



Drug-Associated Psychoses and Criminal Responsibility¹

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There is a growing body of case law dealing with assigning responsibility to those affected by drug-associated psychosis that has led to diverse outcomes. Although a wide range of approaches has been adopted in different jurisdictions, three broad approaches to the problem have been proposed that can be loosely categorised as liberal, conservative and intermediate. Leong, Leisenring and Dean (2007) have recently pointed out that the lack of uniformity in the law in this area may reflect the clinical uncertainty relating to drug-associated psychoses. It may indeed be impossible for the law to take into account current clinical uncertainties, but having an overview of possible approaches that the law may take should at the very least provide options for reform.

This paper examines two recent Australian cases that display the difficulties that judges and juries face in dealing with assigning responsibility for crimes when drug-associated psychosis is in issue. The current law which focuses on distinguishing between internal and external causes of mental impairment can lead to differing outcomes and raises problems for mental health professionals in attempting to distinguish between internal and external causes when diagnosing an offender's illness.

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The paper outlines three alternative approaches to the current law relating to assigning criminal responsibility and the policy issues that they raise. It is suggested that each approach can be viewed as representing the 'means whereby juries work rough justice in a difficult area of law and morality' (Morris, 1953, p. 437).

Case Studies

Two recent Australian cases highlight some of the problems with the law and expert evidence in this area. The first case concerns 29 year old Thomas Sebalj, a butcher by trade who stabbed to death his girlfriend, Claire McKenna with a boning knife. Sebalj had a long history of drug abuse. He started taking amphetamines intranasally at the age of 18. In his early twenties, he regularly smoked cannabis and injected amphetamines. From the age of 25, he used heroin and cannabis daily, then at the age of 29, entered a methadone program to try to wean himself off heroin. Reportedly to counteract the sedating effects of methadone, Sebalj returned to using amphetamines.

Towards the end of 2001, Sebalj decided to give up amphetamines and to take control of what he saw as his directionless life. He stopped work so that he would not have the money to spend on drugs. He abruptly ceased amphetamine use. He began to experience visual and auditory hallucinations which grew in severity for some weeks before he stabbed his girlfriend. He told his parents that he feared his food and drink were being tampered with and that he was under surveillance by people wanting to kill him.

Sebalj visited his doctor on the 15th, 17th and 18th December complaining of symptoms of anxiety. On the 19th December, he went to a hospital, seeking help, but did not fully disclose his symptoms for fear that hospital staff intended to harm him.

On the 20th December, after a sleepless night, Sebalj again went to the doctor, but found the surgery closed. He went to the police station complaining of problems with his head. The police referred him to a nearby hospital where he was diagnosed as being in a psychotic state. He was given tranquillisers and anti-psychotic medication and released into the care of his girlfriend, with arrangements that a member of the Crisis Assessment Team would visit them that evening. When a nurse visited Sebalj that evening, Sebalj had killed his girlfriend.

At Sebalj's trial for murder, Smith J refused to allow the defence of mental impairment (as it is called in Victoria) to be raised (*R v Thomas John Sebalj*, 2003). Sebalj was found guilty by a jury of the murder of Claire McKenna in August 2003. By March 2004, there was evidence that Sebalj displayed symptoms consistent with a schizophrenic process illness. Sebalj believed that officers had been trying to control or bug him and that he had a steel object in his knee that had been interfering with his thoughts.

The sentencing judge took into account Sebalj's symptoms of mental illness and sentenced him to 15 years' imprisonment with a non-parole period of 12 years (*R v Thomas John Sebalj*, 2004).

The second case concerns 29 year old 'JM' who was charged with trespassing with intent to steal, three counts of theft and assault with intent to rape. As with Sebalj, JM had a long history of substance abuse. He started taking cannabis at the age of 12, progressing to daily use from the age of 15. Throughout his twenties, he would take amphetamines or heroin intranasally every few months at parties. In April 2004, he travelled to a seaside resort to stay with friends and to 'party'.

On the 17 April, JM was 'squatting' in a house. He amused himself by rearranging various items there. He then entered another house that was being renovated and took away a nail gun. On the 19 April, JM had smoked cannabis and taken 'ice' (a smokeable form of methamphetamine). He entered a house belonging to the victim whom he knew through her daughter. He rearranged some of the items in the house and removed all the food from the fridge and ate some of it.

When the victim arrived home, he met her outside, but followed her into the house again. The victim started cleaning up the place. JM followed her into the bedroom where he pushed her onto the bed and tried to open her legs. He slapped her in the face when she kept her legs closed and grabbed her by the throat when she got up from the bed.

JM then seemed to be shocked by what he had done and left the house, taking some money and a motorcycle helmet and vest. He subsequently stole a motorbike and went back to the city. He was arrested walking around naked and taken to hospital.

Unlike Sebalj's case, both the prosecution and defence agreed that JM could raise the defence of mental impairment and Judge Smallwood of the Victorian County

Court directed the jury in this regard (*R v JM*, 2005). He was duly found not guilty on the ground of mental impairment.

Both Sebalj and JM had a long history of substance abuse and both were psychotic at the time of their crimes, yet Sebalj was found criminally responsible for his actions and JM was not.

The differing outcomes of these two cases can be explained by the fact that JM had been diagnosed with schizophrenia in his early twenties. He had been on antipsychotic medication with which he was occasionally non-compliant. He had ceased his medication from around January 2004. The agreement to direct the jury in relation to the defence of mental impairment was very much based on the presumption that it was JM's pre-existing mental illness that contributed to his offence rather than the substances he had imbibed prior to the commission of the offences.

Yet how is it that a person who ceases antipsychotic medication and partakes in illegal substances can be treated so differently to a person who tries to get off illegal substances and seeks medical help? The answer lies in the way in which the courts have traditionally distinguished between internal and external states of mental impairment. This approach is explored in the following section.

The Current Law

The traditional *M'Naghten Rules* (*M'Naghten's case*, 1843) which set out the rules relating to the defence of insanity refer to a 'defect of reason' arising from a 'disease of the mind'. The latter term is purely a legal construct (McSherry, 1993). In *Sebalj's* case, the trial judge ruled that the defence of mental impairment (the term mental impairment rather than insanity is now used in jurisdictions such as Victoria and South Australia) was unavailable because Sebalj's psychotic state was not a 'disease of the mind'. This decision is dependent on a line of cases that draw a distinction between a defect of reason resulting from an underlying condition and a defect of reason caused by something external. In *R v Radford* (1985), King CJ stated:

[A] "defect of reason" in the *M'Naghten rules*...must result from an *underlying pathological infirmity of mind*, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the *reaction of a healthy mind to extraordinary external stimuli* [emphasis added].

The distinction between an underlying condition and that brought about by extraordinary external stimuli has been accepted by the members of the High Court of Australia in *R v Falconer* (1990) (at 53 per Mason CJ, Brennan and McHugh JJ, at 60 per Deane and Dawson JJ; at 85 per Gaudron J). It has also found its way into the definition of 'mental illness' in section 269A of the *Criminal Law Consolidation Act 1935* (SA) which refers to 'a pathological infirmity of the mind'. In *Bratty v Attorney-General (Northern Ireland)* (1963), Lord Denning stated (at 412) that 'the major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind'.

This underlying condition/external cause distinction has been criticised as being over-exclusive (*R v Falconer*, 1990) and leading to inconsistent results (McSherry, 1993). The current law also assumes that a clear distinction can be made regarding internal and external causes of mental impairment by mental health professionals, which is not always the case. This is taken up a little later in the paper.

The next section outlines three different approaches that could be taken to this issue of assigning criminal responsibility to offenders with drug-associated psychosis.

Three Different Approaches to Assigning Criminal Responsibility

The Liberal Approach

In the context of its 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 (VLRC, 2004). The VLRC highlighted two conceptual difficulties inherent in situations of drug associated psychosis. First, the notion of 'responsibility' in this context is a difficult one to limit (VLRC, 2004). For example, can Sebalj be said to be fully 'responsible' for his psychotic state as he had chosen to withdraw from drugs and thus, 'responsible' for murder?

Secondly, the VLRC noted that the interpretation of mental impairment in *Sebalj* runs counter to the underlying conceptual purpose of the mental impairment defence (VLRC, 2004). The Commission stated that in keeping with the defence's underlying purpose it should not matter what the cause of the impairment was so long as the excusing condition stems from a failure of cognitive functions. Where such failure

affects an accused such that he or she is unable to understand what they are doing or that it is wrong, then the mental impairment defence should be available (VLRC, 2004).

This approach marks a major step toward broadening the scope of what may be considered mental impairment because the focus is on the state of mind of the accused *at the time* of the criminal act. Mark Kelman (1981) has pointed out that the time-frame adopted by the criminal law is usually a very short one: it is that of a photo rather than a video. The fault and physical elements making up the crime must be concurrent: the accused is judged by his or her actions at a particular instant. The VLRC is very much taking this 'snapshot' approach to the defence of mental impairment, rather than the 'frame by frame' approach, which focuses on prior conduct.

The VLRC was of the opinion that a provision should be added to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) specifying that the term 'mental impairment' includes but is not limited to the common law notion of 'disease of the mind' (VLRC, 2004). Significantly, the government did not take up this recommendation in its *Crimes (Homicide) Act 2005* (Vic) which put into effect many of its other recommendations in relation to defences to homicide.

The Conservative Approach

In contrast to the VLRC's liberal approach, some have argued that it is essential to take a 'frame by frame' approach and look at the prior conduct of offenders in assigning criminal responsibility. A conservative approach focuses on the defendant's conduct *prior to* the criminal act and imposes criminal responsibility according to whether or not that prior conduct can be considered blameworthy. If the defendant has taken illicit drugs, or even failed to take prescribed medication for a diagnosed mental illness, this approach means that he or she could not be afforded a defence of mental impairment because such conduct can be considered 'blameworthy'. On this approach, both Sebalj and JM could be barred from raising the defence of mental impairment because both had a history of taking illicit drugs.

Sir James Fitzjames Stephen (1883) was of the view that certain defences should not be available to any person whose 'absence of the power of control has been produced by his [or her] own default' (p. 149). More recently, Robinson (1985) has argued that a person's criminal responsibility should depend upon his or her culpability at the time he or she *causes* the conditions of his or her defence, rather than at the time

of the offence itself. This would mean that those who experience psychotic symptoms which appear to result from the ingestion of illicit drugs, even if those psychotic symptoms persist, should not be considered to be suffering from a disease of the mind and hence should be denied a defence of mental impairment.

Mitchell (1999, 2004a, 2004b) has developed this argument to formulate the concept of 'meta-responsibility', to justify negating a defence of mental impairment to those who have caused the conditions of that defence. This involves analysing a defendant's conduct prior to the offence and hence substantially broadens the relevant time frame for assigning criminal responsibility. Kelman (1981) has suggested that such an approach reflects the elasticity of time and blameworthiness in the criminal law.

In responding to the question of how broadly to frame the time period prior to the commission of the offence, Mitchell (2004b) acknowledges 'that some practical limit will have to be set (on a case-by-case basis)' (p. 67). Such a search will, he claims, be delimited by an evidentiary test of relevance.

The Intermediate Approach

An intermediate approach between the liberal and conservative views seeks to draw a dividing line between temporary and more permanent states of impaired mental functioning. This is reflected in the current legal focus on 'internal' versus 'external' causes of mental impairment.

In some jurisdictions in the United States (but not in other countries that derive their laws from the British model), an alternative intermediate approach is based on the concept of 'settled insanity'. This affords a defence in circumstances where there is relatively prolonged psychotic symptomatology, of duration sufficient to be considered to be an 'independent' disease of the mind, even if the onset was clearly associated with illicit drug use. This approach does not afford a defence to those with short-lived episodes of psychotic symptoms triggered by illicit drug use however.

The majority of the United States Court of Appeals, Fifth Circuit in *United States v Lyons* (1984) stated:

[M]ere narcotics addiction, standing alone and without other physiological or psychological involvement, raises no issue of such a mental defect or disease as can serve as a basis for the insanity defence (p. 245).

In *People v Skinner* (1986), the Californian Court of Appeal held that for an insanity defence to be available, the mental condition of the defendant must be 'fixed and stable', last for a reasonable period of time and not be solely dependent on the ingestion and presence of the drug in the body. Following this approach, in *Commonwealth of Virginia v Dillard* (2003), the defendant was found not guilty of murder by reason of insanity on the basis of expert evidence that his marijuana and alcohol use had given rise to psychotic symptoms that persisted for some months and required intense clinical intervention (Feix & Wolber, 2007). The settled insanity approach thus echoes the common law approach, which holds that if substance use induces an *enduring* condition such as permanent brain damage, then a defence of mental impairment may be raised (*DPP (UK) v Beard*, 1920, pp. 500-1; *R v Meddings*, 1966, p. 310).

Russ Scott and William Kingswell (2003) have called for a similar approach in Australia such that drug-associated psychosis should be considered a form of mental impairment for the purpose of a defence when the symptoms of psychosis have persisted longer than 28 days and despite negative supervised urine drug screens.

Policy Issues

The liberal approach suggested by the Victorian Law Reform Commission means that those with drug-associated psychoses would qualify for the defence of mental impairment and could be found not criminally responsible if it could be shown that their condition meant that they did not know that what they were doing was wrong. Thus, for example, offences committed in the midst of an acute psychosis which appears to have been triggered by the ingestion of amphetamine a few hours beforehand may qualify, regardless of the absence of any enduring mental illness.

It has been suggested that if the defence were to be broadened in this way, the 'floodgates' would be opened up to intoxication being seen as a defence. For example, Smith J in *R v Thomas John Sebalj* (2003) stated at para 10:

Unless some limits are imposed on the term 'a mental impairment', the statutory defence and statutory regime would apply wherever the mind of a person charged with an offence has been adversely impaired to a material degree by alcohol or drugs. This would be a dramatic and extremely wide-ranging change to the law and vast numbers of the accused people could seek to rely on and be made subject to the statutory regime.

In comparison to the liberal approach, a conservative approach to assigning criminal responsibility to those suffering from drug associated psychoses would most likely be a politically popular move since the public generally have little sympathy for those who are seen to bring about their own disorder by taking illicit drugs, even in the presence of a pre-existing mental illness. It would bring those with a pre-existing chronic mental disorder onto an equal footing with others by making it clear that chronic mental illness does not necessarily result in a chronic state of incompetence with respect to autonomous choices.

However, the conservative approach also brings with it certain problems. From a legal perspective, the conservative approach has important repercussions for the general principle that there must be a concurrence of physical and fault elements (Bronitt & McSherry, 2005) for criminal responsibility to be made out. It arguably stretches the boundaries of concurrence far beyond attempts by the courts to impose a fault element upon a series of acts or a continuing act (*Jiminez v The Queen*, 1992; *Thabo Meli v The Queen*, 1954).

In his review of Mitchell's book on 'meta-responsibility', Nigel Walker (2005) notes that "meta-responsibility"... raises genuine issues for retributively-minded moralists' (p. 614). In particular, Walker signals the legal and moral problems associated with holding an individual 'punishably culpable for doing something which merely risked an unintended and far from certain result' (p. 614).

The intermediate approach based on 'settled insanity' is perhaps somewhat easier to justify than the two extremes of the liberal and conservative approaches. High-risk mentally disordered offenders with comorbid substance use disorders would not be disbarred from raising a defence of mental impairment. On this approach, Sebalj may well have been afforded a defence.

However, the 'settled insanity' approach, as with the approach based on an internal/external division raises problems for those attempting to diagnose a settled condition. As exemplified by the case of 'JM', the intermediate approach assumes that those with a mental illness such as schizophrenia are not responsible for taking illicit drugs, just as they are not held responsible for failing to optimise their mental health if they do not comply with treatment.

In addition, there is some evidence that those who take psychostimulants for a prolonged period of time may develop a chronic relapsing condition, essentially indistinguishable from a schizophrenic illness (Bowers et al, 2001). In such cases, although the mental disturbance was initially precipitated by an external agent, certain long term neurobiological changes may result in an 'autonomous' mental disorder which has an 'internal' quality - a condition likely to sit within the legal category of 'settled insanity'. In contrast, those whose drug use is much less copious and whose psychotic episodes are brief, with no ensuing long-term sequelae, are not likely to qualify for the defence. Johnson writes that 'the message is clear - under the criminal law, it is better to be a chronic drug abuser than an occasional one' (Johnson, 1994, p. 270).

Conclusion

The cases of Sebalj and JM raise difficult issues relating to how to attribute criminal responsibility to those with drug-associated psychoses. The current law which depends on an internal/external cause distinction can lead to arbitrary results.

The three different approaches discussed – liberal, conservative and intermediate – all raise difficult policy issues, not only because diagnoses of drug-associated psychosis involve complex, indeterminate clinical issues, but because each approach brings into sharp relief moral questions concerning the way in which criminal responsibility should be assigned.

.In analysing issues of public policy, there are some who have argued that only some individuals 'deserve' to receive 'precious' mental health resources (Scott & Kingswell, 2003) and those who are partly responsible for bringing about their own mental impairment should be less of a priority than those with a diagnosable mental illness. However, the temptation to go for an easy 'fix' by focusing on overly narrow time frames, by abandoning fundamental legal principles, or by suggesting that there are readily available 'scientific' answers, needs to be resisted. Only by fully recognising the consequences of each approach to assigning criminal responsibility can progress be made.

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