AN CHÚIRT UACHTARACH
THE SUPREME COURT

Clarke CJ
McKechnie J
Charleton J
O'Malley J
Irvine J

Supreme Court appeal number: S:AP:IE:2018:000131

[2020] IESC 000

Court of Appeal record number 2014/44

[2018] IECA 145

Central Criminal Court bill number: CCDP0058/2011

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

PROSECUTOR/RESPONDENT

- AND -

CELYN EADON

ACCUSED/APPELLANT

Judgment of Mr Justice Peter Charleton delivered on Friday 20 December 2019

1. Celyn Eadon, the appellant, was 19 years old when he killed his mother Nóirín Eadon at their family home in Derrycrieve, County Mayo. On being arraigned in January 2014 before the Central Criminal Court, Carney J sitting in Castlebar, he pleaded guilty to manslaughter. This plea still stands. At trial, the homicide and the accused's responsibility for it were not contested. Essentially, the jury were considering the facts in order to search out the accused's state of mind so as to determine whether the plea to manslaughter properly met the fault of the accused or whether he should instead be convicted of murder. The jury, making findings of fact on issues of diminished responsibility and intoxication as partial defences to murder, rejected these defences and, on 5 February 2014, returned a verdict of guilty of murder. That conviction was upheld by the Court of Appeal; judgment of Edwards J of 15 May 2018. Leave to appeal to this Court was granted on 16 April 2019 on two issues: intoxication as a defence to murder and the adequacy of the judge's charge on that defence. This judgment gives reason for concurring with McKechnie J.

Background

2. Celyn Eadon had a substance addiction problem for approximately five years prior to this homicide. Apart from alcohol, he had been spending €400 a week on cocaine, crystal meth, ecstasy, cannabis in various forms. He also consumed large quantities of alcohol, which was where this terrible journey started. Despite this, he had not been violent to his mother or younger brother prior to the day that he killed her. In statements to the gardaí, the attack on his mother was explained by the accused in terms which indicated internal turmoil and involved crop circles, demons and poison gas invading his home, and pursuit by aliens. He claimed that he killed her with a knife because he "didn't know whether it

was my mother", that she "was a totally different person" and that she was replaced by an imposter and was "mad". She suffered several stab wounds, from which she died.

3. Before the jury, the accused called psychiatric evidence asserting that at the time of the homicide his responsibility was diminished within the meaning of the Criminal Law (Insanity) Act 2006. For a successful plea of diminished responsibility, the conditions set out in s 6 must be fulfilled. These require the prosecution to prove that the accused perpetrated the external element of the killing of another person, intending to kill that person or cause that person "serious injury", as s 4 of the Criminal Justice Act 1964 requires. Hence, the prosecution must prove murder. The essential elements of what makes a killing unlawful remain as a burden to be proved beyond reasonable doubt by the prosecution. For the accused to have the defence of diminished responsibility, he or she must demonstrate a "mental disorder", which in s 1 of the 2006 Act "includes mental illness, mental disability, dementia or any disease of the mind", but, most relevant to the circumstances here, specifically "does not include intoxication". Under s 6(1)(c), that mental disorder need not be "such as to justify finding him or her not guilty by reason of insanity" but the accused must demonstrate that his or her mental disorder "was such as to diminish substantially his or her responsibility for the act". The burden of demonstrating clearly that the accused laboured under diminished responsibility, or was insane at the time of the murder, rests on the defence as an evidential burden to the standard of probability; *The People (DPP) v Heffernan* [2017] IESC 5. The full detail of this is in the judgment of McKechnie J.

4. A consultant psychiatrist called on behalf of Celyn Eadon was of the view that his many years of high ingestion of pharmaceuticals had damaged his brain function and thus brought about a mental disorder which reduced his control over his actions and his responsibility for killing his mother. The jury did not find that evidence convincing to the requisite standard. That does not mean that the evidence was not honest, it only means that they preferred the contrary evidence. Hence, the accused was left without diminished responsibility as a defence and intoxication as a defence thus came to the fore. This defence tends to be more complex in terms of applying it to a given set of circumstances than, for instance, self-defence since most people sitting on a jury will appreciate that a person under attack is entitled to use reasonable force to defend themselves. Drunkenness as a defence, however, has always tended to be more policy based and where the focus should lie requires not a lengthy, but an adequate, explanation from the trial judge to the jury. This, as McKechnie J holds, the jury did not get.

Judge's charge

5. As to the fundamental direction that grounds a judge's instructions to a jury in a criminal trial, Carney J cannot be faulted. He told the jury that the prosecution had to prove their case, that the accused did not need to contribute to the evidence at the trial, that the standard was to demonstrate that no reasonable doubt remained, and that this entailed disproving any basis for a defence raised by the accused. Their task was to approach the evidence shrewdly and to judge the case based on the evidence which they had heard, taking into account any argument of counsel, but not mistaking any question to a witness,

or any statement in a speech by counsel, as evidence. He defined murder, in accordance with s 4 of the Criminal Justice Act 1964, as an unlawful killing where the accused intended to either kill the victim or cause the victim serious injury. In this context, an unlawful killing is one where the accused is not acting in proportionate and reasonable self defence, a matter which did not arise in this case. While, he said, a person is presumed to intend the natural and probable consequences of their actions, the onus of proving beyond reasonable doubt that the presumption had not been rebutted remained at all times on the prosecution. Central to his directions on the defences raised by the accused was the diminished responsibility claim. Carney J's charge to the jury on that issue is not appealed. As to intoxication, the trial judge told the jury that this could be a "freestanding" defence apart from any issue as to brain damage from years of drug-taking leading to diminished responsibility for killing, and that:

> the voluntary taking of drink or drugs does not under our law form a defence or any mitigation in one's responsibility to society … that is the law. But it is of course that situation that intoxication is part of the mix in relation to whether a person is capable of forming the necessary intent [to kill the victim or to cause the victim serious injury].

6. That direction was wrong. A person may be capable of intending to kill and yet not so intend. An example would be that an individual becomes furious over derogatory remarks made about his mother, he suppresses his anger, sees, but decides not to use, a nearby kitchen knife, and walks away. A person may have a drunken ability to intend to kill and yet may purposely engage their consciousness in order to murder someone. A drunken intent is still an intent. An example would be that a person gets very drunk and becomes unusually furious in consequence of an argument, picks up a brick and brings it down the victim's head, intending to cave in his skull. A person may kill but have no ability to intend to do what was done, to take the last example, because his emotions are not just loosened by the alcohol he has consumed but he has entered a state where his conscious mind is no longer controlling his body to any extent. The problem is, as the trial judge said in his charge to the jury, no one can see inside the accused's mind. What the accused intended is to be inferred from what others see and hear; the facts on the ground, meaning the state of the victim's body or the presence or absence of defensive markings; any admissions made by the accused which explain his mental state at the time; a prior declaration of intent; and the application of shrewdness and commonsense to the analysis of the circumstances.

7. But the key factual issue for a jury always is: did the accused intend to kill or cause serious injury in striking the victim? It is not whether the accused was capable of acting purposively but whether in dispatching the victim he did so with the specific purpose of causing death or serious injury. Were it to be the case, referring now to the evidence before the jury, that the accused, by reason of alcohol consumption, acted where his mind was not engaged with his actions or were it to be the case that in consequence of intoxication the accused believed that he was struggling with an alien from outer space and so intended to kill or cause serious injury to a dangerous attacking and malign non-

human creature, the mental element of the crime would be missing. Hence, in those circumstances, the action would be assault or manslaughter but not murder. In all such examples, however, the true position is that the ability to intend to kill or cause serious injury is only part, but can be a very important part, of the analysis. If someone is not able to intend to kill or cause serious injury, then in striking a blow they did not commit murder. If someone is capable of acting with the purpose of killing or causing serious injury, but does not as a matter of fact have that intent, they did not commit murder. Thus, it is not whether someone was incapable by reason of alcohol consumption of forming any intent to kill or cause serious injury but, rather, the question is did they, as a matter of fact, have that intention?

Counsel substituting for a proper judicial direction

8. On this appeal, the Director of Public Prosecutions has pointed out that counsel for the prosecution had correctly summarised the law on intoxication as a defence, stating to the jury in the closing speech that the accused would not be guilty of murder but guilty of manslaughter if, by reason of ingesting alcoholic drink and drugs, he did not intend to kill or cause serious injury to his mother. Hence, the argument is that deficiencies in the judge's charge should be supplemented by what counsel said in closing the case and should thus be cured.

9. A decade ago, counsel for both the prosecution and defence confined any mention of the law to what was essential to whatever argument they wished to make. Thus, the nature of what constitutes a reasonable doubt received mention, but was not elaborated upon. What constituted robbery or murder was outlined, but not in such a way that counsel might be mistaken for giving legal directions to the jury.

10. That restraint is central to the proper division of responsibility, so that it is the trial judge that gives directions and that is what a criminal trial requires. Essential to a trial "in due course of law" under Article 38.1 of the Constitution is that there is a judge to act impartially, to ensure that testimony is admissible, and the conduct of witnesses and of counsel stay within the limits of decorum, to make legal rulings based on reason, to instruct the jury as to their function, the burden and standard of proof, the legal elements of the charges, any defences in respect of which the accused has adduced sufficient evidence, and to summarise the essential facts and how inferences might be drawn from these, while highlighting any essential points on which the verdict of the jury may hinge. It is clear that while the trial judge's charge should include a brief summary of the prosecution and defence cases, and that he or she is entitled to comment on these, a judge should not enter into advocacy when expressing a view and should state the respective roles of trial judge and counsel so that the jury is aware that they alone are the tribunal of fact and are unfettered by any apparent opinion expressed by the judge. The jury are only bound by the judge's directions on points of law. Any especial warning relevant to the case should also be given, such as an accomplice warning, or any necessary reference to an uncorroborated confession statement by the accused in accordance with s 10 of the Criminal Procedure Act 1993. The authorities are clear that a wide measure of appreciation should be given to the trial judge on any appellate analysis

as to the structure and form of the charge; *Attorney-General v Murray* [1926] IR 266, *R v Lawrence* [1982] AC 510 per Lord Hailsham LC, *The People (DPP) v Gleeson* [2018] IESC 53, paragraphs 8-9, Coonan and Foley, *The Judge's Charge in Criminal Trials* (Dublin, 2008) chapter 2, and Archbold, *Criminal Pleading, Evidence and Practice* (66th edition, London, 2018) paragraphs 4-430 to 4-444..

11. As McKechnie J states, there should be no blurring of the role of counsel and the judge; or of the judge and the jury. The judge assists the jury by pointing to relevant facts and by giving a brief summary of the essential evidence, a concise statement of the prosecution and defence cases and any pivotal points in the case. Usually these are one and the same. The judge may read a note of the evidence to the jury, if they request that. However, the judge is not assessing the facts and is not finding guilt or making determinations of the weight of evidence in a jury trial. It is the jury who are collectively the judges of fact. A jury does not hear legal argument; a judge does. A jury hears and is bound to follow any legal direction from the judge. The judge is sworn to adjudicate on law and, hence, it is his or her task to deliver a statement of the law to the jury in the context of the issues in the case. A judge is a servant of the law, and as sworn, acts without fear or favour, affection or ill-will towards any person; Article 34.6.1º of the Constitution. The jury is sworn to give "a true verdict … in accordance with the evidence"; Juries Act 1976 s 18. Counsel have no such function and should not trespass on either the role of the trial judge or that of the jury. The duty of counsel for the prosecution and the defence is to argue their respective cases. It is not the function of the trial judge to contend for any particular scenario, nor is there a requirement for him or her to reiterate what is obvious. The trial judge will have heard the entire case and must be presumed to have an appreciation of the building blocks of what the prosecution allege and how this is countered by the defence, if any evidence is adduced by the defence. Hence, the judge is entitled to a measure of appreciation as to the manner in which it is felt right by him or her to approach directing the jury.

Reasonable doubt

12. In contrast to the objective charge given by the trial judge on the standard of proof and what was said about the meaning of what is a reasonable doubt, it is not appropriate for counsel to give examples that stick in the mind of the jury as a nagging, but inaccurate, counterweight to proper legal directions. It did not happen in this case, but reference has been made in other cases to a reasonable doubt being the kind of shock that a parent would feel on being woken up in the middle of the night and told that their son had just been arrested for robbing a bank. Of course, a parent would not believe that such a thing could be true, unless their child had a criminal track record; a fact that would, in any event, usually never be disclosed to a jury. That example has nothing whatsoever to do with a reasonable doubt. The function of finding fact exercised by a jury in a criminal trial is objective, the jury are acting as part of the judicial function but only in relation to fact, and no one with an emotional interest in a case should serve as a juror or judge. The presumption of innocence is not a belief in the innocence of a close relative, but an open mind that assumes nothing against the accused; unless, and until, the prosecution prove a relevant fact beyond reasonable doubt. In that respect, the presumption of innocence is

like a blank sheet of paper upon which the jury may write proven facts, but may only write proven facts, not supposition or conjecture; and then the jury must assess such facts in the context of the argument of counsel as to the meaning of the facts, as to what they do or do not amount to; and then the task of the jury is to decide if there is sufficient proof to pronounce the accused guilty of the crime charged. If not, the verdict is not guilty.

13. To accede to what the Director of Public Prosecutions has argued for on this appeal is to invite both confusion on roles and would amount to the overturning of the essential architecture of a criminal trial. Instead, counsel should leave legal directions to the trial judge and confine argument to matters of fact with a view towards persuading the jury of the validity of their respective cases or the weakness of whatever case has been made against their client

Intoxication as a defence

14. At page 121 of his judgment in *The People (DPP) v Reilly* [2005] 3 IR 111, McCracken J for the Court of Criminal Appeal, states that the law on intoxication "has been present in the common law since before the foundation of this State and has been the basis of numerous decisions, particularly in the realm of unlawful killings and unlawful assaults." Were the string of decisions from *The People (Attorney General) v Manning* (1955) 89 ILTR 155 to 312 to *The People (DPP) v Murphy* (Court of Criminal Appeal, unreported, 8 July 2003) to *The People (DPP) v McBride* [1996] 1 IR 312 to the Reilly case itself, abrogated in favour of reasoning based on strict logic, then this would have to be "done by the legislature." While the common law can develop incrementally, where a fundamental choice is to be made as between policy that completely alters the existing law and the application of precedent, both the constitutional order and the requirements of legal certainty necessitate that judges apply, rather than invent, the law. There is a difference between gathering together a body of disparate cases applying negligence as an ingredient of various torts and turning those precedents into a free-standing tort in itself, as in *Donoghue v Stevenson* [1932] AC 562, or allowing inherent reliability and trustworthiness as a general exception to the hearsay rule arising out of the myriad of exceptions, as in *Ulster Bank v O'Brien* [2015] IESC 96, and a decision that turns existing law subject to numerous analyses, including by the Law Reform Commission, on its head. Such changes were made in other jurisdictions, rejecting the implication of mental state in drunkenness in favour of an individualised approach, in *R v Daviault* [1994] 3 SCR 63 which was a common law development, or upon the application of the Canadian Charter of Fundamental Rights and Freedoms in *R v O'Connor* (1980) 146 CLR 64.

15. As McCracken J stated, the law on intoxication pre-dates the foundation of the State and was part of this jurisdiction's inheritance of law under Article 50.1 of the Constitution. In fact, the law continues to be as stated in the 26th edition of Archbold's *Pleading, Evidence and Practice in Criminal Cases* (London, 1922, Roome and Ross editors) at 19-20, despite the reanalysis of the law in such English cases as *R v Morgan* [1976] AC 182 and *Director of Public Prosecutions v. Majewsk*i [1977] AC 443. These cases were the ones approved in Reilly but the true legal position was in fact stated in the 1922 edition of Archbold. There,

the editors first state the earlier law, which was that drunkenness "which produces a perfect though temporary frenzy or insanity … was formerly held not to excuse the commission of any crime" and thus an offender "under the influence of intoxication could derive no privilege from a madness voluntarily contracted, but was regarded as equally answerable to the law as if he had been in full possession of his faculties at the time". This, the former law, up to the English decision in *Director of Public Prosecutions v Beard* [1920] AC 479, underpins the policy of the current law whereby some diminution in culpability is enabled to those who do not specifically intend the result of their actions. This means that the lesser included offence to the charge is the one of which they are guilty; thus wounding with intent becomes wounding, and homicide with intent to kill becomes manslaughter due to the lack of the consequential mental element.

16. Had the trial judge in this case simply quoted from the 1922 edition of Archbold, as follows from the preceding passage, there would have been no appeal in this case: "Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime charged must be taken into consideration with the other facts proved in order to determine whether or not he had such an intent." Hence, it is not that the defence is incapacity to form an intent to kill or cause serious injury in a homicide case, though if a person has no capacity to form such an intent he or she cannot be guilty of murder, but rather the defence is that by reason of the consumption of intoxicants that the accused, as a matter of fact, did not form that intent.

Fault and alcohol

17. Were the common law to return to its origins in the *Beard* decision, or were it to have been an Irish court with knowledge of the special defence of excessive self-defence in *The People (AG) v Dwyer* [1972] IR 416 reducing murder to manslaughter, or the humane decision of the House of Lords in *R v Camplin* [1978] AC 705 attributing the fixed characteristics of the accused to the reasonable person test in provocation, it is possible that the test that would have been applied might have related to the moral culpability for murder: that murder being the most heinous crime, only those with the moral culpability appropriate for conviction should be found guilty. While getting drunk is a fault, it is also reasonable that voluntary intoxication, to the degree that the accused is no longer aware of what he or she is doing so that they kill, does not carry the same degree of culpability as a cold-blooded murder. McKechnie J, in his judgment, cites a range of other authorities but all are to the same effect as regards the law in this jurisdiction. All of the options for courts faced with this problem are comprehensively considered in Michael Dillon, The Law on Intoxication: A Criminal Defence (Dublin, 2015).

18. That option of a *Dwyer*-type analysis was not what happened in *Director of Public Prosecutions v Beard* or in *Director of Public Prosecutions v. Majewski*, where the House of Lords held, for what were both policy reasons and through following the earlier precedent, that the basic and specific test reasoning should continue. From the policy point of view, there was good reason for not allowing voluntary intoxication to constitute a defence in itself. This was not just because drunkenness is a voluntary action in itself which can lead to uncharacteristic behaviour, but the alternative of finding fault in the accused getting

drunk, or high on drugs, in the first place may not always reach a just result. Certainly, young people with no experience of drugs can ingest something with disastrous consequences for other people, but that does not mean that they should have no criminal responsibility. In an address to an international conference of the Judicial Studies Institute in Dublin Castle in 1998, Dr Desmond Corrigan elucidated the connection between alcohol consumption and violence:

> while drug users were responsible for 82% of burglaries, non-drug users were responsible for the majority of detected crimes of violence including sexual offences, murders and assaults. I would, however, dispute the label 'non-drug users' in relation to violent crimes since research clearly shows that one drug is implicated in far more crimes of violence than any other and that drug is alcohol. Murdoch and his colleagues in an analysis of over 9,000 violent crimes from 11 different countries found that nearly two thirds of violent offenders were drinking at the time of the crime. They report that it is now widely accepted that alcohol has a direct and close-related effect on aggression in humans. Alcohol is a legal drug subject to 'controls and regulations', yet this legislation has not reduced the amount of crime due to alcohol nor has it reduced the police, judicial, or penal resources required to deal with those drug related crimes. Consistently, annual reports on crime show that alcohol-related offences outnumber other drug related offences by 700%. Therefore, it cannot be claimed that legalisation will reduce crime against the individual. There are risks of violence associated with controlled drugs such as amphetamines and cocaine because of the paranoia resulting from the use of these drugs, but most violence associated with drugs centres on [alcohol] (quoted, chapter 25 of Charleton and McDermott on Criminal Law and Evidence (Dublin, 2020)).

19. Regrettably, these were prescient words that may be considered in the context of the current appeal. It is easy to attack the *Majewski* analysis on the basis that it is a fundamental principle of criminal law that every crime which is not a regulatory offence, one of absolute or strict liability, requires a mental element. Hence, assault can be committed by recklessness but that is a state of mind requiring culpable awareness that, for instance, putting acid into a hand dryer in a toilet may injure someone's hands or face. That mental state of recklessness could be argued to be as much a mental element as an intent to kill since it is unlikely that someone takes a lethal weapon to a victim without the purpose of killing or seriously injuring that person. In point of fact, in the first example, the foresight from which recklessness is to be inferred might be more easily deduced than the actions of a woman in a temper who picks up a knife on her abusive domestic partner. Clarkson, in Understanding Criminal Law (2nd edition, London, 1983) at p 499 illustrates this in the context of the then law of inadvertent recklessness as it then applied in England:

> This approach would have caused no problems if the law had simply stated that murder was in a special position and drunkenness was a partial excuse thereto, reducing liability to manslaughter. But instead, by adopting the broader stance,

> that intoxication was a defence to all crimes of specific intention, the law was thrown into confusion. Having developed this absurd and meaningless construct, the law found itself having to define it. What was a crime of specific intent? The judicial tale of attempts to define crimes as specific intent verges at times on the theatre of the absurd (Beard, 1920; *Gallagher*, 1963; *Bratty*, 1963; *Majewski*, 1977) and cannot be recounted here. Suffice it to conclude that the cumulative effect of these cases and *Caldwell* (1982) is as follows: Drunkenness is only a defence to crime of specific intent. These are crimes that can only be committed *intentionally*, and in which the mens rea extends beyond the *actus reus*. The defendant must intend to do something more than that which is specified in the *actus reus*.

20. And it is true, as many academic commentators argue, that Lord Birkenhead's original analysis in *Director of Public Prosecutions v Beard* can be made to take on a tortured meaning and a life of its own. This emerges from Lord Simon's discussion of what is meant by crimes of specific and basic intent in *R v Morgan* at 216-7:

> By 'crimes of basic intent' I mean those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*. The *actus reus* generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in the *actus reus*. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The *actus reus* of assault is an act which causes another person to apprehend immediate and unlawful violence. The mens rea corresponds exactly ... On the other hand there are crimes of ulterior intent - 'ulterior' because the mens rea goes beyond contemplation of the *actus reus*. For example, in the crime of wounding with intent to cause grievous bodily harm, the *actus reus* is the wounding. The prosecution must prove a corresponding *mens rea* (as with unlawful wounding), but the prosecution must go further: it must show that the accused foresaw that serious physical injury would probably be a consequence of his act, or would possibly be so, that being a purpose of his act.

21. Essentially, however, this resolution between logic and policy has devolved from choices made by the courts in the formulation of the common law. Prior to *Director of Public Prosecutions v Beard*, it was doubtful if even automatism brought on by intoxication afforded any excuse where the consumption of the mind-altering substance was voluntary. After that, the law was interpreted, until *Director of Public Prosecutions v. Majewsk*i, as requiring that the accused did not just not have malice aforethought for murder, as it was then called, in consequence of voluntary intoxication but that he or she could not so intend. In other words, incapacity was first of all irrelevant in consequence of intoxication, then from *Beard* it became the sole test until finally, in *Majewski*, the test became one of fact as to whether whatever capacity might remain in consequence of

intoxication was exercised so as to intend to kill or cause serious injury. Regrettably, this is where the trial judge stated the law incorrectly to the jury.

22. A more basic question in relation to murder, which almost always, unless it is a poisoning case, takes place due to an assault with a weapon, is whether the accused may properly be convicted of assault notwithstanding that, by reason of his or her self-induced intoxication, the act alleged to constitute the assault was not intended at all. The law, as set out in *The People (DPP) v Reilly*, will not excuse the fundamental action of assault though, if the intent to kill or cause serious injury is missing in fact, due to self-administered mind-altering substances, it will reduce murder to manslaughter. The House of Lords in *Director of Public Prosecutions v Majewski* answered that question in the same way. Lord Salmon stated that logic in human affairs was an uncertain guide and a very dangerous master, and indicated that although the rule adopted by the House of Lords was illogical it was acceptable because the alternative was imperilling the safety of the public peace. The House of Lords decision was a refinement of the rule stated in *Beard*, that evidence of self-induced intoxication negativing the mental element is a defence to a charge of a crime or crimes of specific intent but not to a charge of any other crime. Thus, for an accused charged with the crime of basic intent, to adduce evidence of self-induced intoxication would not answer the charge.

Drunken intent

23. Two other points might be useful to mention. Firstly, as the trial judge told the jury in *The People (DPP) v Reilly*, and as explained earlier, a drunken intent is still an intent. Further, it is clear what policy choice was made by the Oireachtas in the Criminal Law (Insanity) Act 2006. This further constricts the courts in reanalysing the problem of drunkenness and the mental element of crime in a way which resets the law to accord with an intent or not, recklessness or not, test that would make the culpability of taking drink and drugs depend on whether the accused, possibly very young like Celyn Eadon in this appeal, foresaw, and thus might be inferred to have intended or to have been reckless, that violent conduct would result from his indulgence of intoxicating spirits or substances. It is clear from s 1 of the 2006 Act that intoxication is excluded from being considered as a mental disorder. This is a clear policy choice made by the Oireachtas and was made in a piece of legislation relating specifically to the effect of intoxication on criminal culpability. Both diminished responsibility and the law as to the defence of intoxication therefore run on parallel tracks. Even though capacity for control is diminished by alcohol consumption, this is not a defence that may be run under the rubric of diminished responsibility as provided for in the 2006 Act. Furthermore, being drunk and being violent leaves the violence culpable. Any crime, such as rape or forms of robbery or theft, and intentional assaults, is thus punishable. Intentional assaults done with the realisation that death or serious injury will result remain a state of mind from which intention under s 4 of the Criminal Justice Act 1964 may be inferred.

24. Hence, to use an extreme example, since murder may not, by many people, be easily contemplated or carried out, to use alcohol to assist in the accomplishment of this act has no effect on criminal liability. The best-known instance of this is *A-G for Northern Ireland*

v Gallagher [1963] AC 349. There, the accused suffered from a personality disorder and a mental illness which manifested itself in periodic explosive outbursts, which, to his knowledge and that of and all who knew him, erupted when he had consumed alcohol. On the day of his release from a mental hospital he purchased a knife and a bottle of whiskey and was seen cycling towards his former home. Later he arrived at a neighbour's house and said he had killed his wife, the greater part of the bottle of whiskey having been consumed either before or after the killing or both. According to Lord Denning:

> If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do.

25. This case is the main illustration for the principle that a drunken intent is still an intent. That emphasises that the true question for the jury where drunkenness is run as a defence in a crime requiring a specific intent is whether the accused intended that element of the crime. The second point concerns automatism. While the decision in *R v Lipman* [1970] QB 152 has been much criticised by academic commentators in England, the underlying logic, that voluntary intoxication causing a person to temporarily go out of their mind does not excuse homicide, but reduces the offence to manslaughter, remains sound. In *Lipman*, the accused strangled the victim, his girlfriend, on an LSD trip. His evidence was that he did not know the victim was a human being but that, in terms of his distorted consciousness, he believed that he was wrestling with snakes in the underworld. Some commentators claim that what they describe as his complete absence of a mental element was ignored by the Court of Criminal Appeal and that the judgment amounted to a redrawing of the principles of criminal law. If one takes the principle, that argument goes, that a crime cannot be committed without a mental element as beyond argument, then the absence of a mental element cannot be used to justify a conviction for an act perpetrated without the will of an accused while on a drugs trip. If, on the other hand, the counter-argument runs, the use of such a drug is commonly known to cause aggression, or to bring a person under its influence to behave aggressively, or perhaps to behave unpredictably, such foresight in an accused may be evidence capable of being regarded by a jury as amounting to a reckless disregard by the accused of the consequences of his actions. The abuse of such a drug, if death results from it to another party at the hands of the drug taker, can be criminal negligence.

Involuntary intoxication

26. Non-voluntary intoxication, as where a man slips pharmaceuticals into another man's drink at a party, with violent consequences, is treated of a different order than the kind of conduct illustrated in *The People (DPP) v Reilly*. There the accused spent the night

drinking over several hours, only going to bed early in the morning. He had a knife in his possession and during the night he got up and stabbed to death a sleeping baby in the same room. The accused was found so asleep in the morning that throwing a bucket of water over him was the only way to rouse him. He was found guilty of manslaughter. Involuntary intoxication, however, has always been looked at differently to what happened in that case. The Law Reform Commission has taken the view that involuntary intoxication can give rise to a full defence to a criminal charge which may be committed by intention, recklessness or criminal negligence; Law Reform Commission, Report on Intoxication (LRC 51-1979) page 11. Intoxication offences of strict liability, for example, drunken driving are, in the opinion of the Law Reform Commission, excluded from this analysis, and this reasoning seems unimpeachable and to accord with the existing precedents as to strict liability.

27. In *The People (DPP) v Murphy* (Unreported, Court of Criminal Appeal, 8 July 2003), the defendant was convicted of three counts of manslaughter and various counts of arson on Innisboffin in County Galway and sentenced to 14 years imprisonment. The accused had set fire to a house. The fire had killed three sisters. At the trial, there was evidence of a motive relating to being excluded from a bar. The accused was on painkillers for a rib fracture and had been drinking in two pubs whilst waiting for the ferry and, on arriving on the island, he had spent the night drinking in a bar, which he had eventually been told to leave. Witnesses had described his behaviour as strange and also described him as showing signs of alcohol intoxication and some thought that he may have been drugged as well. At trial, automatism was not raised but involuntary intoxication was pleaded as an aspect of that defence. However, the jury did not act on that defence. The Court of Criminal Appeal held that the trial judge had properly directed the jury on the issue:

> The charge was along the lines, firstly, that the issue or hypothesis of involuntary intoxication had been sufficiently raised and the prosecution had to negate it beyond a reasonable doubt. As to the law on the topic itself it was said that "… The law on this matter … seems to be that if one is so intoxicated, involuntarily or innocently, to the extent that one doesn't know what one is doing and one has no control over one's actions, that can be used as a defence … So the test is, does a person who is innocently intoxicated, know what he is doing or have control over his acts? Then he cannot avail himself of this defence notwithstanding that he is so intoxicated."

28. On the facts, the Court concluded that "it was plainly within the scope of the jury to be satisfied that intoxication, whether voluntary or involuntary did not exist to the required degree and/or that any intoxication was voluntary." This issue was also considered in McCracken J's judgment in *The People (DPP) v Reilly*. According to the conclusion at p 120, if the question was whether or not voluntary intoxication in itself was a defence to a criminal charge, "this court would have no hesitation in answering "no"." But, as to automatism, the court continued, making the entire passage worth quoting:

> It should be made very clear what this Court is being asked to decide. The question is not whether intoxication is in itself a defence to a charge of manslaughter, and indeed if that were the question this Court would have no hesitation in answering 'No'. Neither is the question whether automatism may ever be a defence to a charge of manslaughter. This Court accepts that there are circumstances in which it may be a defence and indeed this was clearly the direction given by the learned trial judge to the jury in the present case. He emphasised that the jury should acquit if there was a free standing situation where the accused was not in control of himself. The issue is whether the jury could or should acquit if there was a situation where the accused at the time of the death of [the baby] was in a condition where he could not control himself or prevent the actions that led to the death of [the baby] but where such condition was brought about by the accused's excessive consumption of alcohol. If those circumstances afford a defence to the accused, then clearly the issue of whether the facts supported that defence should have been left to the jury.

Summary

29. In terms of future instructions to juries, it is very hard to improve on the direction of Carney J in the *Reilly* case, where he was also the trial judge. This direction makes it clear that voluntary consumption of alcohol or other intoxicants, such as drugs, cannot excuse or lessen culpability for homicide. Involuntary consumption is a different issue, but that has not come before the court in this case. Voluntary consumption of alcohol, whereby the accused did not in fact intend to kill or cause serious injury, can reduce the crime of murder to manslaughter. The culpability associated with killing another person by getting oneself into such a state where there are predicted consequences of labile emotions and violence, can be reflected in the sentence. But, that is not something that the jury should be concerned with. This was the direction of Carney J in *Reilly* which he did not repeat in this case:

> So you acquit if he didn't kill [the baby] or if there is a doubt about that. You acquit if he wasn't in control of his actions and couldn't prevent himself doing what he did. But that contemplates a freestanding situation of not being in control of himself. If that situation came about through the voluntary consumption of alcohol you have to look at the place of intoxication in the criminal law. By voluntary consumption of alcohol I mean taking a drink when one chose to take it and had a free choice about taking it or not. That contrasts with the situation where your drink is spiked. The situation about drink is that intoxication is not a defence in the criminal law. It is incapable of amounting to a defence but it is material to the question of intent. ... Intoxication could prevent the accused person having the intent that is necessary to sustain the crime of murder. If he didn't have that intent, you would be concerned with the crime of manslaughter. …You had a lot of expert evidence in relation to things happening during sleep and if you do something that you have no control over, say the epileptic or the diabetic in a hypo or a hyper as the case may be, if they do something that they absolutely have no control over then they do not have criminal liability for that. You must do something by having a free choice, even a

> drunken free choice, to incur criminal liability for it. So we had evidence from these experts in relation to the various conditions that can arise ... But I left it open to you that if you found a free standing situation in which the accused had no control over his actions, then he would not be criminally liable and he would be entitled to a verdict of not guilty. But if that situation has come about because of his voluntary consumption of alcohol then you look instead to the law of intoxication .... If you think whatever condition arose in this case arose from the voluntary consumption of alcohol then you look at the law of intoxication and that does not afford a defence against manslaughter.

Result

30. In the case under appeal, there was an incorrect direction by the trial judge on intoxication mixing up a lack of capacity with a lack of intent. The above-quoted direction made no such error and is a useful precedent, even in shortened form, since the second part arose from a question from the jury. In the result of the present case, there should be an order overturning the decision of the Court of Appeal and returning the prosecution to the Central Criminal Court so that a decision can be made by the Director of Public Prosecutions as to whether to retry the accused for murder or whether the existing plea of guilty to manslaughter is acceptable in all the circumstances.