relevantly intoxicated?
3. What sorts of knowledge inform the challenging task of assessing whether and how the consumption of alcohol, or other drugs, is relevant to key elements of criminal responsibility, such as whether the accused acted with the requisite *mens rea*?
4. Are current practices adequate, and do Australian appellate courts provide sufficient guidance to magistrates and judges?

The article’s findings and analysis are presented in three parts. Part I presents the qualitative findings of an examination of the collected cases, focused on explaining the means by which intoxication is established in criminal cases, and the language used to articulate “degrees” of intoxication. Attention is drawn to the often partial, fragmentary, and imprecise evidence on which courts are required to rely in making decisions about the nature and criminal law relevance of a person’s intoxication. Part II considers the ramifications of definitional ambiguity and evidentiary incompleteness for how criminal courts (judges and juries) tackle the complex task of assessing a person’s level of intoxication, and adjudicating on the relevance of this assessment for the prosecution’s ability to prove its case beyond reasonable doubt. This part of the article is organized around a case study of 66 cases from the study’s dataset, in which intoxication was in issue in relation to the accused’s criminal responsibility (including cases involving the so-called intoxication “defense”⁹). Employing a theoretical framework drawn from the work of Mariana Valverde¹⁰ and Arlie Loughnan,¹¹ it shows that tribunals of fact are frequently directed by judges (and legal practitioners)

with a number of recognized exceptions, where the circumstances or implications of the offender’s intoxication are regarded as grounds for some mitigation.

9. In Australia, as in the United States and elsewhere, the phrase intoxication “defense” is used loosely to refer to the rules that govern the opportunity of the accused to raise evidence of intoxication to negate the prosecution’s assertion that s/he acted with the requisite *mens rea*. The parameters of the “defense” have been restricted by legislation in many jurisdictions in both countries, including by limiting the “defense” to *specific intent* crimes; see, e.g., California Penal Code, § 29.4(b); *Crimes Act 1900* (NSW) s 428C.

10. MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* (2003).

11. ARLIE LOUGHNAN, *MANIFEST MADNESS: MENTAL INCAPACITY IN THE CRIMINAL LAW* (2012).

to draw on “common knowledge” or “lay knowledge” about the effects of alcohol and other drugs, and to give meaning to the legal concept of intoxication. Part III of the article examines the effects of the validation of common knowledge as the source of the concept of intoxication, focusing on two important features: (1) a tendency to marginalize the evidence of medical and scientific experts as ill-suited to the determination of the legal issues in question; and (2) judicial deployment of “tests” for intoxication that focus on a person’s observable motor functions. In particular, this part of the article considers the appropriateness of using such approaches for assessing complex executive cognition functions associated with intent formation.

I. DEFINING AND EVIDENCING “INTOXICATION”

This part of the article demonstrates that the cases in our Australian dataset revealed no standard “check list” of evidence for proving intoxication. There is considerable case-to-case variation, and discretionary subjective assessments are commonplace. Imprecise colloquial language about intoxication was employed frequently, both by witnesses and by judges.

Courtroom assessments about intoxication typically involve three questions. First, how much alcohol (or other drug(s)) did the person consume? Secondly, what effects did the consumption of alcohol or other drugs have on the person? Thirdly, what bearing does this evidence have on a relevant legal inquiry? In relation to this third point, such inquiries include:

- Is the witness credible and/or their testimony reliable?
- Did the accused have the requisite *mens rea*?
- Did the complainant (in a sexual assault case) consent?
- Did alcohol or other drugs play a *causal* role in the offending (with possible implications for sentencing)?

These legal inquiries are frequently difficult to answer with confidence, whether because of the nature of the available evidence, or the complexity of the matter to be determined, or both. This claim will be supported in Parts II and III of the article via a case study of what the judgments reveal about the intoxication–*mens rea* relationship.

The review of 327 Australian appellate decisions for this study revealed that the available evidence to determine if a person should be regarded as

“intoxicated” for a particular criminal law purpose took a variety of forms and was produced from a variety of sources or “authors.” These approaches included:

- biological detection (e.g., blood alcohol concentration)
- self- and/or witness reports of consumption
- self- and/or witness reports of behavior or “state”
- appearance, behavioral assessments by police officers
- CCTV footage and video recordings of police interviews
- assessments by medical, toxicological, or psychiatric experts
- judicial assessments of the available evidence.

In the cases reviewed, there was a wide variation in the nature, volume, and quality of the relevant evidence of the accused or victim’s intoxication. Surprisingly, given the high stakes involved in criminal cases concerned with serious charges,¹² it appeared that courts were often required to make complex and important decisions about whether a person was relevantly intoxicated with limited evidence. For example, in the Queensland case of *R v. Baker*,¹³ where the charge was attempted murder, one of the central issues at trial was whether the accused was so intoxicated that he did not have the requisite mens rea (intent to kill). Yet the available evidence consisted only of patchy and vague self- and witness reports on the accused’s consumption (“grog, pot and a bit of ecstasy”;¹⁴ “10 Tooheys New”¹⁵), the accused’s rating of his intoxication on a 10-point scale (“6, 7”¹⁶), and the evidence of a police officer that he did not observe “any indicia of intoxication.”¹⁷ There was no blood alcohol concentration result or toxicology report.¹⁸ It might be expected that for serious offenses such as murder, the relative precision of a blood alcohol concentration reading would be commonplace, yet the review of cases completed for this study showed this was not the case. Blood alcohol concentration readings

12. Of the 327 cases in this study’s dataset, 80% involved homicide, sexual assault, or aggravated assault charges; McNamara et al., *supra* note 8, at 154.

13. *R v. Baker* [2014] QCA 5.

14. *Id.* at ¶ 79.

15. *Id.* “Tooheys New” is a well-known Australian brand of regular strength beer.

16. *Id.*

17. *Id.* at ¶ 78.

18. *Id.* at ¶ 79.

were available in only a minority of cases, and most of these were driving harm cases.¹⁹

The case of *R v. Martin*²⁰ was an exception to the general pattern identified. In this case, the court had the benefit of a variety of types and sources of evidence going to the question of intoxication: a blood alcohol concentration reading for the accused (and the victim); expert evidence (from a government medical officer) on the likely effects of the accused's blood alcohol concentration on his functionality and cognition; evidence provided by the first police officer on the scene about the accused's demeanor and behavior; evidence provided by a police scientific officer; the evidence of bar staff at the licensed premises where the accused had been drinking; the evidence of a witness about the accused's intoxication; the accused's own evidence; and the trial judge's assessment based on all of the available evidence.²¹ Parts II and III of this article will consider whether the availability of this breadth of evidence produces qualitatively better determinations on the question of intoxication.

Expert evidence on the effects of alcohol and other drugs featured unevenly in the cases reviewed. Where it was present, it typically took the form of an explanation of the abilities/inabilities that a person could be expected to have, at the level of intoxication the accused was found (or estimated) to have. For example, in *R v. Mitchell*²² the accused had consumed alcohol (methylated spirits) and cannabis. He said in a police interview that he had no memory of the relevant events (in which he had bashed the victim to death). Based on a blood alcohol concentration reading taken several hours after the fatal assault, a government medical officer estimated that the accused's blood alcohol concentration was between 0.255 and 0.273 at the time of the offense. The court summarized the expert's evidence as follows:

The doctor gave evidence that a person with a blood alcohol percentage between 0.2 and 0.3 might be drowsy or lose consciousness, not understand very well what was said, have impaired sensations about what was happening,

19. In one non-driving case, a police officer gave evidence of his "estimate" of the accused's blood alcohol concentration (0.15), based on observed behavior; *R v. Kay* [2012] QCA 327, ¶ 7. Elsewhere, the authors (with others) have discussed the research literature on the difficulty of assessing blood alcohol concentration in this way; Quilter et al., *supra* note 3, at 937–38.

20. *R v. Martin* [2011] QCA 342.

21. *Id.* at ¶¶ 6, 7, 10, 15, 35, 47, 50, 57, 58, 63, 65.

22. *R v. Mitchell* [2013] QCA 248.

have impaired memory or gaps in memory, have slurred speech, loss of balance, clumsiness, slow response times, and behave and speak inappropriately. The doctor found it difficult to comment about the effect of mixing alcohol and cannabis, but observed that people could perhaps behave in an irrational, aggressive, or even psychotic fashion. He agreed that there was research to suggest that alcohol in the blood might lead to a faster absorption of the active ingredient in cannabis, resulting in a more rapid effect. Drinking methylated spirits and smoking cannabis together could combine to produce a much greater effect than either would have individually.²³

As this case illustrates, additional challenges are raised by cases which require assessment of the intoxication of a person who has consumed a combination of different drugs. *Abdel-Hady v. R*²⁴ was a case that featured expert evidence on the individual and combined effects of multiple drugs: alcohol, cocaine, and zolpidem (Stilnox).²⁵ The atypical level of substance-specific detail may be explained by the fact that the case involved the relatively rare charge of causing another person to take an intoxicating substance with intent to commit an indictable offense,²⁶ thus requiring the Crown to prove, *inter alia*, that the drugs in question constituted an intoxicating substance. In any event, this isolated example served to highlight the frequent absence of equivalent detail in many of the cases reviewed, particularly in relation to drugs other than alcohol. The implications of this asymmetry will be considered further below, in the context of a discussion of the tendency of Australian courts to ultimately approach intoxication as a matter of “common knowledge.”

Experts are rarely in a position to opine on the intoxication of the accused personally because, when such assessments are based on interview(s) with the accused (typically in a context where the case raises mental illness and/or cognitive impairment issues, in addition to intoxication), the interviews take place some considerable time after the alleged commission of the offense.²⁷

23. *Id.* at ¶ 9. See also *R v. Humbles* [2014] SASCFC 91; *R v. Civic* [2014] QCA 322; *R v. Stanley* [2013] NSW CCA 124.

24. *Abdel-Hady v. R* [2011] NSWCCA 196.

25. *Id.* at ¶¶ 42–46, 50–56.

26. *Crimes Act 1900* (NSW) s 38.

27. Expert evidence on the effects of alcohol and other drugs, including implications for the offender’s level of culpability, was more frequently present in the sentencing appeal cases

In a rare exception—the case of *R v. Lakin*²⁸—a psychiatrist engaged primarily to give evidence on the relevance of the accused’s post-traumatic stress disorder, made an assessment of the accused’s intoxication on the basis, *inter alia*, of having viewed a video of the arrest of Lakin:

Dr Raeside further concluded that, objectively, the video of the defendant’s arrest did not provide evidence of marked intoxication, that the defendant’s reported memory of events was inconsistent with marked intoxication, but that the toxicology sample suggested at least a moderate intoxication, which, he opines, would presumably have been higher at the time of the offending.²⁹

Expert evidence on alcohol and other drug effects was most common where the case required the court to consider the relative contribution of (and to disentangle) intoxication and mental illness and/or cognitive impairment.³⁰ The judicial treatment of expert evidence on intoxication will be discussed further below, in relation to the question of its relevance to the Crown’s ability to prove beyond reasonable doubt that the accused had the requisite *mens rea*.

Another key finding of the review of cases undertaken for this study was that *imprecision* was a feature of many of the descriptions and assessments of intoxication. In addition to self-description and self-assessment regularly being the only basis for assessments of offender and/or victim intoxication,³¹ the very nature of self-assessment lends itself to imprecision.

Table 1 summarizes and illustrates the variety of forms that self-assessment took. It shows that the cases featured quantitative and qualitative estimates of the volume consumed, the duration over which consumption occurred, a “score” on a 1–10 scale of intoxication, or an adjectival or colloquial account of the extent of the person’s intoxication. A number of these approaches appear to represent an attempt to translate subjective qualitative accounts into ostensibly “objective” quantitative measures. An

in this study’s dataset, especially where a pre-sentence report related the intoxication to mental illness and/or cognitive impairment; *see, e.g.*, *Carpenter v. R* [2013] NSWCCA 130; *R v Van Setten* [2012] SASFC 90; and further, McNamara et al., *supra* note 8, at 174–84.

28. *R v. Lakin* (2014) 118 SASR 535.

29. *Id.* at ¶ 53.

30. For example, *id.* and *R v. Clough* [2010] QCA 120. This pattern was also apparent in sentencing decisions in this study’s dataset: McNamara et al., *supra* note 8, at 179–81.

31. Reliance on self-report was especially common in sexual assault cases in relation to evidence of *victim* intoxication; McNamara et al., *supra* note 8, 167–68.

Table 1. Illustration of Modes of Self-Assessment of Intoxication

<i>Form of Self-Assessment</i>	<i>Description</i>	<i>Case</i>
<i>Volume of alcohol consumed—quantitative</i>	“She had drunk three cans of a vodka energy drink, a Midori and a ‘Cowboy shot’ . . .”	<i>Sharma v. R</i> [2011] VSCA 356, ¶ 5
	“She had consumed two casks of white wine and a dozen vodka cruisers”	<i>R v. Frank</i> [2010] QCA 150, ¶ 11
	“ . . . he said he had drunk ‘probably half a bottle’ of Jim Beam before taking the bus to the city, but that the bottle was ‘not a huge one’. He said later that night he drank ‘a box’ of beer over two and a half hours.”	<i>DBW (a child) v. W. Austl.</i> [2011] WASCA 206, ¶ 30
<i>Volume of alcohol consumed—qualitative</i>	“Ms Sambo agreed she had been drinking a lot on the day of the killing”	<i>R v. Harold</i> [2010] QCA 267, ¶ 12
	“As to her state of intoxication, MS gave evidence that she had been drinking alcohol throughout the night.”	<i>R v. Rahmanian</i> [2010] SASC 137, ¶ 11
	“The complainant had drunk heavily during the day and evening”	<i>R v. Butler</i> [2011] QCA 265, ¶ 4
<i>Time period during which alcohol was consumed</i>	“She had drunk two or three cans of pre-mixed bourbon every hour from midnight until 4 am”	<i>R v. Quinlan</i> [2012] QCA 132, ¶ 4
	“They had spent the afternoon at the local tavern and both were intoxicated.”	<i>Munda v. W. Austl.</i> (2013) 249 CLR 600, ¶ 81
	“She had been drinking (champagne) for many hours”	<i>Singh v. W. Austl.</i> [2012] WASCA 262, ¶ 10
<i>Measurement out of 10</i>	“The appellant described himself as ‘pissed’ when he arrived . . . assessing his level of intoxication as eight and a half or nine out of ten . . .”	<i>McDougall v. R</i> [2013] ACTCA 14, ¶ 18

(continued)

TABLE 1. (continued)

Form of Self-Assessment	Description	Case
Descriptive/adjectival	"When asked to describe how intoxicated she was out of 10, she replied 'nine' ..."	<i>Cook v. W. Austl.</i> [2010] WASCA 241, ¶ 23
	"She said at this stage she was still 'very drunk' and on a scale of one to ten she estimated she was at about eight to nine"	<i>Jones v. R</i> [2010] NSWCCA 117, ¶ 16
	"She said that she did not feel drunk but was 'a bit tipsy, a bit happy' and not completely drunk"	<i>Sharma v. R</i> [2011] VSCA 356, ¶ 18
	"Just cruising, just out of it, whacked, you know."	<i>Sullivan v. R</i> (2012) 221 A Crim R 490, ¶ 10
	"He was heavily intoxicated to the extent that he claimed to have blacked out repeatedly ..."	<i>R v. Derks</i> [2011] QCA 295, ¶ 21

appearance of accuracy and validity is thus created, but the scientific basis for the claim is unclear. For example, how is a jury to receive and interpret an accused's self-report that he had consumed "6 Cougars, 2 Coronas and 3 Jim Beams," noting as the Queensland Court of Appeal did in that case, that "there was no evidence of the strength of the drinks, the period over which he drank them or their effect on his sobriety"?³² Apart from providing a crude indicator of the volume of alcohol consumed,³³ it is not clear how such "quantified" evidence assists jurors to make decisions in relation to the particular intoxication-related issue(s) that may be in issue in any given trial.

32. *R v. Barden* [2010] QCA 374, ¶ 50.

33. If the bourbon drinks consumed by Mr. Barden were of the pre-mixed can variety, his consumption added up to approximately 15 standard alcoholic drinks (10 grams of alcohol), according to Australian Government guidelines; Austl. Gov't, Dep't of Health, *Standard Drinks Guide*, ALCOHOL.GOV.AU, <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/content/drinksguide-cnt#spirits>. In the United States, a standard drink is 14 grams of alcohol; National Institute on Alcohol Abuse and Alcoholism, *What is a Standard Drink?*, NIAAA.NIH.GOV, <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/what-standard-drink>.

Counting drinks is not the only form of quantification employed in criminal cases where intoxication is in issue. The trial practice of asking a witness to self-assess their intoxication on a 1–10 numerical rating scale (NRS) is common practice in Australian criminal courts (see examples in Table 1). Although NRSs are widely regarded as valid as a self-report mechanism for assessing pain,³⁴ their use for the self-assessment of intoxication levels is more contentious, particularly for criminal law purposes. Although there is evidence of NRSs having some utility in assessing generic *degrees* of intoxication,³⁵ such scales are insensitive to the wide spectrum of alcohol and other drug effects covered by the term “intoxicated.” The World Health Organization’s ICD-10³⁶ recognizes that intoxication is not a single-symptom condition and that the “signs” and “dysfunctional behavior” upon which a diagnosis may be based can include, variously, “disturbances in the level of consciousness, cognition, perception, affect, or behavior that are of clinical importance.”³⁷ It follows that NRSs are likely to be an unhelpful guide to the nuanced, discrete intoxication-related issues on which a criminal court may be required to adjudicate—such as whether a witness’s testimony is reliable, whether a complainant in a sexual assault case consented, or whether the accused acted with the requisite *mens rea*.

Another form of “lay” assessment that featured in a small number of cases was witness assessment of the relevant person’s apparent intoxication. These too were commonly characterized by imprecision. For example, in *R v. Mitchell*³⁸ a witness described the accused, who had consumed alcohol and cannabis, as “‘well off his head’, not paralytic ‘all that much’, and ‘really drunk . . . paralytic . . . could hardly stand up’.”³⁹

34. Mark P. Jensen & Paul Karoly, *Self-Report Scales and Procedures for Assessing Pain in Adults*, in HANDBOOK OF PAIN ASSESSMENT 19, 26 (Dennis C. Turk & Ronald Melzack eds., 3rd ed. 2010).

35. Sarah Callinan, *Alcohol’s harm to others: Quantifying a little or a lot of harm*, 3(2) INT’L J. ALCOHOL & DRUG RES. 127 (2014); Elizabeth Manton, Sarah MacLean, Anne-Marie Laslett, & Robin Room, *Alcohol’s harm to others: Using qualitative research to complement survey findings*, 3(2) INT’L J. OF ALCOHOL AND DRUG RES. 143 (2014).

36. WORLD HEALTH ORGANIZATION, THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIOURAL DISORDERS: DIAGNOSTIC CRITERIA FOR RESEARCH F10–F19 (1993) (Mental and behavioral disorders due to psychoactive substance use).

37. *Id.* at FIX.0 Intoxication, G2.

38. *R v. Mitchell* [2013] QCA 248.

39. *Id.* at ¶ 3.

Perhaps inevitably, cases in which offender self-report was the only evidence of intoxication prompted judicial doubt about veracity. For example, in the case of *Liu v. WA*⁴⁰ there was evidence that a bottle of whiskey had been consumed by a group of three people (including the victim and the two accused). The court observed:

However there was no evidence:

- (a) about what portion of the bottle Ms Liu drank;
- (b) about the volume of the bottle of whiskey;
- (c) about the period of time the alcohol was consumed; or
- (d) that Ms Liu was affected by the alcohol she consumed.⁴¹

In another case in which the accused asserted that he was intoxicated as a result of marijuana consumption, the trial judge expressed concern that there was no pharmacological evidence at trial about the effects of marijuana and that the jury was being asked to speculate.⁴² The accused relied heavily on self-report about how much he had consumed and how he felt—“stoned, whacked, out of it”⁴³—and there was “... no evidence of intoxication [] save the evidence of the applicant at trial.”⁴⁴ In these circumstances the New South Wales Court of Criminal Appeal found no fault with the trial judge’s decision to decline to leave intoxication to the jury as relevant to *mens rea*.

The observation that imprecision was common in the cases reviewed is not based only on the prevalence of different modes of self-assessment. “Authoritative” voices in the justice system—police officers, trial judges, appeal courts—frequently articulated their assessments that a person was (or was not) intoxicated in vague language. Illustrative examples of judicial language, showing the major categories of terms used, are provided in Table 2.

The cases reveal surprisingly little meaningful articulation of what the term “intoxication” means.⁴⁵ The value of the judicial adoption of

40. *Liu v. W. Austl.* [2012] WASCA 218.

41. *Id.* at ¶ 34.

42. *Sullivan v. R* [2011] NSWCCA 270, ¶ 12.

43. *Id.* at ¶ 19.

44. *Id.* at ¶ 34.

45. This finding is reminiscent of the phase of this study that considered *statutory* language on intoxication, which identified more than 50 different word/phrase formulations, many of which lack precision and utility demarcating “intoxication” for criminal law purposes; Quilter et al., *supra* note 3, at 923.

Table 2. Illustrations of Judicial Language on “Intoxication”

“Affected by”	“He was, I am satisfied, affected by alcohol”	<i>Stewart v. R</i> [2012] NSWCCA 183, ¶ 21
	“GM was significantly affected by alcohol”	<i>Mulkatana & Mulkatana v. R</i> [2010] 28 NTLR 31, ¶ 54
“Intoxicated”	“At the time of the killing, he was intoxicated by alcohol and cannabis.”	<i>Munda v. W. Austl.</i> (2013) 249 CLR 600, ¶ 82
	“Had consumed a considerable amount of alcohol during the evening and she was extremely intoxicated”	<i>Singh v. W. Austl.</i> [2012] WASCA 262, ¶ 25
	“She became very intoxicated”	<i>Victor v. W. Austl.</i> [2011] WASCA 94, ¶ 4
	“The trial judge found that the respondent was very intoxicated when the events in question occurred”	<i>W. Austl. v. Camus</i> [2014] WASCA 74, ¶ 105
	“marked intoxication”	<i>R v. Lakin</i> (2014) 118 SASR 535, ¶ 54
	“She was significantly intoxicated”	<i>Ali v. R</i> [2014] NSWCCA 45, ¶¶ 8, 31
	“Was very substantially impaired by the fact that he was under the influence by a combination of drugs (they being alcohol and cannabis)”	<i>R v. Millwood</i> [2012] NSWCCA 2, ¶ 2
“Under the influence”	“You told the police you thought it was likely you were under the influence of alcohol or drugs at the time of your actions.”	<i>P v. Tas.</i> [2014] TASCCA 5, ¶ 21
	“He also became aware fairly quickly after entering the house that the appellant was under the influence of liquor to some degree”	<i>R v. Martin</i> [2011] QCA 342, ¶ 14
	“The judge noted that both appellants were intoxicated and his Honour inferred that both were addled by alcohol.”	<i>Gosland & McDonald v. R</i> [2013] VSCA 269, ¶ 6
Other	The defendant “had taken a good deal of liquor”	<i>R v. Lutze</i> (2014) 121 SASR 144, ¶ 30
	“[The victim’s evidence] is vague and imprecise in significant aspects, probably as a result of her befuddlement from drink”	<i>Amato v. DPP</i> [2013] VSCA 346, ¶ 46

qualifying terms like “very,” “extremely,” or “significantly” (see Table 2) is questionable. The same may be said of familiar clichés like “affected by” and “under the influence.” Like the crude forms of quantification on which comment has already been made, such language seems ill-adapted to the discrete inquiries required by criminal trials. Curiously, such language was sometimes used to “translate” a blood alcohol concentration reading or estimate, presumably on the basis that this would assist the tribunal of fact to make sense of the scientific evidence. For example, in *R v. Chenery*,⁴⁶ the Queensland Court of Appeal adopted the language employed at trial by experts to describe the victim as “moderately intoxicated” (blood alcohol concentration 0.184) and the accused as suffering from “gross intoxication” (estimated blood alcohol concentration 0.267), without any explanation of what the qualifiers “moderately” and “gross” mean.⁴⁷ The significance of an apparent preference for lay colloquial descriptions of intoxication over expert scientific nomenclature is considered later in this article.

Even in the rare case where the court actively considered the meaning of “intoxication,” reliance was placed on ordinary meanings found in dictionaries. In the case of *R v. Clough*,⁴⁸ which involved amphetamine intoxication, in a context where the accused asserted that he was *not* intoxicated at the relevant time (a pre-condition to gaining access to the defense of insanity under Section 27 of the Criminal Code (Qld)⁴⁹), the trial judge and the Court of Appeal discussed at length the ordinary meaning of “intoxicated.” Muir JA said:

I respectfully agree with the primary judge’s conclusions that the ordinary meaning of “intoxication” is wide enough to encompass more than comparatively short-term elation or stimulation and that “intoxication” . . . includes the secondary effect of amphetamine consumption from which the appellant was suffering at relevant times. The primary judge referred to the Macquarie Dictionary definition of “intoxication”, which included:

46. *R v. Chenery* [2011] QCA 271.

47. *Id.* at ¶ 6.

48. *R v. Clough* [2010] QCA 120.

49. See *Criminal Code* (Qld) s 28(2): “[The provisions of s 27] . . . do not apply to the case of a person who has, to any extent intentionally caused himself or herself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not and whether his or her mind is disordered by the intoxication alone or in combination with some other agent.”

1. inebriation, drunkenness.
2. *Pathol.* Poisoning
3. the act of intoxicating.
4. **overpowering action or effect upon the mind**

and the *Shorter Oxford Dictionary* definition, which included:

1. the action of poisoning; (an instance of) the state of being poisoned . . .
2. **The action of inebriating or making someone stupid, insensible or disordered in intellect**, with a drug or alcoholic liquor; the condition of being so stupefied or disordered . . . *fig* The action or power of exhilarating or highly exciting the mind; the elation or excitement beyond the bounds of sobriety.⁵⁰

Ironically, despite the efforts of the Court to engage in a meaningful discussion of the definition of “intoxication,” the discussion does little to illuminate the meaning of the concept for criminal law purposes. The bolded passages in the above quote are presumably regarded as offering the greatest guidance, and yet consider the language in which they represent the concept of intoxication: “stupid,” “insensible,” “disordered in intellect,” “overpowering action.” When these phrases are added to the language used by judges (see Table 2) and witnesses (Table 1), discussed earlier, a pattern can be discerned. The prevailing modes of explaining and evidencing intoxication in Australian criminal cases are characterized by imprecision and a reliance on vernacular expressions.

In one of the most bizarre (and inappropriate) metaphorical attempts to make a person’s degree of intoxication comprehensible to a jury (in this case, the intoxication of the victim who fell from the tray of a ute [a pickup truck] being driven by the accused, and was killed), the trial judge in *R v. Carberry*,⁵¹ said, “That is the reason you do not drive around in the ute with a six-year-old boy, a retarded person, a dog or an intoxicated person.”⁵² On appeal the Full Court of the South Australian Supreme Court observed that “[t]he evidence did not permit such emotive expressions or analogies to be fairly used. They were unhelpful, liable to distract

50. *R v. Clough* [2010] QCA 120, ¶ 14 (emphasis added).

51. *R v. Carberry* [2014] SASFC 78.

52. *Id.* at ¶ 6.

and had the capacity to mislead.”⁵³ It is worth noting, however, that the Court offered no further guidance on how the trial judge *should* have explained the concept of intoxication and its relevance to the matters in issue.

Overall, the cases reviewed in Part I reveal a pattern of courts frequently being required to make complex decisions with evidence that often lacked nuance and sophistication, and that was not obviously adapted to the tasks at hand. These findings give rise to an important question: Under such conditions, by what means is the available evidence and the opaque discursive construction of “intoxication” *linked* to criminal trial adjudication? The next part of this article aims to draw on the study’s dataset to propose an answer to this question.

II. THE INTOXICATION-CRIMINAL RESPONSIBILITY RELATIONSHIP

To illuminate how the apparent gaps between the available intoxication evidence and the key issue(s) for adjudication in a criminal trial are filled, the authors undertook a case study of a subset of judgments. The case study subsample consisted of all cases in the dataset in which intoxication was an issue in relation to the accused’s *criminal responsibility* ($n = 66$ cases; 20% of the total dataset). The primary aim is to show how the deficits that were described in Part I of this article are remedied in practice. The case study included, but was not limited to, cases in which the so-called intoxication defense was an issue. Indeed, one of the motivations for choosing to focus on cases in the project dataset where the relationship between the accused’s (asserted) intoxication and criminal responsibility was adjudicated upon,⁵⁴ is to counteract the common tendency to use the term “intoxication

53. *Id.* at ¶ 40.

54. Elsewhere the authors have shown that, despite its obvious importance, questions about the accused’s *mens rea* and criminal responsibility are just one of the ways in which intoxication evidence may be of significance in a criminal case. For example, of the 327 cases in the study’s appellate decisions dataset, 40% addressed the relevance of the accused’s intoxication to sentencing, and 9% addressed the relevance of the *victim*’s intoxication to her/his credibility and reliability as a witness (primarily in sexual assault cases). The multiple purposes for which Australian criminal laws and trials attach significance to intoxication are discussed more fully in Quilter et al., *supra* note 3, at 918–20; and McNamara et al., *supra* note 8, at 153.

defense” loosely, and in a way that masks the multiple ways in which intoxication can be implicated in the assessment of criminal responsibility. Because of the ubiquity of the term, the complexity of the relationship between intoxication evidence and determinations of criminal responsibility is often underappreciated. In fact, the defense strategy of relying on intoxication to negate the Crown’s capacity to prove the elements of the crime charged is only one of the ways in which intoxication evidence can influence the course and outcome of a criminal trial—and it is a risky strategy even then.⁵⁵ In addition to marginalizing all the other important ways in which intoxication is involved in criminal law enforcement and decision making, the terminology “intoxication defense” has always been something of a misnomer. Intoxication may be implicated in the determination of criminal responsibility in a range of ways.⁵⁶ It may be:

- asserted by a defendant for an exculpatory purpose—most commonly, to negate the Crown’s capacity to prove specific intent (noting that, even if successful, this strategy is likely to result in conviction for a lesser crime, rather than acquittal);⁵⁷
- asserted by a defendant to support the subjective test component of another defense, such as provocation,⁵⁸ self-defense,⁵⁹ or mistake of fact;⁶⁰
- the subject of a judge’s direction to the jury, even if not asserted by the defendant, reflecting the trial judge’s obligation to put intoxication

55. See McNamara et al., *supra* note 8, at 169–74.

56. For a fuller discussion, see *id.*

57. All Australian jurisdictions, with the exception of Victoria, have adopted the position that intoxication may only be raised to negative *specific* intent—i.e., an element of an offense definition where the prosecution must prove an intention to bring about a particular consequence—and not *general* (or basic) intent. The distinction was endorsed by the House of Lords in *DPP v. Majewski* [1977] AC 443 (U.K.), and although it was rejected by the High Court of Australia in *R v. O’Connor* (1980) 146 CLR 64, legislatures have modified the Australian common law position. The veracity of the general intent/specific intent distinction as an appropriate basis for determining the availability of exculpatory intoxication evidence has been questioned; see, e.g., TASMANIAN L. REFORM INSTITUTE, *INTOXICATION AND CRIMINAL RESPONSIBILITY* (FINAL REPORT NO. 7), 46 (Aug. 2006); William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 *PERP-DINE L. REV.* 67 (1979).

58. For example, *R v. Lindsay* [2014] SASCF 56.

59. For example, *Dal Cortivo v. R* [2010] ACTCA 14.

60. For example. *Commissioner of Police v. Stehbins* [2013] QCA 81; *Prazmo v. W. Austl.* (No 2) [2010] WASCA 99.

- evidence to the jury if there is sufficient evidence that it may be relevant to a matter that goes to the guilty/not guilty decision;⁶¹
- counterintuitively, asserted by the Crown to strengthen (not weaken) the prosecution's assertion that the defendant acted with the requisite intent;⁶² and
 - asserted by the Crown to foreclose access to a defense (noting that legislation defining some defenses expressly excludes reliance on intoxication evidence⁶³).⁶⁴

The dataset did contain a small number of cases in which the trial judge was found to have erred in his/her explanation of the law on intoxication's relevance to the question of the accused's guilt.⁶⁵ However, overall, there was little evidence that this is an area of the criminal law in Australia where the rules are so complex⁶⁶ that judges are frequently falling into legal error.⁶⁷ The application of the rules, however, is another matter—though, it is

61. For example, *SW v. R* [2013] NSWCCA 103; *R v. George* [2013] QCA 267; *R v. Barden* [2010] QCA 374; *Mulkatana & Mulkatana v. The Queen* [2010] NTCCA 4.

62. For example, in *Ward v. R* [2013] NSWCCA 46, ¶ 82, the trial judge directed the jury: “You can have an intoxicated intention. You can have an intention that is based on alcohol and drugs. In fact, very often, unfortunately, the situation is that a person forms a certain intention because they are intoxicated and they would no [*sic*] not have formed it if they were not.” *See also* *R v. Barden* [2010] QCA 374; *Mulkatana & Mulkatana v. The Queen* [2010] NTCCA.

63. For example, the defense of insanity in s 27 of the *Criminal Code 1913* (WA) and the *Criminal Code 1899* (Qld), the partial defense of extreme provocation in s 23 of the *Crimes Act 1900* (NSW), and the partial defense of diminished responsibility in s 159(3) of the *Criminal Code 1983* (NT).

64. *Babic v. R* [2010] VSCA 198; *MG v. R* [2010] VSCA 97, ¶ 16; *R v. Stanley* [2013] NSWCCA 46; *R v. Humbles* [2014] SASCFC 91.

65. *R v. O'Loughlin* [2011] QCA 123; *R v. George* [2013] QCA 267; *R v. Douglas* [2014] QCA 187; *R v. Lindsay* [2014] SASCFC 56; *Dal Cortivo v. R* [2010] ACTCA 14.

66. Unlike, for example, the law of common law complicity; NSW L. REF. COMMISSION, *COMPLICITY* (REPORT NO. 129) (2010). Alleviating complexity was one of the major objectives of the recent codification of complicity law in Victoria (*Crimes Act 1958*, ss 323–324C) in response to J.A. WEINBERG, JUDICIAL COLLEGE OF VICTORIA AND DEPARTMENT OF JUSTICE, *SIMPLIFICATION OF JURY DIRECTIONS PROJECT* (REPORT TO THE JURY DIRECTIONS ADVISORY GROUP) ch 2 (2012).

67. Suggested/standard directions contained in Benchbooks are widely used: *see, e.g.*, *R v. Handley* [2011] QCA 361; Queensland Courts, *Supreme and District Courts Benchbooks*, PART L84 “INTENTIONAL INTOXICATION,” http://www.courts.qld.gov.au/__data/assets/pdf_file/0005/86090/sd-bb-84-intentional-intoxication.pdf; *McDonald v. R* [2010] NSWCCA 220; Judicial Commission of NSW, *Criminal Trial Courts Benchbook*, PART [3–250] “INTOXICATION,” <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/intoxication.html>.

noteworthy that the complexity of the task faced by the tribunal of fact in a case where intoxication evidence features was rarely acknowledged by appellate courts in the judgments examined.

Staying with the instance in which the accused’s intoxication is said to be relevant to mens rea, juries (or in judge-alone trials, judges and magistrates) are routinely asked to answer two very difficult related questions—often, as noted above, with limited evidence and guidance. First, what was the degree or extent of the accused’s intoxication? Second, taking that level of intoxication into account, has the Crown established that the accused had the requisite mens rea?

The deceptive ease with which these questions can be put to the jury is illustrated by the case of *R v. Baker*, where the trial judge made it clear that the level and effects of a person’s intoxication are matters for the jury:

Similarly, for the purposes of this particular section, intent to cause grievous bodily harm is a specific intent and so the considerations that I explained to you before about intoxication are equally appropriate. If you, having considered the evidence, if you accept that there was some degree of intoxication, the extent and the nature of that intoxication, ladies and gentlemen, is a matter for you to determine. If there was any intoxication, that’s a matter for you, but whether and to what extent that intoxication impacted on his capacity to have the necessary intention is a matter that’s relevant to consider.⁶⁸

It is questionable whether there is adequate appreciation of just how challenging such inquiries are. The case of *R v. Stanley*⁶⁹ is illustrative. The accused, who was recognized to have been “grossly intoxicated,”⁷⁰ was charged, inter alia, with assault with intention to have sexual intercourse.⁷¹ On the facts and the manner in which the indictment was framed, the Crown was required to prove that the accused had the specific intent to put his penis in the victim’s mouth. The New South Wales Court of Criminal Appeal described this central question for the jury as “a simple one, of a kind routinely answered by juries.”⁷²

68. *R v. Baker* [2014] QCA 5, ¶ 82.

69. *R v. Stanley* [2013] NSWCCA 124.

70. *Id.* at ¶ 6].

71. *Crimes Act 1900* (NSW) s 61 K.

72. *R v. Stanley* [2013] NSWCA 124, ¶ 56.

Even if this is true of proving intent generally,⁷³ is it really accurate where the jury, inter alia, has to decide how the accused's intoxication influenced whether he formed the requisite intent?⁷⁴ Furthermore, on what knowledge are juries expected to draw in answering these questions?

The trial judge's direction in *R v. Stott*,⁷⁵ with which the Full Court of the Supreme Court of South Australia found no fault, provides a further illustration of the sorts of complex inquiries about the state of mind of an intoxicated person, in which juries are expected to engage. The defendant was charged with multiple offenses, including aggravated creating risk of harm and aggravated endangering life, after driving a car at police officers who were pursuing him on foot and endeavoring to apprehend him.⁷⁶ The trial judge said:

The inferences about intention and recklessness which may be drawn in the case of a sober person from his actions may not be as readily drawn in the case of an intoxicated person. I am sure you all know that alcohol can dull our senses. It can cloud or confuse our perceptions of our surroundings and the behaviour of other people. So when you are considering with what intention or state of mind the accused acted, you will bear in mind the effect, if any, of the influence of alcohol upon his mind. As I have mentioned, you will bear in mind intoxication when considering both intention and recklessness. I remind you that he will have been reckless in causing harm, endangering life or causing serious harm if he was aware that there was a substantial risk that his driving could result in harm or putting life in endanger [*sic*] or causing serious harm, and he went ahead and drove the way he did, despite the risk and without adequate justification.⁷⁷

This quotation brings into focus the questions that were posed at the beginning of Part II of this article. What sorts of knowledge and what sorts of "expertise" do the work of defining and proving intoxication, and explaining its effects on the intoxicated person? The answer, the authors assert, is "common knowledge."

73. See JEREMY GANS, *MODERN CRIMINAL LAW OF AUSTRALIA* 76 (2012); Nicola Lacey, *A Clear Concept of Intention: Elusive or Illusory?*, 56(5) *MOD. L. REV.* 621 (1993); Iannella v. French (1968) 119 CLR 84, 95 (Barwick CJ).

74. See, e.g., McDonald v. R [2010] NSWCCA 220.

75. R v. Stott [2011] SASFC 145.

76. *Id.* at ¶ 5.

77. *Id.* at ¶ 20.

A. “Common Knowledge” of Intoxication

Mariana Valverde has described a “curious form of knowledge that appears to exist only in legal contexts: ‘common knowledge’.”⁷⁸ She has explained, “Common knowledge is not some kind of average of what people know. It is not descriptive but imperative; it is the knowledge we all ought to have.”⁷⁹ One of the case studies employed by Valverde to amplify her analysis of the part that common knowledge plays in legal decision making is the operation of legal regimes for liquor licensing in Canada, specifically in relation to the assessment of whether a person is “drunk.”⁸⁰ Most relevantly for present purposes, Valverde found that “knowledges of alcohol and of alcohol’s effects on human bodies are regarded as lay rather than expert knowledges.”⁸¹

Loughnan has examined the 19th and 20th century history of the common law concept of “intoxication” in the context of her broader study of mental incapacity in criminal law⁸² and advances a thesis similar to Valverde’s. Although the specific focus of the following observations was the legal concept of “insanity,” they apply equally to the concept of intoxication:

Lay knowledge, which is a form of collective knowledge, is a broad and flexible construct, capturing the socially ratified attitudes and beliefs . . . held by non-specialists. . . . Lay knowledge encompasses experiential or firsthand knowledge (of alcohol, or mental illness, for instance), but extends beyond this empirical base to include social attitudes . . .⁸³

Both Loughnan and Valverde make the important point that lay knowledge is not synonymous with lay adjudication. Lay knowledge is not only employed by jurors, but also “informs the decision-making of legal actors—including judges, magistrates, prosecution, and defense counsel.”⁸⁴ When

78. VALVERDE, *supra* note 10, at 224. See also CLIFFORD GEERTZ, *LOCAL KNOWLEDGE*, Ch. 4. *Common Sense as a Cultural System* (1983).

79. VALVERDE, *supra* note 10, at 224.

80. *Id.* at Chs. 6 & 7.

81. *Id.* at 190.

82. LOUGHNAN, *supra* note 11, esp. Ch. 7.

83. LOUGHNAN, *supra* note 11, at 47–48. See also Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9(3) J. POL. PHIL. 249 (2001); Arlie Loughnan, *The Expertise of Non-Experts: Knowledges of Intoxication in Criminal Law*, in *INTOXICATION AND SOCIETY: PROBLEMATIC PLEASURES OF DRUGS AND ALCOHOL* (Jonathon Herring et al. eds., 2013).

84. LOUGHNAN, *supra* note 11, at 196.

judges use common knowledge on intoxication, “that common knowledge becomes part of the judge’s storehouse of what Bourdieu calls professional legal capital.”⁸⁵

There was strong evidence that common/lay knowledge about alcohol effects is a powerful ingredient in contemporary Australian judicial decision making about the relevance of intoxication to criminal responsibility. Part III of this article will argue that the concept (or “entity”⁸⁶) of intoxication that is operative in criminal trials is a *legal* concept that is produced by and controlled by lawyers and judges rather than scientific, medical, or psychological experts. This fact, combined with its lay knowledge foundations, explains the mixture of considerations that constitute the concept—in Valverde’s terms, “a loosely put together entity composed of a number of somewhat arbitrarily chosen ‘facts’”⁸⁷—including (adverse) moral judgments about alcohol and drug consumption and intoxication.⁸⁸ One of the effects of the dominance of lay knowledge of intoxication is that “it functions to forestall certain arguments about what is known and not known about intoxication.”⁸⁹

The cases reviewed suggest that arbiters of fact in Australian criminal courts are regularly required to draw on common knowledge to fill the deficit when it comes to the meaning of the concept of intoxication, and the effects of alcohol (and other drugs). A typical deployment of “common knowledge,” in Valverde’s terms, is when jurors are effectively “reminded” about something they are expected (indeed, required) to know, as the following examples from our case study demonstrate:

I am sure you all know that alcohol can dull our senses. It can cloud or confuse our perceptions of our surroundings and the behaviour of other people.⁹⁰

85. VALVERDE, *supra* note 10, at 171; see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

86. Loughnan has described the late 19th century and 20th century development of a “distinct legal entity of intoxication”; LOUGHNAN, *supra* note 11, at 174.

87. VALVERDE, *supra* note 10, at 187.

88. *Id.* at 198–201; see also MARIANA VALVERDE, DISEASES OF THE WILL: ALCOHOL AND THE DILEMMAS OF FREEDOM 51 (1998) (drunkenness as a “hybrid”—“part vice, part disease”). McCord has described U.S. criminal laws on intoxication as reflecting “a rule of law that is based on a curious mixture of, on the one hand, moral sentiment, and on the other, unexamined factual assumptions regarding the effects of alcohol on human mental functioning”; David McCord, *The English and American history of voluntary intoxication to negate Mens Rea*, 11(3) J. LEGAL HIST. 372, 389 (1990).

89. LOUGHNAN, *supra* note 11, at 186.

90. R v. Stott [2011] SASFC 145, ¶ 20.

It is in accordance with ordinary human experience that a well intoxicated person may retain capacity and ability to think and act, albeit with limitations.⁹¹

Such matters [i.e., understanding the effects of alcohol and other drugs “on the mind”] may not be wholly unfamiliar to jurors. Some may know at first hand some of the effects spoken about, at least of alcohol. Such jurors would be able to judge from experience.⁹²

In some instances, the judicially asserted “common knowledge” appeared to stretch into scenarios that are, in fact, quite unlikely to be common, yet jurors are rhetorically compelled to assume that this is so. Consider the following trial judge direction and the analogy employed:

To give you an example of what may be a more common experience. A person has too much to drink and whilst in an intoxicated state gets in the car and drives home. The next day that person may have no recollection of having driven the car. But it does not follow that because he does not recall driving the car that it was not intentional. Whilst he may not have remembered the driving the next day, at the time that he drove the car he intended to drive it. Lack of recollection does not equate with loss of intent or loss of ability to control your body.⁹³

A further consequence of the trope of common knowledge is that considerable latitude is left for the prosecution to bring into the category of common knowledge “facts” about alcohol effects that may be adverse to the accused. For example, in *R v. Kay*⁹⁴ the defendant objected that it was wrong of the Crown to assert at trial that alcohol made him aggressive, when there was no evidence of such a causal relationship in his case.⁹⁵ The Queensland Court of Appeal declined to characterize the Crown’s submission in this way:

It is not clear that the criticism was maintained of the submission claimed to have been implicitly made by the prosecutor, that there was evidence that the appellant had a propensity to become aggressive when drunk. No such submission was made. Defense counsel did not advert to any such

91. *Shepherd v. R* [2011] NSWCCA 245, ¶ 192.

92. *R v. Stanley* [2013] NSWCCA 124, ¶ 60.

93. *Babic v. R* [2010] VSCA 198, ¶ 106.

94. *R v. Kay* [2012] QCA 327.

95. *Id.* at ¶ 18.

submission. The prosecutor was merely making some commonplace observations about the effects of alcohol on human behaviour.⁹⁶

If reliance on “common knowledge” is problematic as a basis for adjudication in relation to alcohol intoxication, it is even more so in relation to the “intoxicating” effects of other drugs. A significant part of the asserted justification for the adequacy of lay knowledge as a touchstone for criminal law assessments of intoxication, is that jurors are likely to have some form of first-hand experience of the effects of alcohol consumption.⁹⁷ Among Australians aged 14 and above, 86 percent have consumed alcohol at least once, and 37 percent drink at least weekly.⁹⁸ However, the majority of Australians have never used an illicit drug. Of those that have: 35 percent have used cannabis; 11 percent have used ecstasy; 8 percent have used cocaine; 7 percent have used meth/amphetamines; and 1 percent have used heroin.⁹⁹ Different drugs have different primary effects (including depressant, stimulant, and hallucinogenic effects),¹⁰⁰ including different effects on executive cognitive function.¹⁰¹ The World Health Organization’s ICD-10 emphasizes that an intoxication diagnosis must be based on “signs” and “dysfunctional behaviour” that that are “compatible with the known actions of the particular substance (or substances).”¹⁰²

In these circumstances, if there is doubt about the validity of alcohol intoxication assessments, there must be even greater doubt about whether tribunals of fact are making sound assessments of the intoxication of an accused person (or victim) in cases where other drugs have been consumed.

The case study also provides evidence to support the arguments advanced by Valverde and Loughnan that common knowledge on

96. *Id.* at ¶ 39.

97. VALVERDE, *supra* note 10, at 183.

98. AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE, NATIONAL DRUG STRATEGY HOUSEHOLD SURVEY: DETAILED REPORT 2013 (2014).

99. *Id.*

100. WORLD HEALTH ORGANIZATION, LEXICON OF ALCOHOL AND DRUG TERMS (T. Babor, R. Campbell, R. Room, & J. Saunders eds., 1994).

101. Carl L. Hart et al., *Is Cognitive Functioning Impaired in Methamphetamine Users? A Critical Review*, 37 NEUROPSYCHOPHARMACOLOGY 586 (2012); Antonio Verdejo-Garcia et al., *COMT val158met and 5-HTTLPR Genetic Polymorphisms Moderate Executive Control in Cannabis Users*, 38 NEUROPSYCHOPHARMACOLOGY 1598 (2013); Antonio Verdejo-Garcia et al., *Differential effects of MDMA, cocaine, and cannabis use severity on distinctive components offer executive functions in polysubstance users*, 30 ADDICTIVE BEHAVIOUR 89 (2005).

102. WORLD HEALTH ORGANIZATION, *supra* note 36, at F1x.0 Intoxication, G2.

intoxication is not merely unmediated “common sense,” but rather, a set of understandings that are validated and given “capital” by authoritative voices, including police, lawyers, magistrates, and judges.¹⁰³ Part III will examine the techniques employed by judges to render the concept of intoxication tangible and “visible” to juries, and argue that “tests” of intoxication based on a person’s mechanical functionality are an influential component of the common knowledge of intoxication that circulates in Australian criminal courts. Attention will be drawn to the marginalization of expert evidence, and the appropriateness of judicially constructed “tests” of intoxication will be assessed.

III. THE DEPLOYMENT OF COMMON KNOWLEDGE OF “INTOXICATION”

Review of the cases in the sample for this study suggests that courts do not necessarily attach great value to contemporary expertise from outside the law on the effects of alcohol and other drugs—at least in relation to the matters of primary relevance in a criminal trial (for example, did the accused intend to cause serious harm?). Judges regularly assert authority over the determinative concept of “intoxication.”¹⁰⁴ This finding echoes Loughnan’s observation that the “low profile of expert evidence in cases in which intoxication is pleaded” is consistent with the ascendancy of lay over expert knowledge when it comes to criminal court decision making about intoxication.¹⁰⁵

There is a parallel with the defense of “insanity”/mental illness,¹⁰⁶ another legal concept which listens to, but does not defer to, “non-legal” expertise.¹⁰⁷ However, there is also a notable difference. Although it is

103. VALVERDE, *supra* note 10, at 171; LOUGHNAN, *supra* note 11, at 196.

104. Valverde has shown that resistance to the “medicalization” of intoxication has a long history; VALVERDE, *supra* note 88, at 49–50; also LOUGHNAN, *supra* note 11, at 181.

105. LOUGHNAN, *supra* note 11, at 196.

106. Loughnan has traced the interconnected development of the legal concepts of “insanity” and “intoxication,” as well as other categories of mental incapacity; *see, generally*, LOUGHNAN, *supra* note 11.

107. Both intoxication and insanity have been described as hybrid concepts; *see, e.g.*, VALVERDE, *supra* note 88, at 51; Katey Thom & Mary Finlayson, “*They’re Not Really Doing ‘Normal’ Psychiatry: The Socio-Legal Shaping of Psychiatric Expertise in Insanity Trials*,” 20(1) PSYCHIATRY, PSYCHOL. & L. 46 (2013).

controversial and the subject of criticism,¹⁰⁸ there *is* a recognized legal definition of the state of “insanity” that operates in the context of assessing criminal responsibility.¹⁰⁹ By contrast, there is no widely recognized and judicially or legislatively authorized definition of “intoxication,”¹¹⁰ and yet the concept is engaged on a regular basis in criminal justice decision making.

Part I of this article observed that expert evidence on the effects of alcohol (and other drugs) was sometimes (but not routinely) part of the evidence in the cases reviewed. The discussion here focuses not on frequency but on judicial attitudes to such expert testimony, and its relative importance compared to what the jury is assumed to already know about intoxication. A pattern identified across a number of cases is illustrated by the case of *R v. Stanley*.¹¹¹ This was a case in which the Crown appealed against a decision that the trial be by judge alone.¹¹² The appeal dealt with a number of issues about the basis on which the decision was made. Having upheld the appeal on other grounds, the New South Wales Court of Criminal Appeal considered afresh whether a judge-alone trial was warranted, and focused on the fact that the accused’s intoxication would be in issue. One of the defendant’s grounds for requesting a judge-alone trial was that a jury was neither appropriate nor necessary because the trial would feature complex expert evidence on intoxication, and the charges¹¹³ were such that this was not a case in which the trier of fact would be required to apply “community standards” to decide whether he was guilty. The Crown’s position was that a jury would be best placed to answer the intoxication/specific intent question “from their own experience.”¹¹⁴ The Court agreed that a jury was the “preferable tribunal of fact”:¹¹⁵

108. See, e.g., NSW LAW REFORM COMMISSION, PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM: CRIMINAL RESPONSIBILITY AND CONSEQUENCES (REPORT NO. 138) (2013).

109. *M’Naghten’s Case* [1843–1860] All ER 229 (U.K.); *R v. Porter* (1933) 55 CLR 182 (Austl.). The law has been codified in modified form in several Australian jurisdictions; see, e.g., *Criminal Code* 1913 (WA) s 27.

110. Quilter et al., *supra* note 3; McNamara et al., *supra* note 8.

111. *R v. Stanley* [2013] NSWCCA 124.

112. Pursuant to the *Criminal Procedure Act* 1986 (NSW) Pt. 3 Div. 2.

113. The accused was charged with intentional or reckless infliction of actual bodily harm with intent to have sexual intercourse, indecent assault, and assault.

114. *R v. Stanley* [2013] NSWCCA 124, ¶ 17.

115. *Id.* at ¶ 61.

I doubt whether the evidence of the pharmacological experts is likely to be complex. As their reports stand, they agree. They may continue to agree. A jury is not likely to have difficulty understanding opinions about the effects of alcohol and the other drugs mentioned on the mind, particularly the ability to form and the likelihood of the formation of intent. Such matters may not be wholly unfamiliar to jurors. Some may know at first hand some of the effects spoken about, at least of alcohol. Such jurors would be able to judge from experience.¹¹⁶

Interestingly, the trial judge had expressed the view that the foreshadowed evidence of the two experts on drug effects (about which they mainly agreed) did not appear to have “any relevance to the question of specific intent”¹¹⁷—that is, the central issue to which their evidence was designed to relate.

This case was only the most blunt illustration of a wider pattern detected during the case review: a judicially perceived gap between what experts can tell us about alcohol and other drug effects on the one hand, and what the criminal law needs to know and decide on the other. At the same time there was considerable evidence of a willingness, on the part of some judges, in their directions to juries and in appellate judgments, to offer their own insights on what should be regarded as legitimate and compelling indicia of intoxication. In addition to the substantive flaws in this approach, to which attention will be turned directly, it is also worth noting that a fiction is thus being perpetuated regarding the role of juries and the law/fact distinction. Courts are simultaneously asserting that intoxication—whether? how much? which effects?—is a matter for the jury, while exerting considerable influence on how the inquiry is framed.¹¹⁸

Strikingly, even in “classic” cases where the central intoxication-related issue was whether the accused formed the requisite specific intent for the crime, judges were inclined to explain the concept of intoxication, less in terms of cognition and intent formation (which surely would require deference to experts of alcohol and other drugs and psychology), and more in terms of the ability to perform motor skill activities, based on common knowledge about the relationship between alcohol use and control over

116. *Id.* at ¶ 60.

117. *Id.* at ¶ 19.

118. This blurring of the tribunal of fact/tribunal of law distinction is not unique to trials in which intoxication evidence features; *see, e.g.*, the seminal House of Lords decision in *DPP v. Stonehouse* [1978] AC 55 (U.K.) regarding the law of criminal attempts, and the role of judge and jury.

bodily functions. This approach appears to involve a significant blurring of the distinction between intention and voluntariness.¹¹⁹ In addition, when faced with “scientific” evidence of the accused’s intoxication (e.g., a blood alcohol concentration reading), and/or expert evidence about the likely effects of such a level of intoxication, there was a recurring tendency to prefer “lay” evidence more consonant with common knowledge. The Australian Capital Territory case of *Byrne v. R*¹²⁰ is a good example of the tendency to rely on evidence of mechanical function to prove cognitive intent. The trial judge found that the accused, “although he had been somewhat intoxicated . . . he must have been generally in control of his mental faculties as he had been able to exercise good physical control.”¹²¹

The case of *Blackwell v. R* is also illustrative.¹²² It was not in doubt that the accused was intoxicated when he glassed the victim; the contested issue was “the extent of his intoxication.”¹²³ The New South Wales Court of Criminal Appeal observed:

Whilst there was evidence that the appellant was intoxicated, it was very much a matter for the jury to determine whether his level of intoxication was such that he was not capable of forming the relevant intent.¹²⁴

Although there was other evidence that the appellant’s level of intoxication may have been high, that evidence needed to be assessed in the context of all the circumstances, which included, at the time that the police officers arrived at the scene, that the appellant had been manhandled both by the off-duty police officers and by the security guards. It was also open to the jury to accept Mr McGuinness’ evidence. If they did so, that was also evidence which supported the verdict.¹²⁵

Mr. McGuinness was the pub licensee who, along with a pub security guard, had given evidence that the accused was *not* intoxicated.¹²⁶ Note the

119. Sometimes judges employed a vague colloquial hybrid phrase that posed the relevant question as: was the accused “in control of his faculties”; e.g., *Catley v. R* [2014] NSWCCA 249, ¶¶ 28–29.

120. *Byrne v. R* [2014] ACTCA 31.

121. *Id.* at ¶ 23.

122. *Blackwell v. R* [2011] NSWCCA 93.

123. *Id.* at ¶ 97.

124. *Id.* at ¶ 105.

125. *Id.* at ¶ 107.

126. *Id.* at ¶¶ 23–24, 26. There was no judicial comment on the credibility and reliability of the evidence of the licensee, given the incentive to avoid characterizing the accused as

licensee’s approach to defining intoxication, which was effectively endorsed by the trial judge and the Court of Criminal Appeal:

Mr McGuinness also expressed the opinion that the appellant was not intoxicated: he said that the appellant was not slurring his words, was not falling over, or in any way showing signs of intoxication. He said that the appellant did not lose his balance and he wasn’t crying or mumbling.¹²⁷

As the following extract explains, an important part of the Crown’s case that the accused had the requisite intent was that, immediately prior to the attack, he was capable of performing a number of functions:

The Crown’s position was that the appellant’s level of intoxication was not such as to deprive him of the ability of forming the necessary intention, that is, to inflict grievous bodily harm. Its case was that the appellant, some few minutes before the incident, was functioning reasonably, as evidenced by the fact that he was able to communicate with bar staff, had ordered drinks and paid for them with his credit card. The Crown’s case in this regard was supported by the CCTV footage.¹²⁸

Table 3 provides extracts (with emphasis added) from a selection of cases to illustrate the tendency of courts to focus on evidence of physical/motor functionality, and the amount of force used by the accused, as bases for inferring intention. These were not isolated examples. There were a number of instances where judges articulated or endorsed an approach to making an inference about the cognitive process of intent formation that relies heavily on evidence of the mechanical functions that the accused was able to perform.¹²⁹ These findings are consistent with Valverde’s observation that the legal construction of intoxication involves an assumption that “[d]runkenness . . . is something that can be directly

intoxicated. Evidence of a licensee that the accused *was* intoxicated would have the potential to be self-incriminatory in the context of liquor licensing law offenses (e.g., serving alcohol to an intoxicated person). Note also the contrary assessment of a police officer: “Detective Senior Constable Veitch . . . gave evidence that the entry in the police custody records in relation to the appellant was, ‘When arrived at charge room exhibited signs of moderate to serious intoxication evidenced by unsteady on feet, smell of alcohol, glassy eyes, slurred speech’” (at ¶ 27).

127. *Id.* at ¶ 26.

128. *Blackwell v. R* [2011] NSWCCA 93, ¶ 97.

129. *See also Babic v. R* [2010] VSCA 198; *R v. Bacon* [2012] QCA 340; *Hegarty v. R* [2012] VSCA 2012; *R v. Huni* [2014] QCA 324.

Table 3. Illustration of “Tests” for Assessing Relevance of Intoxication to Intent Formation

Extract	Case
Now, of course, you can see the [appellant] on the CCTV, the images and he is not obviously drunk. He is certainly <i>capable of walking and talking and capable, you may have thought, of forming an intention</i> . He was capable of inflicting serious injury.	<i>R v. Barden</i> [2010] QCA 374, ¶ 7
Intoxication . . . will not ordinarily prevent an accused from performing an intentional act, nor from intending the consequences of those acts and, accordingly, does not affect the accused's criminal liability for those acts. But the intoxication may reach <i>a point of such intensity that the accused's mind will become separated from the movements of his body</i> so that such movements are truly involuntary and/or unintentional, and that is the point that must be reached before someone is not legally responsible for their actions or their intentions.	<i>Babic v. R</i> [2010] VSCA 198, ¶ 106 ^[a]
Whilst the evidence established that both the appellant and the deceased were well affected by alcohol when they left the hotel, the evidence does not go so far as to establish that the appellant was “blind drunk” <i>or unable to function or find his way home</i> .	<i>Shepherd v. R</i> [2011] NSWCCA 245, ¶ 192 ^[b]
. . . [T]he appellant recognised his brother and rebuffed his brother's suggestion that he should stop assaulting the deceased, the appellant was <i>able to pick up a very large bin and strike his intended victim</i> with it, the appellant referred to blood and killing the deceased, the appellant said that he was destined for jail in any event, and the appellant complied promptly with police directions. When that evidence is taken into account together with the evidence that the appellant <i>repeatedly kicked the prone deceased in the head with steel capped boots over a prolonged period</i> , the proper conclusion is that it was reasonably open to the jury to infer that, despite the very high degree of the appellant's intoxication, he killed the deceased with the intention of doing him grievous bodily harm.	<i>R v. Mitchell</i> [2013] QCA 248, ¶ 15
Whilst he was plainly intoxicated, I am satisfied beyond reasonable doubt that he was not so intoxicated that he did not form an intent to burgle the deceased's house . . . In particular, the evidence that the appellant had left his DNA on Mrs Mabb's handbag . . . indicating that he had <i>rifled through it</i> , points to a <i>directed and deliberate course of conduct</i> ; which in my view rules out intoxication to such an extent that he could not form the necessary intent for burglary or, indeed, murder . . . While there was undoubtedly evidence of the appellant's intoxication	<i>R v. George</i> [2013] QCA 267, ¶¶ 67, 69, 73

(continued)

TABLE 3. (continued)

Extract	Case
the evidence also conveyed the <i>presence of obviously purposeful conduct</i> . This included <i>multiple applications of blunt force trauma</i> to the heads of both deceased as well as trauma to the chest of the female deceased sufficient to dissect her coronary artery. The <i>degree of force</i> used bespoke an intention to at least do grievous bodily harm. Moreover this was <i>not a case of some apparently spontaneous, drunken, unthinking behaviour</i> .	
a. The Victorian Court of Appeal accepted that, in this passage, the trial judge had blurred voluntariness and intent, but concluded that overall the jury had not been misdirected.	
b. The Court commented, <i>inter alia</i> , on the accused's ability to walk from the pub to the scene of the crime, and wash himself (¶¶ 131, 132).	

‘seen’ or ‘observed’.”¹³⁰ But whatever misgivings there may be about the validity of such a conception of intoxication in the liquor licensing context—where what is at stake is, for example, whether a licensee (or his or her employee) has served alcohol to an intoxicated person¹³¹—they are amplified where the nature of the inquiry is how alcohol and other drug consumption has affected the executive cognitive function of an alleged violent offender.

The preference for lay assessment based on observable functionality in the cases in this study’s dataset was especially striking in cases where there was evidence of the offender’s blood alcohol concentration at the time of the conduct in question. For example, in *R v. Martin*,¹³² based on a sample taken several hours later, it was estimated by a government medical officer that the offender’s blood alcohol concentration was between 0.264 and 0.454.¹³³ In addition, the medical officer gave evidence of the likely effects of intoxication at such levels:

Although there would be individual variation, at a blood alcohol level of 0.3, generally speaking, a person would be visibly intoxicated, with stupor and an adversely affected gait, to the point of being unable to stand. It would also be likely to cause memory loss, blackouts and urinary incontinence. . . . At a blood alcohol level of 0.3 a person could not walk a straight line, would have difficulty putting a finger to the nose when asked and there would be

130. VALVERDE, *supra* note 10, at 188.

131. *Id.* at 172f.

132. *R v. Martin* [2011] QCA 342.

133. *Id.* at ¶ 65.

other visible signs of intoxication, including a real difficulty in engaging in meaningful conversation.¹³⁴

Nonetheless, the Court attached greater significance to other evidence, specifically evidence of what the accused *could* do:

It is true that the blood alcohol reading taken from the appellant well after his arrest strongly suggested that at the time the police arrived late on 20 December he was heavily intoxicated. But other objective evidence, although confirming that he had been drinking throughout the day and into the evening, did not suggest that he was heavily intoxicated when he left the Bowls Club at about 7.45 pm. The appellant's extremely high level of intoxication when the police arrived shortly before midnight may have been because he drank a great deal *after* stabbing the deceased, perhaps to drown a guilty conscience as he realised the enormity and finality of his deadly deeds. . . . During the 000 call, the jury may have considered he deliberately avoided giving his name to escape detection. Later when talking to police officer Geraghty, he gave a falsely exculpatory version to cover up what he had done. Neither of these matters suggested that he was so intoxicated he did not form an intent to kill or to do grievous bodily harm to the deceased at the time of the killing. Importantly, the number, positioning and depth of the stab wounds described by the pathologist strongly supported a deadly intent to kill.¹³⁵

The South Australian case of *R v. Humbles*¹³⁶ provides another strong illustration of this tendency. At the judge-alone trial, experts gave evidence that the accused's blood alcohol concentration was 0.252–0.284 at the time of the commission of the offense, and that at such a level, his "ability to think through the consequences of his actions would be grossly impaired."¹³⁷ Nonetheless, the trial judge concluded that the Crown had established beyond reasonable doubt that the accused had the intention to kill. Reflecting the functional common knowledge approach to intoxication identified in this article, the judge drew attention to evidence of various tasks that the accused had been able to perform (e.g., cock and point the gun) and other behaviors (e.g., "he had the presence of mind to flee"; and he gave coherent answers to basic police questions such as a request for his identity).¹³⁸ On the expert evidence provided, the trial judge said:

134. *Id.*

135. *R v. Martin* [2011] QCA 342, ¶¶ 68, 71.

136. *R v. Humbles* [2014] SASFC 91.

137. *Id.* at ¶ 17.

138. *Id.* at ¶ 25.

I accept their evidence that there can be circumstances where the ingestion of alcohol and drugs can impair a person’s state and presence of mind to the extent that they may be incapable of forming an intention beyond that of basic intent. However, for the reasons I have given, I find it proved beyond reasonable doubt that such circumstances did not exist in this case. . . . Although his condition was one of gross intoxication and his behaviour was in many ways bizarre, nevertheless I find it proved beyond reasonable doubt that the [defendant] had the intention . . . to kill.¹³⁹

On appeal, the Full Court supported the trial judge’s analysis:

The Judge’s recounting of the effect of the medical evidence was entirely accurate. Both expert witnesses expressed the view that the ingestion of alcohol and drugs can impair a person’s state and presence of mind. They did express the opinion that this may lead to an incapability of forming a specific intent. They did not express any opinion as to whether or not the defendant did form the requisite specific intent. As the Judge observed, this was a matter on which the finder of fact was to reach a conclusion having regard to all the evidence.¹⁴⁰

This case does provide further evidence of a judicial reluctance to yield dominion over the concept of intoxication to medical/scientific experts, preferring to allow legally shaped, common knowledge understandings to provide the primary reference point for decision making. The comments of the Queensland Court of Appeal in *R v. Davis*¹⁴¹ provide a further illustration:

Dr Butler considered it a mere possibility that his capacity to form that intention was severely impaired by his amphetamine intoxication. Even if it were so impaired, there would still have been a residual capacity to form the intent. There was other evidence (particularly the number of shots fired and the pressure needed to engage the trigger) from which the jury could have been so satisfied even in the face of Dr Butler’s opinion.¹⁴²

The point being advanced is not that cases in which a “functional” approach was preferred and/or blood alcohol concentration and expert evidence was not regarded as determinative, necessarily miscarried. Rather,

139. *Id.*

140. *Id.* at ¶ 39.

141. *R v. Davis* [2012] QCA 97.

142. *Id.* at ¶ 59. See also *W. Austl. v. Silich* (2011) 43 WAR 285, ¶ 28; *Namatjira v. R* [2013] NTCCA 08, ¶¶ 32–34; *McDougall v. R* [2013] ACTCA 14, ¶ 42.

this article is drawing attention to an important question regarding the nature of the concept of intoxication and how it is proven in criminal trials. When courts are expressing views about the strength of the case against an accused with respect to the formation of specific intent, even where there is evidence of intoxication, it is not clear what theory of the relationship between intoxication and intent formation they are bringing to the exercise. It appears that “tests” that are better suited to assessing whether an accused acted voluntarily, are being used to assess whether s/he acted with a particular intention. Predicting a person’s level of intoxication based on observed behavior is well known to be very difficult—even for trained health professionals.¹⁴³ Attempts to reach a conclusion about a particular complex element of intoxication—that is, the effect on intent formation—are likely to be even more challenging, especially for persons without training, expertise, or experience in the task.

Intent formation is part of executive cognitive function, which has been defined as “a subset of cognitive capacities encompassing a variety of higher order cognitive abilities, such as attention, abstract reasoning, organization, mental flexibility, planning, self-monitoring, and the ability to use external feedback to moderate personal behavior.”¹⁴⁴ Experimental research supports the view that intoxication diminishes executive cognitive function.¹⁴⁵ To the extent that the criminal law recognizes, in principle, that intoxication may impede intent formation, the law can be said to be generally in sync with the scientific evidence. However, when it comes to the *operationalization* of this principle, a significant gap is apparent. Specifically, the research literature does not support the deployment of de facto field tests

143. Robin Room, *The relation between blood alcohol content and clinically assessed intoxication: Lessons from applying the ICD-10 Y90 and Y91 codes in the emergency room*, in WORLD HEALTH ORGANISATION, *ALCOHOL AND INJURIES: EMERGENCY DEPARTMENT STUDIES IN AN INTERNATIONAL PERSPECTIVE* 149–60 (C. Cherpitel et al. eds., 2009).

144. Robert O. Pihl, *Alcohol Affects Executive Cognitive Functioning Differentially on the Ascending Versus Descending Limb of the Blood Alcohol Concentration Curve*, 27(5) *ALCOHOLISM: CLINICAL & EXPERIMENTAL RES.* 773, 773 (2003); citing Alan Baddeley & Sergio Della Sala, *Working memory and executive control*, in *THE PREFRONTAL CORTEX: EXECUTIVE AND COGNITIVE FUNCTIONS* (A.C. Roberts et al. eds., 1998).

145. For example, Jordan B. Peterson et al., *Acute alcohol intoxication and cognitive functioning*, 51 *J. STUD. ON ALCOHOL* 114 (1990); M. Oscar-Berman & K. Marinkovic, *Alcohol: Effects on neurobehavioral functions and the brain*, 17 *NEUROPSYCHOLOGICAL REV.* 239 (2007).

that focus heavily on observed motor skill performance as a basis for assessing cognitive functions like intent formation.¹⁴⁶

CONCLUSION

This article confirms that alongside the problem of *statutory* under-definition,¹⁴⁷ the concept of intoxication in Australian criminal law is also characterized by a lack of *judicial* precision. Although the concept is routinely operationalized in courts at all levels—by prosecutors, defense lawyers, magistrates, judges, and juries—the meaning of “intoxication” remains elusive. And yet the review of appellate decisions on which this article reports revealed no evidence that the courts have recognized that there is a deficit. Courts regularly deploy “common knowledge”—a mixture of “facts,” opinions, and attitudes about alcohol and other drug consumption and intoxication—which jurors are assumed to already have, and to which judges provide shape and “juridical capital.”¹⁴⁸ Australian courts appear disinclined to allow medical and scientific expertise on the effects of alcohol and other drugs to exert authoritative influence on the criminal law concept of intoxication. In the cases reviewed, there was very little explicit appreciation that lay expertise may be an inadequate foundation for making complex inferential assessments of cognitive processes like intent formation.

It is recognized that these criticisms need to be contextualized in light of the fact that all of the relevant cases in this study’s dataset involve very serious crimes of violence, including murder, very serious assaults, and sexual assaults. In such cases, the gravity of the harm done, and of the crimes alleged, means that courts are necessarily involved in an exercise that requires balancing two imperatives: fidelity to strict legal principles of criminal responsibility (and a corresponding openness to *any* evidence that may raise reasonable doubt), and community expectations about condemning and deterring intoxicated-related violence. This balancing exercise is not a new one. It is a manifestation of the tension that has been evident in

146. See Raymond C.K. Chan et al., *Assessment of executive functions: Review of instruments and identification of critical issues*, 23 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY 201 (2008).

147. Quilter et al., *supra* note 3, at 935.

148. VALVERDE, *supra* note 10, at 171.

jurisprudential debates at least since the 19th century.¹⁴⁹ It echoes the competing policy arguments in the landmark intoxication decisions of *DPP v. Majewski* (House of Lords)¹⁵⁰ and *O'Connor* (High Court of Australia),¹⁵¹ described by Mason J, in the latter case, as follows:

On the one hand, there are two strands of thought whose thrust is to deny that drunkenness is an excuse for the commission of crime. One is essentially a moral judgment—that it is wrong that a person should escape responsibility for his actions merely because he is so intoxicated by drink or drugs that his act is not willed when by his own voluntary choice he embarked on the course which led to his intoxication. The other is a social judgment—that society legitimately expects for its protection that the law will not allow to go unpunished an act which would be adjudged to be a serious criminal offence but for the fact that the perpetrator is grossly intoxicated. . . . On the other hand, there is the force of the general principle of criminal responsibility that a criminal act needs to be voluntary.¹⁵²

To the extent that the present Australian study found evidence of a judicial reluctance to cede responsibility for framing the criminal law concept of intoxication to experts, and an unwillingness to render the inquiry an exclusively scientific one, it is likely that at least part of the explanation lies in the fact that there is a moral dimension to the determination of criminal responsibility.¹⁵³

Nonetheless, it is submitted that there is reason to be concerned about the mechanisms by which these challenging tensions and balancing exercises are being navigated. Reliance on common knowledge, and the deployment of “tests” based on a person’s observable mechanical functions as a sort of “proxy” for a state of intoxication that is sufficient to impede intent formation (or other cognitive processes) are not, it is submitted, an

149. See, generally, LOUGHNAN, *supra* note II, at ch. 7; also Roth, *supra* note 57; Mitchell Keiter, *Just Say No to Excuse: The Rise and Fall of the Intoxication Defense*, 87(2) J. CRIM. L. & CRIMINOLOGY 482 (1997).

150. *DPP v. Majewski* [1977] AC 443.

151. *R v. O'Connor* (1980) 146 CLR 64.

152. *Id.* at ¶ 15. See also the United States Supreme Court’s decision in *Montana v. Egelhoff* 116 S. Ct. 2013 (1996); and the Supreme Court of Canada’s decision in *Daviault v. The Queen* [1994] 3 SCR 63.

153. It is noteworthy and revealing that in the sentencing context—where *punishment* rather than *responsibility* is in issue—judges appear more willing to rely on expert evidence, particularly where the offender’s intoxication was associated with mental illness; McNamara et al., *supra* note 8, at 174–84.

adequate compromise. The additional problems raised by the need to assess claims of intoxication attributable to drugs other than alcohol (or a combination of alcohol and drugs)—where familiarity and “common sense” are even less likely to be adequate—must also be acknowledged. In 1990, McCord observed that, even if it is believed (as he did) that:

moral judgment should be the ultimate goal of the law in this area . . . moral judgment cannot be intelligently made without first securing the best possible understanding of the physiological effects of alcohol on human mental functioning. Thus, the direction for further research is clear: find out what science has to tell the law about the physiological effects of alcohol.¹⁵⁴

More than 25 years later, the point remains apposite in the case of alcohol, and even more so, in the case of other psychoactive substances.¹⁵⁵ Further research could usefully investigate whether there is a more satisfactory middle ground in which space is created for more fine-grained expert guidance on the implications of alcohol and other drug consumption for specific physical and cognitive functions. Specifically, criminal court decision making would benefit from guidance that maps more closely to the discrete inquiries with which a particular trial is concerned, and which more precisely delineates and appreciates the different effects of different drugs.

154. McCord, *supra* note 88, at 389.

155. See WORLD HEALTH ORGANIZATION, *supra* note 36.