DRUG USE AND THE DEFENCE OF MENTAL IMPAIRMENT: SOME CONCEPTUAL AND EXPLANATORY ISSUES

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Recent work has highlighted the problem of amphetamine use in Queensland. In particular, concern has been expressed in relation to what has been described as a 'disturbing trend' towards the provision of exculpatory defences based on findings of 'amphetamine-induced psychosis'. While the subject of a spate of cases before the then Queensland Mental Health Tribunal, instances of drug induced psychosis are not restricted to Queensland. Similar issues have arisen in the context of the Victorian Law Reform Commission's recent analysis of people with mentally impaired functioning who kill. What has become apparent in both case law and reform proposals dealing with this area is the interconnectedness of issues of principle and policy. The present article endeavours to clarify the thicket of conceptual and explanatory issues underlying voluntary drug use and the subsequent raising of a defence of non-responsibility.

Introduction

In a recent article Russ Scott and William Kingswell have drawn attention to certain problems associated with what they describe as 'amphetamine-induced psychosis'.[1] According to the authors such a condition is characterised by two distinct types: an acute onset psychotic state that resolves when the individual stops using the drug, and a chronic psychotic state occurring with a history of prolonged usage.[2] From a forensic point of view it is distinguishing between 'intoxication', 'psychosis' and the

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1 R Scott and W Kingswell, 'Amphetamines, Psychosis and the Insanity Defence: Disturbing Trends in Queensland' (2003) 23 *Queensland Lawyer* 151.

2 Ibid 4.

legal definition of 'mental disease' that is most problematic. Of particular concern is the question of whether, given a psychobiological point at which a mental disorder exists independently of the consumption of a drug, this should give rise to a defence of mental impairment?[3]

The growing use of amphetamines Australia-wide cannot be gainsaid. Figures released by the Australian Institute of Criminology last year indicate that an overview of arrest patterns for offenders between 1995-6 and 2003-4 reveal that 'arrests for amphetamines have almost doubled'.[4] The difficulties faced by forensic psychiatrists, lawyers and policy makers in the face of such an ever-growing problem have been the subject of a recent paper.[5] Rather than rehearse these broad concerns the present paper endeavours to explore some of the underlying conceptual issues faced by legal theorists in responding to the voluntary consumption of psychoactive drugs.

As a starting point it is important to distinguish between two distinct types of question. On the one hand is the question of whether a diagnosable mental disorder exists independently of the consumption of the drugs. Such a question is clearly a matter for expert evidence. On the other hand, is the question whether a defence of mental impairment should be available to an accused who has voluntarily chosen to consume drugs? In particular, should such an individual's mental state at the time of the offence be taken into account? These two latter questions form the focal point of the ensuing discussion. Indeed it is a principal contention of this paper that both of these last two questions raise normative issues falling outside the purview of contemporary clinical research.

In order to answer these questions this paper will critically examine three approaches that have been adopted in assigning criminal responsibility in situations of drug related states of mental impairment.[6] The first approach is one espoused by the Victorian Law Reform Commission during its examination of homicide offences committed by people with mentally impaired functioning.[7] Succinctly stated, the Commission adopted the view that the causal antecedents of an accused's behaviour are extraneous to the question of his or her culpability. According to the Commission

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3 'Mental Impairment' is the terminology employed in the Victorian statute *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997, s 20, replacing the common law defence of insanity.

4 Australian Institute of Criminology, *Australian Crime: Facts and Figures* (2006) 42.

5 A Carroll, B McSherry, D Wood and S Yannoulidis, 'Drug-Associated Psychoses and Criminal Responsibility' in *Psychology, Public Policy and Law* [in press].

6 See ibid.

7 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 203-52.

if there is a cognitive failure on the part of an accused non-responsibility should follow as a matter of principle.

The VLRC view that cause is irrelevant to the question of an accused's culpability is diametrically opposed to the second approach adopted in such cases. This is the view put forward by Edward Mitchell in the course of his discussion of the notion of 'meta-responsibility'.[8] Focusing on prior conduct Mitchell would hold an accused responsible where he or she has engaged in prior culpable behaviour that in turn constitutes the conditions of the defence relied upon. Mitchell's views will be examined in Part IV below.

The third approach I will consider is one that has found favour with some American theorists who have called for a test of 'settled insanity'.[9] This latter approach is predicated on a finding of a state of mental impairment subsequent to drug use. Such theorists argue that such a state may be ascertained either through evidence of a fixed, stable state independent of drug use, or upon a demonstrated predisposition to psychosis. A consideration of both these views will form the substance of Part V.

Prior to considering the relative merits of each of these views by way of introduction I propose to outline certain general principles of criminal responsibility. Such principles, while necessarily contentious at points, will nevertheless facilitate the ensuing discussion by providing a normative background. The application of these principles to the highly specific defence of mental impairment will in turn form the final part of the expository section. Concluding remarks will endeavour to provide an overview of the preceding analysis and in so doing place in better focus the true nature of the enquiry.

General Principles

(a) Criminal Responsibility: Criminal responsibility requires an account of the conditions that lead to the attribution of fault for particular actions by an individual.

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8 Edward Mitchell, 'Meta-Responsibility and mental disorder: causing the conditions of one's own insanity plea' (1999) 10 *Journal of Forensic Psychiatry* 597; *Self-Made Madness: Re-thinking Illness and Criminal Responsibility* (2004); 'Culpability for inducing mental states: The insanity defence of Dr Jekyll' (2004) 32(1) *The Journal of The American Academy of Psychiatry and the Law* 63.

9 J Reid Meloy, 'Voluntary Intoxication and the insanity defence' (1992) Spring *The Journal of Psychiatry and Law* 439.

Two such accounts are termed 'subjective' and 'objective'.[10] These accounts are distinguished on the basis of the criteria each employs in ascribing proscribed acts to a particular actor. 'Subjectivist' accounts seek to utilise subjective terms in such ascriptions while 'objectivist' accounts employ terms of an objective character.[11]

Further, subjectivist accounts may be divided into analyses involving a focus on either 'choice' or 'character'. A choice analysis highlights actions which an agent has chosen as being truly his or her own. In contrast, a character analysis seeks to underpin ascriptions of action to an individual on the basis of his or her character traits. Such traits, according to a character theorist, are revealed in his or her dispositions, attitudes or motivations.[12] Yet, it has been maintained that such a focus on character misses the true focus of liability, namely, action. This is readily apparent from the fact that proscribed action extends to behaviour that may be viewed as 'out of character'. As Antony Duff has noted, criminal action is not merely evidence from which guilt is to be inferred but in fact constitutes criminal guilt.[13] It may be noted that the force of this point applies equally to a choice theorist's ascription of criminal action on the basis of an individual's choice.

Yet, the apparent conflict between these two subjectivist accounts, choice and character, stems from a false dichotomy between what a person 'is' and what he or she 'does'. As Silber has argued, 'what a man [or woman] does is a function of what he [or she], in the context of his [or her] situation, is, and what he [or she] is within this context is revealed by what he [or she] does'.[14] An individual's criminal responsibility is not determined by either his or her choice or character but action. Such action reveals, as the action of an independent agent, some inappropriate attitude towards the values the law protects.[15]

The following analysis will take, for ease of explication, the choice theory account of fault. As noted above, the choice theory ascribes actions to an individual on the basis

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10 See Allan Norrie, 'Subjectivism, Objectivism, and the Limits of Criminal Recklessness' (1992) 12 *Oxford Journal of Legal Studies* 45.

11 R Antony Duff, 'Subjectivism, Objectivism and Attempts' in AP Simester, ATH Smith (eds), *Harm and Culpability* (1996) 19, 20.

12 Peter Arenella, 'Character, Choice and Moral Agency' in EF Paul (ed) *Crime, Culpability, and Remedy* (1990) 78.

13 R Antony Duff 'Choice, Character and Criminal Liability' (1993) 12 *Law and Philosophy* 345, 379.

14 J R Silber, 'Being and Doing: A Study of Status Responsibility and Voluntary Responsibility' (1967) 35 *University of Chicago Law Review* 47, 65 (emphasis in original).

15 Duff, above n 13, 380.

of his or her choices.[16] Such choices belong to an individual to the extent that they manifest his or her *intentions* and *beliefs*. As expressed by Ashworth agents should be held 'criminally liable for what they chose to do, and not according to what actually did or did not occur' and must be 'judged on the basis of what they believed they were doing, not on the basis of actual facts and circumstances which were not known to them at the time'.[17] What is required as a necessary precondition of criminal liability is subjective advertence. In the absence of such advertence there can be no liability.[18]

In contrast, an objectivist ascribes actions to an individual on the basis of one of two aspects of action, namely,[19] a result which occurs in the real world due to the action being performed, or what a 'reasonable' person would believe or realise would be the result of performing such an action. Hence, an objectivist will focus on what an individual actually does as distinct from whether he or she has adverted to what is done.[20]

The distinctions alluded to above between the different bases of ascription are made most apparent when we come to consider the various fault elements of an offence. So, for example, it may be noted that recklessness is often viewed as the minimum fault requirement for a criminal offence.[21] This is exemplified by the Commonwealth Criminal Code which proceeds on the basis that conscious advertence is a precondition of criminal liability.[22] Hence, in the context of a result-crime what is required is advertence on the part of the accused individual as to the consequence ensuing in the completed offence.[23]

Such recklessness has two aspects, namely, a mental element and a failure to comply with a standard of conduct.[24] Moreover, the former mental element is comprised of both deliberation and knowledge. That is, reckless conduct in addition to being

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16 Ibid.

17 Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm' (1988) 19 *Rutgers Law Journal* 725, 736.

18 Simester, Smith, above n 11, 8.

19 Duff, above n 11, 21.

20 Simester, Smith, above n 11, 8.

21 Cp *Criminal Code* 1995 s 5.4 (4).

22 Ian Leader-Elliott, The Commonwealth Criminal Code: A Guide for Practitioners (2002) 73.

23 *Criminal Code* 1995 (Cth) s 5.4(2); Cp s 5.4(4): 'If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element'.

24 Peter Cane, *Responsibility in Law and Morality* (2002) 80 for the following analysis of respective fault elements.

deliberate also requires an awareness of a risk that is unreasonable in the particular circumstances. The requisite degree of such risk, while a matter of some contention, is considered by many analysts to require the possibility of a given result ensuing. [25]

In contrast to the subjective advertence required for the fault element of recklessness, negligence consists of a failure to reach a standard of conduct. The requisite standard requires that reasonable care be taken in the course of engaging in a given activity. Hence, negligence is the failure to take reasonable precautions against a foreseeable risk of injury.[26] However, such failure to meet the requisite standard will warrant censure only where it may be characterised as 'gross'. It has been remarked that such a requirement is meant to 'blunt the argument that justice requires advertent wrongdoing before criminal liability is imposed'.[27] It is only in taking such grossly obvious risks that liability ensues, for such risks would be readily apparent to a reasonable person in like circumstances. [28]

Clearly, such a basis for ascription runs counter to the subjectivist dictum calling for advertence.[29] However, equally clear from the objectivist viewpoint is the argument that the very unreasonableness of the behaviour engaged in warrants condemnation notwithstanding any failure of advertence on the part of the accused.[30]

(b) Mental Impairment and Criminal Responsibility: The M'Naghten Rules,[31] establish that cognitive incapacity, 'defect of reason', must be caused by a 'disease of the mind'. That is, a causal link between an accused's impaired reasoning and an underlying 'disease' is required.

What will constitute a 'disease of the mind' is a matter to be determined by law not psychiatry.[32] The relevant question is not whether the accused suffers from a diagnosable mental illness, but rather whether there is an adequate degree of impairment.[33] As expressed by Glanville Williams, insanity is a social judgment

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25 Simon Bronnitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 183, for all offences other than murder.

26 Cane, above n 24, 80.

27 Leader-Elliott, above n 13, 85 citing *The Queen v Nydam* [1977] VR 430.

28 Cane, above n 24, 80.

29 Jerome Hall, 'Negligent Behaviour should be Excluded from Penal Liability' (1963) 63 *Columbia LR* 632.

30 Michael Moore, 'Choice, Character and Excuse' in EF Paul et al above n 12, 29 at 58.

31 *R v M'Naghten* (1843) 4 St Tr (ns) 847.

32 *R v Kemp* [1957] QB 399,406.

33 *R v Sullivan* [1984] AC 156.

founded upon but not precisely representing, a medical diagnosis.[34] The issue of whether such impairment satisfies the legal definition of 'disease of the mind' is at all times a question of law not fact. [35] What remains a question of fact for the purposes of analysis is whether the accused suffered from a 'disease of the mind' at the relevant time in question.[36] This latter factual question will be the subject of expert evidence.[37]

No organic basis, in the sense of physical pathology, need be established for the condition under which the accused may be said to be suffering. Yet, what is called for is that the 'functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder'.[38] 'Disease of the mind' will cover all conditions recognised by psychiatry,[39] including those with a physical basis such as arteriosclerosis,[40] epilepsy,[41] and diabetes. [42] Nevertheless, 'the condition of the brain is [ultimately] irrelevant as is the question of whether the condition of the mind is curable or incurable, transitory or permanent'.[43]

Hence, it has been said that the limits to the notion of 'disease of the mind' are determined by the concept of pathology.[44] As a result 'conditions of intense passion and other transient states attributable to the fault or to the nature of man' do not constitute a 'disease of the mind'. [45] Such latter conditions may be characterised as 'the reaction of a healthy mind to extraordinary external stimuli'.[46]

McAuley and McCutcheon have noted several reasons why the law of insanity is not coextensive with the psychiatric conception of mental disorder.[47] The authors note the following. First, legal insanity is an excuse for wrongdoing, not a diagnosis of the

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34 Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 644.

35 *R v Kemp* [1957] 1QB 399, 406; *R v Falconer* (1990) 171 CLR 30, 48-9.

36 *R v Porter* (1933) 55 CLR 182, 188.

37 *R v Bromage* [1991] 1Qd R 1, 6.

38 *R v Porter* (1933) 55 CLR 182,189.

39 Owen Dixon, 'A Legacy of Hadfield, McNaghten and Maclean' (1957) 31 *Australian Law Journal* 255, 260.

40 *R v Kemp* [1957] QB 399.

41 Bratty v A-G for Northern Ireland [1963] AC 386.

42 *R v Quick* [1973] QB 910.

43 *R v Kemp* [1957] 1 QB 399, 407.

44 Finbarr Mc Auley and John Paul McCutchen, *Ciriminal Liability* (2000) 683.

45 Dixon, above n 39, 260.

46 *R v Radford* (1985) 42 SASR 266, 274, (approved *R v Falconer* (1990) 171 CLR 30).

47 Mc Auley, McCutchen, above n 44, 638-44 from where the following analysis is taken.

accused's mental condition. As such, the scope of the defence is not amenable to expert evidence alone.[48]

Secondly, something more than an organic basis is required, it being the degree of impairment not its cause that is determinative. The legal construct, 'disease of the mind', operates as a criterion of non-responsibility. It provides a means by which to distinguish exculpatory from non-exculpatory conditions. [49] The legal issue remains whether the accused's ' illness' is sufficient to exculpate, not whether it satisfies a recognised diagnostic category.[50]

Thirdly, it must be shown that such a 'disease of the mind' was the cause of the wrongdoing.[51] That is, the defence of insanity must be connected with the proscribed conduct if it is to have any exculpatory force.

Fourthly, the insanity defence at common law is not to be confused with the 'product test'. This latter test seeks to provide an excuse to an accused 'if his [or her] unlawful act was the product of mental disease or mental defect'.[52] Such an argument is misconceived in that it fails to account for the way in which disease affects action. According to the 'product test' any organically determinable condition causing a particular reaction will exonerate. This will be the case whether or not the particular individual concerned could have refrained from reacting in that particular way. [53] Yet, as Morse has noted, such an analysis confuses causation with excuse. For, causation is not necessarily compulsion. Succinctly put, 'if causation were an excuse, no one would be held responsible for any behaviour, criminal or not'.[54]

The manner in which physical disease operates in excusing an individual differs from that in the case of mental disorder. In the former instance excuse stems from the fact that an individual is acted upon rather than acting. That is, there is nothing which an individual suffering from a physical disease actually does. While there may be, for example, in the instance of Parkinson's disease a movement by the agent, such

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48 Jennifer Radden, *Madness and Reason* (1985) 28.

49 Ian G Campbell, Mental Disorder and Criminal Law in Australia and New Zealand (1988) 128.

50 McAuley and McCutcheon, above n 44, 640.

51 *R v Kemp* [1957] QB 399, 407 per Devlin J.

52 *Durham v United States* (1954) 214 F.2d 862, 874.

53 McAuley and McCutcheon, above n 44, 641-4.

54 Stephen J Morse, ' Excusing the Crazy: The Insanity Defense Reconsidered' [1985] 58 Southern California Law Review 777, 789; Cp Michael Moore *Law and Psychiatry: Rethinking the Relationship* (1984) 362.

movement is not an action of the individual. However, this is not the manner in which mental 'disease' operates.

In the instance of mental disorders the 'disease' manifests itself through the individual's psychological state. Such states consist of that individual's desires, beliefs and intentions. Responsibility in relation to these states is not automatically negated because of the existence of an underlying 'disease'. Such reasoning would follow only where the claim 'Mental disorder is not blameworthy' is held to entail the belief that 'Mental disorder mitigates blame for wrongdoing'.[55] Yet, this need not necessarily follow as an individual's behaviour may be condemned even where such behaviour is recognised as part of his or her character. It may be such an individual's very failure to keep such characteristics in check, assuming that others would be able to do so, which grounds our condemnation.[56]

The legal construct, 'disease of the mind', depends on an overly broad conception of disorder as a criterion of responsibility: where such disorder is deemed to deprive the accused of certain capacities he or she is held non-responsible. Such breadth of application has been restricted, however, by explicit recourse to policy-oriented questions pertaining to an individual's future dangerousness and his or her disposition. McSherry has noted three tests that have been explicitly referred to in case law relating to the 'threshold question of did the accused at the time of the commission of the offence suffer from a disease of the mind?'[57]

The *recurrence test*[58] which focuses attention on the likelihood of the operative mental state's recurrence; in cases where such a condition is likely to recur it may be characterised as a 'disease of the mind';

the *internal/external test*[59] seeking to delimit the characterisation of 'disease of the mind' to mental states which have an internal rather than an external aetiology; and

the *sound/ unsound mind test*[60] where the characterisation 'disease of the mind' describes the responses of an unsound mind to both its own internal and any external stimuli.

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55 See,Radden, above n 48, 30-3.

56 McAuley and McCutcheon, above n 44, 643.

57 Bernadette McSherry, 'Defining What is a "Disease of the Mind": The Untenability of Current Legal Interpretations' (1993) 1 *Journal of Law and Medicine* 76, 82-89.

58 *Bratty v Attorney General for Northern Ireland* [1963] AC 386.

59 *R v Rabey* (1977) 37 CCC (2d) 461; *R v Hennessy* [1989] 1 WLR 287.

60 *R v Falconer* (1990) 171 CLR 30.

As previously noted, the legal construct 'disease of the mind' is restricted by application of a policy-oriented question. Succinctly stated, this involves an enquiry as to the 'dangerousness' of a given individual. Where it is held that such an individual is likely to harm others his or her mental condition will be characterised as a 'disease of the mind'. While no longer held responsible, such an individual will be the object of a therapeutic regime.

The following three sections will analyse several approaches that have been adopted in assigning criminal responsibility in cases of drug-induced states of mental impairment.

Causal Irrelevance

In the context of their discussion of people with mentally impaired functioning who kill the Victorian Law Reform Commission (VLRC) turned its attention to clarifying the current scope of mental impairment.[61] The VLRC objected in particular to the Supreme Court of Victoria's interpretation of 'mental impairment' as being 'merely a legislative restatement of the common law'.[62] The Commission argued that adopting a common law definition of mental impairment will not provide a sufficient level of flexibility in the application of the defence.[63] By way of example the Commission cited the case of *R v Sebalj* [64] where the accused was found guilty of murder while in a psychotic state directly related to drug use. During the course of treating his addiction the accused killed his girlfriend. As the accused's psychosis had arisen due to drug use, the court held that it did not fit the definition of 'mental impairment'[65] which, following the common law, required the illness to be a 'disease of the mind'.[66] Not able to use the defence of 'mental impairment' the accused was sentenced to 15 years imprisonment for murder.[67]

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61 VLRC op cit n 7, 203-52, 213 para 5.34.

62 Ibid para 5.34 citing *The Queen v R* [2003] VSC 187 (Unreported, Supreme Court of Victoria, Teague J, 5 March 2003), *The Queen v Sebalj* [2003] VSC 181 (Unreported, Supreme Court of Victoria, Smith J, 5 June 2003).

63 Ibid para 5.35.

64 [2003] VSC 181.

65 The term 'mental illness' while not defined appears in *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, s 20.

66 *The Queen v Sebalj* [2003] VSC 181 para 14 per Smith J.

67 *The Queen v Sebalj* [2004] VSC 212 (11 June 2004) per Williams J.

The Commission noted that there are several objections to allowing a person whose psychosis is induced by alcohol or drugs to rely on mental impairment. In particular 'there is a moral argument that a person ought not to be able to raise the mental impairment defence if they were responsible for causing their condition'.[68] The Commission stated that it did not think this should be a 'consideration in applying the defence of mental impairment'.[69] By way of argument they drew an analogy with current Victorian law in regards to gross intoxication. They noted that *O'Connor*,[70] as the leading case in Victoria, was authority for the view that where an accused's state of intoxication is such as to preclude the capacity to form an intention, he or she must be acquitted. By parity of reasoning the Commission argued an accused's drug-induced state of mental impairment should, where the requisite incapacity is established, lead to a like acquittal.[71]

As a result, the Commission noted, on the current approach in Victoria accused who are so intoxicated that they cannot form an intention to commit a crime cannot be held criminally liable. Yet, the Commission went on to note, accused who are so intoxicated or affected by drugs that they experience a psychotic episode, such that they are either unable to understand what they are doing or that it is wrong, may be held criminally responsible.[72]

The Commission remarked on two principal issues which render drug related states of mental impairment particularly problematic. As the Commission put it, there is a great deal of difficulty in delimiting the notion of responsibility.[73] For example, in the case of *Sebalj* the accused was responsible for the psychosis as he had chosen to engage in the use of drugs the effects of which ultimately had brought on a psychotic episode.

Secondly, the Commission remarked on the fact that the court's ruling on mental impairment in the case of *Sebalj* failed to acknowledge the defence's true purpose. Such purpose, according to the Commission, would preclude taking into account the causal antecedent of the state of impairment. What is critical for the operation of the defence is the cognitive deficiency that gives rise to the requisite incapacities, not how such deficiency came about.[74] An examination of these two issues, that of

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68 VLRC op cit n 7, 214 para 5.37.

69 Ibid 215 para 5.40.

70 *The Queen v O'Connor* (1980) 146 CLR 64.

71 VLRC, above n 7, para 5.42.

72 Ibid.

73 VLRC, above n 7, para 5.43.

74 Ibid.

responsibility and the purpose of the mental impairment defence in the context of drug induced psychoses will be the subject of this section.

As stated above, the Commission remark on the fact that the notion of 'responsibility' in the context of *Sebalj* is difficult to limit. [75] In that case the accused was responsible for the psychoses as he had chosen to withdraw from drugs and it was that withdrawal which had brought on a psychotic episode. Whether an accused should be permitted to benefit from the excusing condition he or she brings about is a moral (and by implication legal) question.

Clearly, the Commission is correct in noting that there is a moral concern attendant upon allowing a person to benefit as a result of a condition that he or she has been responsible in producing.[76] Both subjectivist and objectivist accounts of criminal responsibility endeavour to answer such a concern. As noted above, a subjectivist requires as a necessary minimum for the ascription of actions to an accused, a degree of subjective advertence. Such advertence may be readily established in the context of drug taking given the widespread acknowledgment of the risks attendant on the use of drugs. Similarly, an objectivist account may view drug use that leads to criminal behaviour, in and of itself, commensurate with a degree of gross negligence. However, in both instances, subjectivist and objectivist alike, there is an assumption that the creation of the conditions under which an offence is committed is tantamount to an intention to commit or risk committing such an offence. This issue will be further discussed in the context of my analysis of the concept of 'prior fault', or 'meta-responsibility', in section IV below.

Implicit in the Court's judgment in the *Sebalj* case above is the choice of test used in response to the threshold question of did the accused at the time of the commission of the offence suffer from a 'disease of the mind'?[77] The Court seemed to favour the 'internal/external' test that provides that if the mental state operative at the time of the offence is 'internal' to the accused, as opposed to arising from an external cause, it should be defined as a disease of the mind.[78] The threshold question is policy-oriented asking in effect whether the accused is likely to cause harm to others if not confined? If so, then his or her mental condition will be considered to be a disease of the mind for the purposes of the mental impairment defence. It is implicit in the argument that

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75 Ibid.

76 Ibid, para 5.40.

77 McSherry, above n 57, 82-9.

78 *R v Rabey* (1977) 37 CCC (2d) 461; *R v Hennessy* [1989] 1 WLR 287.

only those with mental conditions arising from some internal source should be detained.[79]

Many of the current legal 'tests' utilise aspects of the conventional 'disease' model of mental impairment. The M'Naghten Rules[80] are limited by the fact that the exculpatory mental state of the accused must proceed from a disease of the mind. For example, in *R v Quick*[81] the Court stated that insane automatism, arises from a 'disease of the mind' which is a 'malfunctioning of [the] mind…caused by a bodily disorder in the nature of a disease'.[82] On the other hand, the Court held that 'non-insane' or 'sane' automatism is not due to a disease of the mind but is the result of 'the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences…'.[83]

However, as noted above, causal questions should be distinguished from questions of responsibility. It is not necessarily exculpatory to be informed in the context of mental states what the cause of the disorder is. The issue is not what was the cause but rather whether there has there been the requisite loss of capacity. For example, Mackay has remarked that in the case of somnambulism it is sleep itself that is the cause of the automatism.[84] As sleep is a 'normal' condition the accused's 'disorder' is internal.[85] However, as Mackay remarks, even if one accepts that sleepwalking can properly be described as pathological, there is still the problem that the cause of the impairment was sleep rather than sleepwalking itself. Mackay concludes by noting that unless the requirement of a causal link between disease of the mind and defect of reason within the *M'Naghten Rules* is to be disregarded in the case of sleepwalkers, it seems difficult to accept that a sleepwalker who is otherwise mentally normal should be classed as legally insane.[86]

The issue of an individual's rationality may be distinguished from the cause of his or her rationality. While the former is of concern to the question of responsibility the latter is not. Similarly, the cause of an individual's conduct is not of immediate concern in relation to his or her conduct. It has been remarked that where control is

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79 McSherry, above n 57, 89.

80 *R v M'Naghten* (1843) 4 St Tr (ns) 847.

81 [1973] 3 All ER 347; Cp *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523.

82 Ibid 356.

83 Ibid.

84 Ronald D Mackay, Mental Condition Defences in the Criminal Law (1995) 49.

85 *R v Burgess* 2 All ER 769, 775 per Lord Lane; *R v Parks* (1990) 78 CR (3d) 1, 19 per Galligan JA.

86 Mackay, above n 55, 50.

extant an individual may be responsible for a spontaneous reflex movement, even where such a movement is caused by disease.[87] As has been noted, so long as such control is in place an individual remains a fit subject of responsibility: control should not be confused with cause as an individual may be in control of his behaviour even where he or she has not caused it. Further, one need not be the cause of something to be in control of that thing. [88] This is made explicit in Frankfurt's account of action as responsible movement.

Frankfurt differentiates action from movement on the basis of an agent's being 'in touch with the movements of his [or her] body in a certain way'.[89] According to Frankfurt what is required for responsibility is 'guidance control'. Such guidance guides behaviour by subjecting it to adjustments compensating for the effects of interfering causes.[90] However, the operation of the guidance system is not dependant on the nature of the interfering causes. It has been remarked that as responsible agents individuals may be viewed as guidance systems responding to the demands of both law and morality. [91] A corollary of this is that as a guidance system the cause of any given individual's mental state and attendant action cannot be determinative of his or her responsibility.

Notwithstanding the above I would contend that the VLRC is mistaken in thinking that the underlying purpose of the insanity defence is satisfied by focusing exclusively on an individual's rational capacity.

It was noted above that the law's construct of disease does not reflect concepts of responsibility. 'Disease of the mind' as a disorder of the reasoning process leading to a specified lack of capacity is delimited in its application by means of the question of dangerousness and clinical intervention. However, as Campbell has noted, as a criterion of mental illness a concern with the disposition of those considered dangerous conflates two issues: the 'utilitarian' issue of what to do with the non-responsible dangerous individual and the moral issue of when to hold an individual criminally responsible.[92] The VLRC approach seeks to establish equivalence between

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87 *Ryan v The Queen* (1967) 40 ALJR 488, 505 per Windeyer J; ID Elliott 'Responsibility for Involuntary Acts: Ryan v The Queen' (1968) 41 *Australian Law Journal* 497,500.

88 S Shute, J Gardner and J Horder, 'Introduction: The Logic of Criminal Law' in Stephen Shute, John Gardner and Jeremy Horder (ed), *Action and Value in Criminal Law* (1993) 1, 19.

89 Harry Frankfurt, The Importance of What we Care About (1990) 71.

90 Michael Smith ,'Responsibility and Self-Control' in Peter Cane and J Gardner (ed), *Relating to Responsibility* (2001) 1, 12 noting 'back-up capacities'.

91 Shute, Gardner and Horder, above n 88, 19; See, Joseph Raz, *Practical Reason and Norms* (1990) 140-6.

92 Campbell, above n 49,129.

the notion of 'disease' and 'non-responsibility' absent consideration of any operative policy issues. The force of such policy issues and the way in which they impinge on questions of responsibility is transparent in the approach courts adopt to the issue of mens rea and insanity.

An accused raising a defence of mental impairment may argue a lack of mens rea where such a mental element is called for by the relevant offence. However, there has been reluctance on the part of courts to characterise such denials of fault as amounting to the prosecution case not being proved. Rather, courts have consistently 'refused to permit evidence of insanity to be used to support an argument of lack of mens rea independently of the insanity defence.'[93] The reason for this reluctance on the part of the courts stems from the fact that such an approach fails to pay heed to the policy questions at the heart of the insanity defence.

Similarly, the VLRC approach fails to acknowledge that the threshold question of what is a 'disease of the mind' is a policy question relating to the likelihood of social danger in the absence of clinical intervention. Recourse to an internal/external and recurrence test, while, as we shall see below, less than a complete safeguard, does nevertheless provide a means by which to ensure such societal protection.

In the following section I turn to a consideration of an approach that stands in marked contrast to the VLRC position, namely, Edward Mitchell's account of 'meta-responsibility'.

'Meta-Responsibility'

In his discussion of 'meta-responsibility', or a person's responsibility for non-responsibility, Mitchell begins by noting an historical precedent, namely Stephen's denial of an insanity defence to any person whose 'absence of the power of control has been produced by his [or her] own default'.[94] The idea of prior fault, according to Mitchell, finds further support in modern legal research, principally in the work of the American scholar Paul Robinson.[95]

In developing the concept Mitchell argues, first, that a defendant's culpability for his or her own meta-responsibility should be reflected in a denial of a mental condition

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93 Paul A Fairall, Stanley Yeo, *Criminal Law Defences in Australia* (4th ed, 2005) 267.

94 Mitchell (2004), above n 8, 66, citing Fitzjames Stephen, *A History of the Criminal Law of England* (1883).

95 Ibid 66, citing Paul H Robinson, 'Causing the Conditions of One's Own Defense' (1985) 71 *Virginia Law Review* 1.

defence.[96] Secondly, in responding to the question of how broadly to frame the time period during which one may look back to find such culpability Mitchell acknowledges 'that some practical limit will have to be set (on a case-by-case basis)'.[97] Such a search will, he claims, be necessarily delimited by an evidentiary test of relevance. Similar issues have been addressed by Paul Robinson in defending his own doctrine of 'creating the condition of one's own defence'.

According to Robinson, of primary interest is the question of whether an accused responsible for bringing about the conditions of his or her defence should be allowed to benefit from the defence? Robinson proposes a general principle to govern all instances of an accused's culpability in bringing about the conditions of his or her defence. Such a principle takes as the most critical factor an accused's culpability at the time he or she causes the conditions of his or her defence, rather than at the time of the offence.[98] On Robinson's analysis an accused will be provided with a defence for the immediate conduct constituted by the offence, but will be liable for the earlier conduct which culpably caused the conditions of the defence. Such a '*conduct-in-causing*' analysis ensures that an accused has an excuse or justification where he or she satisfies the conditions of such a defence.

Nevertheless, on Robinson's analysis, such an accused may be liable for the ultimate offence given that he or she has caused the excused conduct and has an accompanying culpable state of mind with respect to the commission of the offence. For example, a hypothetical cited by Robinson involves an accused that knows of his propensity to violent behaviour when intoxicated. This particular individual decides to kill his wife, and to this end begins to drink excessively with the express intention of bringing about her death. It may indeed be the case that at the time of the killing, given the accused's state of intoxication, he in fact lacks the requisite mental element of the offence, namely, intent or recklessness. Equally, he may have lacked any awareness of his conduct.

On similar facts the accused in *Attorney-General for Northern Ireland v Gallagher*[99] argued that his consumption of alcohol was liable to bring into operation a condition amounting to insanity. He argued that at the time of the offence he was in fact suffering from such a state and as such could not be held responsible for the resulting death. On appeal to the House of Lords it was held that a preliminary question that needed to be resolved concerned the circumstances under which the state of insanity

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96 Ibid.

97 Ibid.

98 Ibid 27.

99 [1963] AC 349; Cp *The Queen v O'Connor* (1980) 146 CLR 64, 73 per Barwick CJ.

had been brought about. Their Lordships held that as the alcohol was consumed in order to bring about the state of insanity the appellant could not have recourse to the defence. Any other decision would be tantamount to condoning the means chosen consciously to bring about the state of non-responsibility.[100]

Fisse has noted that cases such as *Gallagher* highlight the purpose of the distinction drawn between voluntary and involuntary intoxication.[101] Fisse further notes that what such a case highlights is that where drunkenness is put in issue by an accused 'the inquiry, which is to say the relevant time, must be carried back far enough to ascertain whether the intoxication was entered into as a means to an end'.[102] For, if it had been the case that the state of intoxication was entered into for such a purpose it would be manifestly wrong to acquit.[103]

It has been suggested that this type of argument reflects the elasticity of time and blameworthiness in the criminal law.[104] Yet, such an analysis of the backward extension of the relevant time fails to pay sufficient heed to the relevant time frame for viewing an offence in the criminal law. As Fisse has observed, 'the time finally decided on as marking the first significant event in no way affects the time and occurrence of the last significant event, which remains relevant throughout'.[105] It is a series of events rather than a 'time-slice' view of events that is determinative of criminal responsibility. The evidentiary import of such a series of events will, of course, be delimited by the causal connection existing between the accused and the proscribed outcome. [106]

The causing-one's-defence doctrine is ultimately predicated on the view that where an accused causes the conditions of his or her own defence, and attendant upon the creation of these conditions he or she has the required fault element of the offence, he or she will be guilty of the completed offence. Such an account is analogous to the doctrine of 'innocent agency' whereby the excused accused is the 'innocent agent' who was caused to engage in the criminal conduct by the accused's prior, culpable

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100 [1963] AC 349, 382 per Lord Denning.

101 Brent Fisse, *Howard's Criminal Law* (5th ed, 1990,) 15-16.

102 Ibid.

103 Ibid; AG For Northern Ireland v Gallagher [1963] AC 349, 379.

104 Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1980) 33 *Stanford Law Review* 591; Contra: L Shwarz, 'With Gun and Camera through Darkest CLS-Land' (1984) 36 *Stanford Law Review* 413 both cited by Fisse, above n 101, 13n 65.

105 Ibid 15.

106 Ibid 16.

actions.[107] As Robinson's account of the operation of the doctrine indicates, after the jury is instructed as to the state of mind requirements of the underlying offence, they may be instructed that 'the accused may satisfy these elements either at the time of the offence or at the time he or she causes the conditions of a defence'.[108]

Nigel Walker has contended that '"meta-responsibility"… raises genuine issues for retributively-minded moralists'.[109] Such issues include both the legal and moral problems arising from the view that an individual is 'punishably culpable for doing something which merely risked an unintended and far from certain result'.[110]

Lawton LJ in *R v Quick* noted that '[a] self-induced incapacity will not excuse (see *Lipman* [1970] QB 152) nor will one which could have been reasonably foreseen as a result of doing, or omitting to do something…'.[111] As noted above, in a case such as *Gallagher* an accused may, intending to kill another, set about becoming intoxicated in order to undermine his or her requisite culpable mental state. In such a case he or she will be held to have the pre-existing intention. Clearly, in such an instance it is not the mental state of the defendant at the time of the proscribed act that is of utmost importance but rather the subjective state preceding such an act. Having placed him or her self in such a position he or she is responsible for any resulting harm, regardless as to whether he or she has the requisite mental state for the harm so produced. Such a requisite state may involve either intent or a subjective advertence grounding recklessness.

However, 'the transfer of a pre-existing intention and/or recklessness from one time to another is one thing; the deeming of that transfer is another'.[112] This is the kernel of truth in the case of *The Queen v O'Connor* where an accused becomes so intoxicated that he or she cannot form an intention to commit a crime cannot be held criminally liable.[113] At common law it is not correct to say that there may be an automatic transfer of deemed fault to a proscribed result from previous behaviour.[114] The reason why this is so is that a distinction is to be drawn between 'on the one hand, the result of an act

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107 Robinson, above n 98, 54; on 'innocent agency' see Bronitt and McSherry, above n 25, 402-4.

108 Ibid.

109 N Walker, 'Book Review: Mitchell, EW (2003) Self-Made Madness. Rethinking illness and criminal responsibility' (2005) 16 (3) *Journal of Forensic Psychiatry and Psychology* 612, 614.

110 Ibid 614.

111 (1973) 57 Cr. App. R. 722, 735.

112 Mathew Goode, 'On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford' (1987) 11 *Crim LJ* 131, 146.

113 *The Queen v O'Connor* (1980) 146 CLR 64.

114 Ibid 80 per Barwick CJ.

of the conscious will and, on the other, an act of the conscious will with intent to do that act'.[115] As Goode observes, recklessness as to resulting harm is not relevant to the issue of whether an accused acted at all as these issues are distinct from one another.[116]

Nevertheless, our intuition suggests that any defendant who has voluntarily consumed drugs and then caused harm is responsible. This intuition is operative even where at the time of becoming intoxicated the defendant has not formed the requisite fault element for the offence.[117] Given that the effects of drug taking are widely known it may be argued that an accused that places him or herself in such a situation has in fact satisfied the subjective fault requirement of advertence. Yet, as Goode observes, such a claim of common knowledge grounding advertence amounts to '*constructive* or *deemed* fault or culpability. The accused *must be taken to know* that a high degree of intoxication may lead to some kind of violence'.[118] However, such a claim to constructive knowledge is, at best, arguable.

Indeed, the contention that a self-intoxicated accused should be held liable notwithstanding the absence of a requisite mental state on his or her part amounts to an argument for a general exception to the principle of subjective fault.[119] To that degree it is open to question whether 'retributively-minded moralists' such as Mitchell and Robinson would be able to defend their view of 'meta-responsibility' without showing more. Mitchell and Robinson would need to show that such a shift away from subjective fault is justified under the circumstances.

The next section will consider the merit of the views expressed by those theorists who argue for a 'settled insanity' approach to the question of drug-induced psychoses.

'Settled Insanity'

At common law a distinction is drawn between 'an underlying mental infirmity' required for a 'disease of the mind' and a transient, externally caused, non-recurrent mental malfunction.[120] Where such mental malfunction is caused by something internal to an accused and is prone to recur, a 'disease of the mind' is established. Lord Denning has held that while not criminally responsible such an individual

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115 Goode, above n 112, 147.

116 Ibid.

117 *The Queen v O'Connor* (1980) 146 CLR 64, 97 per Mason CJ (diss).

118 Goode, above n 112, 150 (emphasis added).

119 Ibid.

120 *R v Radford* (1985) 42 SASR 266 per King CJ.

should be detained on the grounds of societal protection.[121] Alternatively, where the mental malfunctioning results from a cause lying external to the accused, is transient and unlikely to recur, civil detention is not required.[122] The *M'Naghten Rules* call for a defect of reason to be present at the time of the act. Hence, legal impairment may be established even in situations where a mental malfunction is not likely to continue.[123]

The Victorian case of *R v Meddings*[124] is authority for the view that any condition which is likely to recur, and to that degree presents an element of risk to public safety, should be treated as a disease of the mind. However, the task of predicting future dangerousness with any degree of certainty remains problematic.[125] Additionally, any wholesale adoption of recurrence as a criterion delimiting the scope of the 'disease of mind' enquiry fails to acknowledge any serious mental disease not likely to recur.[126]

The 'internal/external' test has sought to ground the 'disease of the mind' enquiry on a distinction between 'the reaction of an unsound mind to its own delusions or to external stimuli on the one hand' and, on the other hand, 'the reaction of a sound mind to external stimuli, including stress producing factors.'[127] Similarly, in *Meddings* it was held that a 'predisposition, whether resulting from injury or from some other idiopathic cause…[is] a disease of the mind'.[128] Where there is such a predisposition it matters not whether the trigger is 'alcohol…a set of surrounding circumstances…a provocative word or some object which arouses recollection or emotion'.[129]

However, the underlying condition/external cause distinction has not met with universal approval. Most problematic is the over-exclusiveness of the test and its potential to lead to inconsistent results.[130] To take some examples, hyperglycemia (an excess of blood sugar) has been treated as an internal cause, giving rise to a mental impairment defence, [131] while hypoglycemia (a blood sugar deficiency) has been

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121 *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, 412.

122 *Cottle* [1958]NZLR 999 at 1015 per Gresson P.

123 *Kemp* [1957] 1 QB 399

124 [1959] VR 105.

125 Steven Yannoulidis, 'Negotiating Dangerousness: Charting a Course between Psychiatry and Law' (2002) 9 (2) *Psychiatry, Psychology and Law* 151.

126 McSherry above n 57, 83.

127 *R v Radford* (1985) 42 SASR 266, 276 per King CJ; applied *R v Falconer* (1990).

128 [1966] VR 306, 310.

129 Ibid.

130 *The Queen v Falconer* (1990) 171 CLR 30, 75 per Toohey J.

131 *R v Hennessy* (1989) 1 WLR 287.

viewed as an external source precluding such a defence.[132] Equally, as noted above, states of somnambulism have proven to be problematic it not being apparent that such may be convincingly described as 'externally caused'.[133]

A test that seeks to distinguish internal from external causes is too vague to do the work required of it. As Mathew Goode has asked, why is a hypoglycaemic episode precipitated by a combination of insulin and a lack of food externally caused rather than being viewed as a concomitant of the diabetic condition?[134] The only cogent response to this type of difficulty is to acknowledge that 'such conditions are brought about by a variety of factors, some externally based and some not'.[135]

Indeed, such criticisms have caused Toohey J to view the internal/external test as 'artificial…paying [as it does] insufficient regard to the subtleties surrounding the notion of external disease'.[136] Similarly, the Supreme Court of Canada has held that both the internal/external test and the recurrence test while of evidentiary import are not determinative of the 'disease of the mind' enquiry.[137] According to the Court such tests, along side other 'valid policy concerns', are to be viewed as analytic tools. Tools that will assist trial judges in 'answering the fundamental question of mixed law and fact which is at the centre of the disease of the mind inquiry: whether society requires protection from the accused'.[138]

An alternative approach to the internal/external test is to afford a defence in circumstances of 'settled insanity'. The 'settled insanity' approach focuses on the mental state of the accused *after* the criminal conduct. As originally outlined in the case of *People v Skinner* the hallmarks of such a state include a mental condition which is 'fixed and stable', lasts for a protracted period of time and, yet is not predicated on the consumption or operation of a drug.[139]

For Meloy '"settled insanity" becomes the legal point at which voluntary behaviour creates a state of mind that negates culpability for criminal behaviour'.[140] According to Meloy both temporal and causal problems remain with the formulation in *Skinner*. In

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132 *R v Quick* (1973) 3 All ER 347.

133 *R v Parks* (1992) 75 CCC (3d) 287; *R v Stone* (1999) 134 CCC (3d) 353.

134 Goode, above n 112, 142.

135 Ibid.

136 *R v Falconer* (1990) 171 CLR 30, 75-6.

137 *R v Stone* (1999) 134 CCC (3d) 353, 439 per Bastarache J.

138 Ibid 441.

139 *People v Skinner* (1986) 185 Cal. App. 3d 1050 cited Meloy, above n 9, 438.

140 Meloy, above n 9, 439.

seeking to address the ambiguity in the term 'settled' the *Skinner* court employed 'two further semantically ambiguous and clinically meaningless terms, "fixed" and "stable"'.[141] In so doing the court had, Meloy argues, merely substituted semantically equivalent words and had failed to create a new distinction aiding clarification.[142] Additionally, the causal question raised by such cases is how to clinically distinguish the mental state from the drug's effects. Yet, as Meloy notes, the court while requiring that the mental state not be 'solely dependant' on the effects of the drugs taken failed to provide any means by which to ascertain whether this was indeed the case.[143]

In order to alleviate such concerns Meloy suggests 'that courts turn to the scientific literature for direction to formulate a judicial principle that can be applied to the facts in any one particular case'.[144] And in keeping with 'current scientific research', he proposes that 'the concept of "settled insanity" be limited to cases in which a predisposition to psychosis can be substantially demonstrated'.[145] While evidentiary issues would arise these need not be insuperable it being understood that '*but for* the presence of a vulnerability to psychosis, "settled insanity" would not apply'.[146] Several advantages are said to follow from such an approach. In particular, it would eliminate any problem associated with defining 'settled', avoid the arbitrariness associated with the notion of what constitutes a 'reasonable' duration of time, and 'flush out other factors that contributed to the mental state beyond the ingestion and duration of the drug'.[147]

Moreover, the above formulation, it is claimed, would meet squarely the issue of prior culpability in the context of drug-induced psychosis. Meloy argues that the absence of any history in the nature of psychiatric or psychological data would preclude an insanity defence in a case of voluntary intoxication, 'even if the individual had a diagnosable psychotic disorder at the time of the crime that fit the jurisdiction's definition of "insanity"'.[148] Additionally, according to Meloy, such an approach argues for the view that 'despite the individual's voluntary ingestion of drugs, his [or her]

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141 Ibid 449, citing *People v Skinner* (1986) 185 Cal. App. 3d 1050, 1063.

142 Ibid.

143 Ibid 449 citing *People v Skinner* (1986) 185 Cal. App. 3d 1050, 1063.

144 Ibid 450.

145 Ibid 451.

146 Ibid (italics in original).

147 Ibid.

148 Ibid.

biological proneness to psychosis is beyond his volitional control and therefore becomes the most salient factor in his exculpation'.[149]

Russ Scott and William Kingswell have argued that even if it is accepted that the influence of an external factor causes an acute psychosis this need not to be understood as satisfying the 'disease of the mind' enquiry.[150] According to the authors in keeping with what was said by King CJ in *R v Radford* what is called for in a finding of a 'disease of the mind' is something more than 'a temporary disorder or disturbance of an otherwise healthy mind caused by external factors'.[151] Analogously to Meloy, Scott and Kingswell contend that drug-associated psychosis will amount to a 'disease of the mind' only when the symptoms of psychosis have persisted longer than 28 days and in the absence of positive urine drug testing.

Several criticisms may be made in regards to the reasoning of those who support a 'settled insanity' approach. For ease of analysis I will restrict my immediate comments to the work of Meloy. First, Meloy contends that the 'settled insanity' approach be limited to those with a predisposition or vulnerability to psychosis. In order to bolster his argument he cites research suggesting that subjects who become psychotic while using psychostimulants have 'symptoms associated with psychotic disorders [that are] present prior to the drug use but [which are] subclinical'.[152]

Genetically predicated brain organisation variations have been referred to as *dispositions* to forms of mental disorder.[153] The expression 'disease' as a descriptive term is best restricted to those dispositions that are most readily classified as abnormal on the continuum along which such variations are located.[154] Where the term 'disease' is understood to include such dispositions we find a corresponding broadening of the concept of mental illness to incorporate both organic disorders and any 'operative tendency-to-disorder'.[155] The significance of this for the purposes of 'settled insanity' is that any account of mental disorder-as-predisposition while descriptively sound fails to provide the means by which to ascertain the point at which disposition becomes disease. Moreover, the likelihood of discovering any such means remains in

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149 Ibid 452.

150 Scott and Kingswell, above n 1, 175.

151 (1985) 42 SASR 226, 274 applied *R v Falconer* (1990) 171 CLR 30, 49 per Mason CJ, Brennan and McHugh JJ.

152 Meloy, above n 9,451.

153 Michael Roth, 'Schizophrenia and the Theories of Thomas Szasz' (1976) 129 *British Journal of Psychology* 317, 321-2.

154 Finbarr McAuley, Insanity, Psychiatry and Criminal Responsibility (1993) 67.

155 Ibid 67-8.

the realm of conjecture. This point is readily acknowledged by Meloy who concedes that there is no scientific basis in support of 'a relationship between measurable psychosis proneness and subsequent psychotic symptoms following the use of psychostimulants'.[156]

Further, it is suggested by Meloy that proneness 'attenuates' the volitional problem of 'settled insanity' as a 'biological proneness to psychosis is beyond [the defendant's] volitional control and therefore becomes the most salient factor in his [or her] exculpation'.[157] Several observations concerning this claim deserve mention. If, on the one hand, it is taken to mean that notwithstanding the voluntary ingestion of drugs the defendant could not have foreseen the resulting psychosis and harm caused, this brings into sharp relief the principle of subjective fault. This issue was canvassed above in relation to the concept of 'meta-responsibility' and as such will not be rehearsed here. If, on the other hand, what is meant by Meloy's claim is that a lack of 'volitional control' is exculpatory, in and of itself, this does not necessarily follow.

Stephen Morse has argued that so called 'disorders of desire' inevitably beg social, moral and empirical questions.[158] Morse does however acknowledge that some disorders may produce a degree of physical and psychological stress such that an individual's general capacity for rationality is impaired.[159] This suggestion raises the question of the direction of causation in the instance of drug-induced psychoses and biological proneness: the protracted period of drug taking may in fact be the product of a proneness to psychosis rather than the other way around. Nevertheless, Morse is prepared to concede that where an individual's disorder affects his or her capacity for rationality a defence of 'settled insanity' should be available.[160] Yet, and this is the point, whether an individual is 'excused under such a regime would depend on a normative judgment about how much the general capacity…is undermined'.[161]

Both the Scott, Kingswell, and Meloy approaches to the question of settled insanity endeavour to provide formulations which accord with contemporary clinical research. Against such an endeavour to ground criminal responsibility on the basis of scientific literature lies the argument that it is 'public policy considerations concerning criminal responsibility, and not clinical science, [which] determine the issue of innocence or

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156 Meloy, above n 9, 452.

157 Ibid.

158 Stephen J Morse, 'Rationality and Responsibility' (2000) 74 *Sth California Law Review* 251, 263.

159 Ibid.

160 Ibid 264.

161 Ibid.

guilt'.[162] Such policy concerns, it has been held, assist trial judges in 'answering the fundamental question of mixed law and fact which is at the centre of the disease of the mind inquiry: whether society requires protection from the accused'.[163] Indeed, the concept of mental disease has been described as a 'crude but effective policy tool for maintaining a balance between social protection and humanitarian concern for those lacking mental capacity'.[164] An accused will not be excused from criminal responsibility merely on the basis of clinical research. As previously noted, the meaning of the term 'disease of the mind' is a legal rather than a psychiatric question.[165] The issue is whether the accused's mental faculties were impaired by illness, not whether he or she was suffering from a recognised mental illness.[166]

Conclusion

I began my analysis by distinguishing between two types of question. The first is a question to be answered on the basis of clinical evidence: whether a diagnosable mental disorder exists independently of the consumption of drugs. The fact that an accused suffers from cognitive incapacity is not, in and of itself, conclusive. What needs to be established is a causal nexus between such cognitive incapacity and an underlying 'disease of the mind'. The precise nature of what constitutes a 'disease of the mind' is a question informed by a social judgment. Such a social judgment, while founded upon a medical diagnosis, remains a question of law. As previously noted, mental impairment is an excuse for wrongdoing rather than a diagnosis of an accused's mental condition.

The second question is whether an individual who has voluntarily consumed drugs that have led to a state of impaired reasoning powers should be viewed as suffering from a 'disease of the mind'. The construct of 'disease' employed by the law in determining these issues is however apt to mislead. It does not follow that because an accused has impaired cognitive functioning he or she is to be excused. As noted previously, recourse to the notion of 'disease' erroneously facilitates the conflation of compulsion and causation. Where an agent is compelled to act he or she lacks agent causation and is for this reason excused. However, the same may not be said of all cases involving accused who have been caused to act. Whether these latter accused

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162 Fairall and Yeo, above n 94, 255.

163 *R v Stone* (1999) 134 CCC (3d) 353, 441 per Bastarache J.

164 Fairall and Yeo, above n 94, 261.

165 *R v Kemp* [1957] QB 399, 406.

166 *R v Sullivan* [1984] AC 156.

will be excused is a question that will be answered on the basis of a normative judgment. Such a judgment will take into account the accused's ability to respond actively to reasons both for and against behaving in a particular way. That is, at the heart of the normative judgement is a consideration of an accused's capacity to control his or her behaviour.

As Raz has explained 'we are active when our mental life displays sensitivity to reasons, and we are passive when such mental events occur in a way which is not sensitive to reasons.'[167] The underlying force of the distinction being drawn between moral activity and passivity also informs discussions of dissociation in the criminal law. As case law indicates automatic states arising from 'psychological blows' will not, normally, ground a defence. [168] Conversely, dissociation stemming from physical trauma has been viewed as arising from 'external' sources and as such sufficient for the purposes of the defence.[169] At least part of the reason for the distinction is the intuition that an individual is more likely to be mentally and morally 'active' in the former case than in the latter.[170] Underlying such a 'control'-centred analysis, however, is the idea that the scope of the disease of the mind enquiry is delimited by questions of an accused's future dangerousness.

To turn to the above analysis, the VLRC approach outlined above focuses exclusively on an accused's state of mind at the time of the offence. The law clearly requires that an accused's mental disorder cause the wrong in question.[171] However, such an approach fails to acknowledge that an equally pertinent consideration is that such cognitive incapacity be caused by a 'disease of the mind'. That is, the requisite causal link is not merely from incapacity to behaviour but also, and primarily for the purpose of the defence, from 'disease of the mind' to 'defect of reason'. The preliminary question of what constitutes 'disease of the mind' remains the threshold question.

Mitchell and Robinson approach the issue from the perspective of an accused's prior-fault in becoming intoxicated. Yet, such an account is problematic to the extent to which it suggests derogation from general principles of criminal responsibility. In particular the authors fail to show how an accused's action may be justly ascribed to him or her. Neither on subjectivist nor objectivist criteria is such an ascription permissible. Recklessness as the minimum subjective fault element and negligence as the corresponding objective fault element, require conscious advertence, and the

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167 Joseph Raz, *Engaging Reason* (1999) 82.

168 *Rabey v R* (1977) 37 CCC (2d) 461; But see, *The Queen v Falconer* (1990) 171 CLR 30.

169 *R v T* (1990) Crim LR 256.

170 See Meir Dan-Cohen, 'Responsibility and the Boundaries of Self' (1992) 105 (5) *Harvard Law Review* 959, 975.

171 *R v Kemp* [1957] QB 399, 407 per Devlin J.

taking of reasonable precautions against a foreseeable risk, respectively. Foreseeability is the minimum determinative factor in both accounts. A subjectivist would insist that an accused foresee the risk undertaken. An objectivist minded theorist, on the other hand, would hold that a reasonable person must have foreseen the unreasonable nature of the risk undertaken by the accused, before liability attaches. Such a degree of foreseeability is not one that may be readily acknowledged in cases of drug-induced psychoses absent recourse to a degree of constructive fault. The contention that an accused is to be held responsible on the basis of drug-use *simpliciter* is not one which stands up to scrutiny.

Finally, both the Meloy, and Scott and Kingswell, approaches have endeavoured to delimit the enquiry by postulating a state of 'settled insanity' as a precondition of an accused raising a defence of mental impairment. I have argued that these authors in suggesting reliance on 'current scientific research' as a means of formulating judicial principles fail to appreciate the true nature of the defence. The defence of mental impairment is not an attempt to ascertain whether an accused is suffering from a mental illness. Rather, the various formulations of the mental impairment defence, both statutory and at common law, represent 'means whereby juries work rough justice in a difficult area of law and morality'.[172]

Fundamentally, such formulations highlight that it is a public policy consideration, and not scientific research, which is determinative of an accused's criminal responsibility. The policy orientation of the enquiry finds expression in, amongst other things, recourse to the distinction between an internal and external state. While less than conceptually sound the 'internal/external' test provides, in the language of the Supreme Court of Canada, an 'analytic tool' in determining the question of whether clinical intervention is required for societal protection.[173] In so doing the focus does not remain on establishing whether an accused's state of cognitive impairment was 'settled' but whether such a state warrants clinical intervention.

These are difficult questions, not because they raise complex, indeterminate clinical issues, but because by their nature they bring into sharp relief the nature of our responsibility practices. The temptation to bypass such difficulties by focusing on overly narrow time frames, or by abandoning fundamental legal principles, or by suggesting that these are empirically verifiable propositions, should be resisted. It is the difficulty of the enterprise, and the goal to be achieved, which makes it worth our while to consider these questions in as clear a light as possible.

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172 Norval Morris, ' "Wrong" in the M'Naghten Rules' (1953) 16 *Modern Law Review* 435, 437.

173 *R v Stone* (1999) 134 CCC (3d) 353, 439 per Bastarache J.